The Governance of Adult Defendants with Autism through English Criminal Justice Policy and Criminal Court Practice

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Abstract

Foucault's 'governmentality approach' developed the notion of 'dividing practices' (1991; see Seddon 2007) which recognises that how individuals and groups are categorised determines how they are governed. This thesis draws on critical disability studies and criminological literature on 'doing justice to difference' to develop a disability perspective in criminology, in order to analyse the governance of offenders with autism. It argues that there is descriptive and normative value in proactively categorising these groups as 'disabled' under the 'social model' of disability. The social model of disability is helpful in enabling us to distinguish between impairment and disablement. It allows us to comprehend the 'psy' literature, which explores the link between the 'symptomatology' of autism and criminality (the 'impairment branch' of the distinction) in combination with the 'interconnecting variables' (Browning and Caulfield, 2011) which lead offenders with autism into the criminal justice system and their inequitable experiences (the 'disablement branch' of the distinction). This is timely given the entrenchment of this model in the Equality Act 2010 and the inception of the Autism Act 2009, Statutory Guidance (DOH, 2010; 2015) and related policy.

Using cross-method triangulation of qualitative data collected through interviews with elites and practitioners, textual analysis and court observation of eight adult defendants with autism through their court process, this thesis investigates why the status of this group as disabled under the Equality Act 2010 has been overlooked in criminal justice policy and criminal court decision-making. It examines the extent to which policy-makers and criminal justice decision-makers consider the defendant's autism in their decision-making about the defendant's case in the courts. Finally, it examines the impact of 'collateral' effects of the criminal justice process on family members who supported these defendants.

Dedication

In Memory of MK

For my grandmothers Mary Tidball (1910-1992) and Maureen Dorothy Herbert (1922-2014); the intelligent fighter and the elegant writer. A generation or so later and you two would have dreamed beneath these spires too.

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Table of Abbreviations

APA	American Psychiatric Association
AS	Asperger's Syndrome
ASC	Autism Spectrum Condition
ASD	Autism Spectrum Disorder
BCC	Birmingham City Council
CJS	Criminal Justice System
CPS	Crown Prosecution Service
CUREC	University of Oxford Central University Research Ethics Committee
DDA	Disability Discrimination Act
DED	Disability Equality Duty
DOH	Department of Health
DSM	Diagnostic and Statistical Manual of Mental Disorders
ECHR	European Convention on Human Rights
E&HRC	Equality and Human Rights Commission
hfASD	High functioning Autism Spectrum Disorder
HMCTS	Her Majesty's Courts and Tribunals Service
ICD	International Classification of Diseases
LASS	Local Authority Social Services
LD	Learning difficulties
MOJ	Ministry of Justice
NAO	National Audit Office
NAS	National Autistic Society
NDTi	National Development Team for Inclusion

OMCCS	The Offender Management Community Cohort Study
PCC	Police and Crime Commissioner
PRT	Prison Reform Trust
SOPO	Sexual Offences Prevention Order
SSH IDREC	Social Sciences & Humanities Inter-divisional Research Ethics Committee
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UPIAS	Union of the Physically Impaired Against Segregation
WHO	World Health Organization
YJCEA	Youth Justice and Criminal Evidence Act

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Chapter 1 – Introduction

'Jamie', aged 42, received a diagnosis of Asperger syndrome while on a Section 2 Hospital Order, following an attempted overdose. A year later, he assaulted his mother. This followed a string of minor offences and the police advised his parents to press charges as the best route to get professional medical help and access support from social services. At sentencing for the assault, the Magistrates' Court ordered a Section 37 Hospital Order under the 1983 Mental Health Act. Jamie was remanded in custody for three weeks before being moved to a forensic hospital specifically for adults with autism in another part of the country. Over the next five years, he was subject to a series of sectioning orders.

In 2011, Jamie was given a Section 3 Hospital Order, after his domiciliary local authority had failed to fulfil their Section 117 Mental Health Act duty to provide aftercare in the course of discharging him from the original Section 37 issued by the court. Consequently, instead of discharging Jamie from the Court's original Hospital Order, he was made an informal patient and advised to stay in hospital because the local authority would not fund a care package for him to move into supported living accommodation. Frustrated by his continuing institutionalisation, and without any prospect of being able to build a life outside hospital, he consumed a considerable amount of alcohol during unescorted leave. A violent episode ensued and the police were called; he was taken back into hospital and placed on a Section 3 Order.

Nevertheless, once discharge proceedings from this Section 3 arose, his local authority conducted a community care assessment and the social worker concluded that he did not meet the authority's eligibility threshold for supported living accommodation. This was startling, considering that he had not lived independently in

the community for five years. His parents – both in their mid-seventies – were unable to care for him at home. He did not meet the eligibility criteria because the local authority in question had raised its threshold for care and support needs from 'substantial' to 'critical', under its new adult social care policy (BCC, November 2010). At this time, judicial proceedings were being brought against the council on this very issue. The council subsequently lost these proceedings and were compelled by the Administrative Court to restore the previous threshold ((W, M, G, H) v Birmingham City Council [2011] EWHC 1147 (Admin)). However, social workers were still being told by the council to apply a higher threshold within this banding. Jamie remained in hospital, informally, until June 2012 when he moved into independent living accommodation. In August 2012, Jamie died of a heart attack.

Introduction and research motivation

Foucault's 'governmentality approach' developed the notion of 'dividing practices' which recognises that how groups are categorised determines how their conduct is governed (Foucault, 1991; see Seddon, 2007). Jamie's case came to my attention when working with his parents as Policy and Legal Officer at Autism West Midlands. This work[1] revealed to me the complex interplay between health and social care systems for adults with autism who come into contact with the English Criminal Justice System (CJS). It motivated me to conduct the present research to highlight the importance of how 'dividing practices' are applied to adult defendants with autism in the CJS, which is an underdeveloped area of criminological expertise. Research that brings defendants with autism more sharply into focus, within the discipline of criminology, is especially

[1] I am grateful to Jamie and his family for giving me permission to relate their story and to his solicitor for allowing me to use case records to produce this account.

relevant given the developments in the wider legal and policy context through the Autism Act 2009 and accompanying Statutory Guidance (DOH, 2010d; 2015a).

The way certain sections of society are governed is an issue brought to the fore in criminological debate by Jonathan Simon's work *Governing Through Crime* (2007). Jamie's case reflects the findings of the NAO (2009) and the Department of Health (DOH) (2009a) that adults with autism were falling through the gaps in health and social care provision. Mental Health and Learning Disability Services were not providing support to adults with autism where these individuals did not have a co-occurring mental health problem or did not come under medical definitions of 'learning disability', which use an intelligence quotient (IQ) of <70 (*ibid*). These 'dividing practices' (see Foucault, 1991) existed despite the fact that the Autism Act 2009 and accompanying Statutory Guidance use the 'umbrella term' 'autism' to cover all 'autistic spectrum conditions, including Asperger syndrome' (DOH, 2010c: 10) and adults with autism coming under the statutory definition of disability in Section 6 of the Equality Act 2010 (see NAO, 2009; DOH, 2010a: 16). Further, conduct prohibited by this Act, and the duty to provide a reasonable adjustment applies to criminal justice organisations (E&HRC, 2015: 13; 44-56). Yet, rather than being considered under the statutory definition of disability, defendants with autism were characterised as 'vulnerable', 'risky' or 'dangerous'. I wanted to investigate why the Equality Act 2010 was overlooked in criminal justice policy and decision-making, to gain an understanding of why there appeared to be a fracture in the nexus between the conceptualisation of this group as disabled under equalities law and national and local government policies on defendants with mental health problems and learning disabilities. There was also a disconnect between equality law, along with autism-specific policies, and its implementation by decision-makers in the CJS. Therefore, I also wanted to investigate

to what extent these criminal justice decision-makers considered the defendant's autism in their decision-making and the impact that these alternative characterisations have on the treatment of their case.

While feminist and race-critical criminologists have produced numerous examples of the law reflecting the 'subjectivity of the dominant white, affluent, adult, male' (Hudson, 2006: 30), analysis from the perspective of disability theory extends these critiques of 'legal man' to incorporate '"able-ism" as a key characteristic of rampant masculinist subjectivity' (Campbell, 2005: 112). Baldry *et al* highlighted the lacuna in critical criminology which, while taking account of race, gender and class, currently relegates disability 'to the status of an additional dimension of social disadvantage' (2008: 32). Their work aimed to move thinking beyond traditionally siloed disciplinary approaches, and consequently combined insights emerging from critical criminology with innovations from the discipline of critical disability studies (2008: 31) – most notably the 'social model of disability' (see above; Chapter 2). This model, upon which much of this discipline is premised, makes a distinction between impairment, a condition of the mind or body, and disablement, a form of disadvantage or restriction of activity, caused by the failure to take account of impairment. Such failure leads to barriers to participation in mainstream social activities, which are imposed on top of impairment (UPIAS 1976, in Oliver 1990: 22). Criminological theory and criminal justice practice have often sought to categorise offenders with mental health problems through the reductive binary of 'mad' or 'bad', perpetuating a crude and 'false dichotomy' (Seddon, 2007). Building on the work of Baldry *et al* (2008; 2012), this thesis argues that there is descriptive and normative value in proactively categorising these groups as 'disabled' under the 'social model' of 'disability' (see Chapter 2). The development of this theoretical model provides a

critical framework for the qualitative research in Chapters 4 – 8 and is vital in realising the normative objective of establishing how defendants with autism *should* be governed (see Chapter 9).

This intellectual venture is timely given the entrenchment of this model in the Equality Act 2010 and the inception of the Autism Act 2009, Statutory Guidance and related policy which has brought the treatment of adults with autism to the fore in public policy-making. This Act and its accompanying Autism Strategy (2010; 2014) and Statutory Guidance (DOH, 2010; 2015) recognised the lacuna in provision of public services for adults with autism, and related social exclusion; it signalled a focus by legislators on enabling individuals with autism to live more fulfilling and rewarding lives in our society. The 2006 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) was ratified by the UK Government on 8th June 2009. Therefore, it is particularly germane to utilise the 'intellectual resources' available in critical disability studies to develop modes of theorising about the governance of adult defendants with autism in the English CJS.

Section 1 below describes how this thesis integrates the 'governmentality' analytical approach (Foucault, 1984; Seddon, 2007; Lippert and Stenson, 2010) and the 'social model of disability' from disability studies, to formulate a more sophisticated theoretical model for understanding the governance of adult defendants with autism. The social model has also assisted in relating the various strands of 'psy' literature on autism and crime/autism and criminal justice to the studies within criminology. Section 2 defines terminology that will be used in this thesis, Section 3 presents an interdisciplinary literature review, highlighting gaps in knowledge about how individuals with autism are governed in the English CJS, and Section 4 outlines the thesis' objectives and structure. This thesis records a 'history of the present' (Seddon;

2007; Foucault, 1984) by producing a contemporary account of the governance of adult defendants using the Autism Act 2009 as the temporal starting point.

1. The governmentality analytical approach and research questions

Drawing on Foucault, Seddon's work focuses on the 'dividing practices' that channel individuals into prisons, rather than on the field of 'mentally disordered offenders' as a whole. He sees the 'dividing practices' as a contextual tool to bring together three interconnected areas: the modes of objectifying, categorising and distinguishing human subjects; the social and human sciences which provide the language and discursive resources for these modes of 'knowing' human beings and making them subjects; and the modes of controlling, containing and regulating the subjects thus classified (2007: 14). While ultimately dismissing the dichotomy of 'mad' and 'bad' as 'a misleading simplification which leads to analytical imprecision', Seddon nevertheless acknowledges the value of 'dividing practices' which go beyond this dualism to 'encompass interconnected questions about responsibility, social order, cultural sensibilities, treatability, resources and risk management' (*ibid*: 158-9). Although offenders with autism are not considered directly by Seddon, this work is useful in articulating the changing relationship between the penal and welfare domains for mentally-disordered offenders. Since this has not been explored for offenders with autism, this conceptual tool can be used in analysis of the governance of this group. Seddon's critique of the mad-bad dichotomy can be used to question some of the assumptions and discussion within the 'psy' disciplines about the intrinsic link between the symptomatology of autism and violence/symptomatology of autism and crime. However, it fails to contextualise the dividing practices of the CJS within broader academic studies which have recorded the historically-differentiated construction of disability as a social category (Stone, 1985; Hughes, 2002).

Currently, other research does not consider offenders with autism from a disability perspective and nor does it directly examine their 'governance'. In posing the question 'how are offenders with autism governed through criminal justice policy and criminal court practice?' this thesis takes a governmentality approach as its mode of analysis. Utilising the notion of 'dividing practices', it deploys what Donzelot calls the three concepts of governmentality's research programme – strategies, technologies, and programmes of government (Donzelot, 1979) – while responding to Lippert and Stenson's call to incorporate 'the real' into the governmentality approach (2010; see Chapter 3). Thus, the governmentality approach enables analysis of the governance of this group on a number of levels, attending 'to the nexus between everyday practices and techniques, and more abstract technologies and broader political rationalities' while avoiding 'the political insulation characteristic of many micro-focused frameworks' (O'Malley *et al*, 1997: 503). Analysing this 'nexus' reflects the approach of the Section 149 Public Sector Equality Duty in its application to policy and actions of decision-makers. Analogies can also be drawn between the concept of 'cumulative impact', which has been developed by the Equality and Human Rights Commission (E&HRC, 2012a: 15), and the three concepts of governmentality's research programme.

The shifting landscape of the clinical governance of adults with autism (see NICE, 2012) makes the governmentality approach highly relevant. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*[2] (DSM-V) (APA, 2013) collapses the Asperger Syndrome (AS) category into 'a single category called Autism Spectrum Disorder' (NICE, 2012: 11) in parallel with the use of the inclusive 'umbrella' term 'autism' (see DOH, 2010) in recent policy documents, in order to ensure people with

[2] Two international classification systems set out the diagnostic criteria for autism used by clinicians: the American Psychiatric Association's Diagnostic and Statistical Manual version-V (DSM-V) and the World Health Organization's (WHO) International Classification of Diseases version-10 (ICD-10) (1992). Both systems define and diagnose autism in a similar way, based on the observation of behavioural traits.

AS do not miss out on health and social care. Furthermore, AS was only recognised as a diagnostic category in 1996; before this time, professionals struggled to diagnose this group of individuals, many of whom received no diagnosis or were misdiagnosed (Haskins and Silva, 2006). The issue of dividing practices is particularly pertinent as autism is a spectrum condition, which compounds issues arising out of controlling, containing and regulating this group dependent on categorisation. Chapters 4-8 describe how misunderstandings around the nature of this spectrum impact directly on the choice of disposal for adult defendants with autism; for example, the perception by criminal justice decision-makers that it is a spectrum of severity.

Strategies of government, later referred to as rationalities (Gordon, 1991: 3), comprise epistemological 'assumptions and a particular idiom that enables a problem to be translated into language that then makes it amenable to intervention' (Rose, 1999; Gilling, 2010: 1143). Recent criticism has shown that 'it is the "market-consumer" or neoliberal discourse' that now heavily underpins the austerity measures introduced by the Coalition government and the current Conservative government, 'rather than the progressive agenda of the Disability Movement, which is currently the main ideological driver of personalisation' (Ferguson, 2012: 56). This thesis, therefore, investigates which rationalities are applied in criminal justice policy and how these are translated into technologies of governance of offenders with autism. The Liaison and Diversion agenda – developed in parallel to the Equality Act 2010 and the Autism Act 2009 (see Chapter 5) – has made offenders with mental health problems and learning disabilities (as a subset of the broader category of 'vulnerable defendants') a locale for the attention of policy-makers. Thus, what emerged from the current research was the dominant rationality of 'vulnerability'. Chapter 4 contends that the social model of disability provides a better analytical framework than the concept of 'vulnerability' in enabling

the exploration of the 'social, political, cultural, and economic factors that define disability and shape personal and collective responses to difference' (Baldry *et al*, 2008: 32).

'Technologies' of government are 'intellectual and material means and routines that make different forms of rule possible', such as risk management techniques (Lippert and Stenson 2010: 477; Dean, 1999; Lippert, 2010). 'Programmes' are 'prescriptions, plans or schema for acting on some aspect of social conduct'. These 'constitute a space within which the objectives of government are elaborated, and where plans to implement them are dreamed up' (Miller and Rose, 1990: 14). Rose *et al* explicate that 'analysis of governmentalities':

> 'seeks to identify these different styles of thought, their different formation, the principles and knowledges that they borrow from and generate, the practices that they consist of, how they are carried out, their contestations and alliances with other arts of governing' (2006: 84).

Chapter 5 analyses the autism-specific 'programmes of governance' arising out of the Autism Act 2009 and how these apply to defendants with autism. From a governmentality perspective, Rose posits that 'it becomes apparent that each formulation of an art of governing embodies, explicitly or implicitly an answer to the following questions': 'Who or what is to be governed?'; 'How should they be governed?' and 'To what ends should they be governed?' (*ibid*: 85). These questions have been used to frame the thesis' primary research question: *how are adult defendants with autism governed through English criminal justice policy and criminal court practice?*

'Who or what is to be governed?' In posing the first subsidiary question, this research sought to understand how the categories of defendants with mental health problems and learning disabilities were applied to defendants with autism. It explored

whether they were considered in terms of their legal status as citizens with disabilities under the Equality Act 2010, or whether they were more commonly conceptualised as dangerous, 'risky', mentally disordered or vulnerable. In posing this question, the intention was to discern to what extent there was coherence between the legal framework provided by the Equality Act 2010 in its ambit covering criminal justice organisations (E&HRC, 2015: 13), and policies directed at defendants with mental health problems and learning disabilities. Where decision-makers have taken into account the defendant's autism, the language and diagnostic categorisation used have been analysed. For example, do decision-makers differentiate the category of autism and the categories of 'Aspergers' and what implications does this have for the outcomes for the defendant?

'How should they be governed?' The utility of the governmentality approach is that it provides 'the conceptual and analytical equipment for the critical engagement between theory and political practice' (O'Malley *et al*, 1997: 503) in order to render knowable the 'dividing practices' which are applied to offenders with autism and create space to make thinkable a normative position about how they *should* be governed. It is because the 'analytical tools developed in studies of governmentality are flexible and open-ended' that '[t]hey are compatible with many other methods' and 'are not hard wired to any political perspective' (*ibid*). This makes them well-suited for integration with the disability perspective set out in Chapter 2 and the normative venture that this thesis undertakes.

'To what ends should they be governed?' This line of enquiry leads us to understand more clearly how defendants with autism are 'juridical subjects whose conduct is to be limited by law, individuals to be disciplined, or, indeed, people to be freed'. (Rose *et al,* 2006: 84) It also leads us to a further set of questions: at what point

in the court process does the defendant's autism become relevant and to what extent? Is autism a relevant issue in mitigating or aggravating factors and their decision-making around case disposal? How is autism considered in relation to fulfilling sentencing aims? To what extent does it impact on decisions about the appropriate disposal of defendants with autism by the courts? This perspective 'recognises that a whole variety of authorities govern in different sites, in relation to different objectives' 'instead of seeing a single body – such as the state – as responsible for managing the conduct of citizens' (*ibid*).

As a result, a second question emerges: 'who governs what?' The case study at the opening of this chapter recorded the interface between the criminal justice, health and social care systems. The interaction between health and criminal justice is an issue which has been explored in great detail with regards to adults who have mental health problems (see Seddon, 2007) and learning disabilities (Talbot, 2008). However, the interaction with, and influence of, the adult social care system has not been considered in the same level of detail and has only rarely been discussed (see Prison Reform Trust, 2012) in relation to offenders with autism. This thesis does not include a systemic analysis of the interface between criminal justice and social care. However, it does investigate the interaction between criminal justice and adult social care policy as a potential 'interconnecting variable' which may be one of a number of factors leading to the potential 'elevated prevalence' (Browning and Caulfield, 2011 below) of adults with autism in the English CJS. Further, the movement between these systems compels criminologists to examine changing epistemologies and better conceptualize individuals whose conduct is governed through the re-purposing of the adult social care system (see Chapters 8 and 9). This leads to questions about the role of expert witness statements in

court cases and how decisions are made by the court in evaluating which service or institution is the most appropriate for their diversion or disposal.

'According to what logics?' At present, 'public services' within the CJS have no statutory obligations under the Autism Act 2009 and accompanying Statutory Guidance but are told to follow the guidance in order to 'help improve the delivery of the services they provide' (DOH, 2010c: 8; 2015a). Therefore, to what extent does criminal justice policy and criminal court practice acknowledge the Autism Act 2009 and its accompanying policy in their decision-making? Are there, in fact, any logics applied *per se* to adult defendants with autism?

'With what techniques?' There has been a modest but important growth of scholarship that has begun to 'show how civil and administrative processes are increasingly being repurposed so as to accommodate the goals of criminal law' (Spivakovsky, 2014: 3). Drawing on Foucault's governmentality approach in relation to disabled people in the Australian jurisdiction, Spivakovsky calls for criminologists to 'explore the myriad ways by which operations of punishment and punitiveness are being recruited, reconfigured and repurposed across justice arenas in the name of governing the population' (*ibid:* 4). This research is delimited to looking at the governance through the criminal courts of adult defendants with autism up to and including disposal options but not beyond. Nevertheless, in understanding the kinds of techniques of governance that are used for adults with autism, it documents whether, for example, risk management techniques are recruited and whether criminal court disposals reconfigure or repurpose health and social care processes to accommodate the goals of criminal law (see Chapters 8 and 9).

2. Defining key terms

i) Autism

Terminology used to define autism varies across jurisdictions, between professions and professionals and among individuals who are themselves on the autism spectrum. Autism is a life-long ‘spectrum condition’ (Wing, 1995) because, although people with autism share the same difficulties, the condition affects people with autism in different ways (NAO, 2009: 4). In the United Kingdom, Autism Spectrum Condition (ASC) is often preferred to Autism Spectrum Disorder (ASD) by some authors and those individuals with a diagnosis themselves, because this group is neurologically different but ‘not necessarily “disordered”’ (NICE, 2012a: 18). Subgroup diagnostic categories such as autism, AS, pervasive developmental disorders and atypical autism are also used by professionals within research and practice (*ibid*). American psychiatrist Leo Kanner introduced the modern construct of autism (Kanner, 1943). A year later, the Viennese paediatrician Hans Asperger gave an account of a similar phenomenon, autistic psychopathy (1944), which formed the basis of the modern diagnostic construct of Asperger’s disorder (or Syndrome) (Cashin and Newman, 2009). The development of the AS sub-category partly reflects divergence in parallel accounts of similar phenomena and partly historical clinical differentiation: while both conditions share what has been known as the ‘triad of impairments’ involving difficulties with social interaction, communication and a restricted and stereotyped pattern of behaviour (Wing, 1995; APA, 1994; 2000), in AS there is no developmental language delay and IQ is always >70 (NICE, 2012a). Whether or not ‘autistic and Asperger’s disorders are separate entities is a contentious issue’ (see Cashin, 2006; Eisenmajer *et al*, 1996; Gillberg, 1998); nonetheless, the distinction has played a marked role in allocation of

resources and access to services in the English policy context (see DOH, 2010a; Chapters 4 and 5).

The DSM-V collapses the sub-categories of AS and autism into one single category called Autism Spectrum Disorder, now 'characterised by difficulties in two domains: (A) social-communication and (B) strongly repetitive behaviour/difficulties adjusting to rapid and unexpected change/unusually narrow interests' (NICE, 2012a: 18; APA, 2013). Specific difficulties in these domains are discussed below where they are relevant to the prevalence of offenders with autism, patterns of offending and association with violence and criminality. In parallel, the inclusive 'umbrella' term 'autism' is used in recent legal and policy documents to cover all individuals on the autism spectrum, including individuals with AS (Autism Act 2009, DOH 2010a, b, c). The term 'autism' is used in this sense to create a nexus between the present research and these policy developments. However, when discussing original research studies, the specific terminology used by the authors will be cited. This will ensure the authors' work is accurately represented and reflect their potentially significant use of certain categorisations.

Although there are similarities in the key issues affecting offenders with mental health problems and learning disabilities, autism is given special attention in this thesis for a number of reasons. Firstly, it has particular features which challenge mainstream accounts of criminality and corresponding standard criminal justice responses. Secondly, as co-occurring mental health problems and learning disabilities are not always present, these individuals fit awkwardly into health and social care provision and access to such support. This means the inter-connecting variables (Browning and Caulfield, 2011; see below) which lead them onto criminal justice pathways are likely to differ from those with mental health problems and learning disabilities. Thirdly,

many adults with 'unrecognised autism' may only receive a diagnosis after coming into contact with the CJS as offenders or victims (Hare *et al*, 1999). Hence, they will have previously missed out on access to services that a diagnosis facilitates, making a governmentality analysis particularly apposite.

ii) Defendants with autism

Adult defendants with autism are defined as individuals aged 18 or over who have received a diagnostic assessment (see NICE, 2012a) of autism, which has been disclosed to a criminal justice decision-maker and made known to the criminal court prior to or during the criminal court proceedings, and who have been charged with a criminal offence at the time of this research. There are, of course, difficulties in restricting the definition in this way. On one view, it means the thesis is establishing its own 'dividing practices' by giving pre-dominance to medical definitions of the condition. Professional controversies abound (see Baron-Cohen, 2008) in relation to parameters of accurate identification, assessment and diagnosis of autism. Criticism can also be levied at the primacy which is given to decision-making by these professionals who, in some cases, may have given a diagnosis when the defendant was a child or whose prior diagnosis is later called into question. After all, there is 'wide variation in rates of identification and referral for diagnostic assessment, waiting times for diagnosis, models of multi-professional working, assessment criteria and diagnostic practice for adults with features of autism' (NICE, 2012a: 367). Also, these disparate 'factors contribute to delays in reaching a diagnosis and subsequent access to appropriate services' (*ibid*) and in turn may become one of the 'interconnecting variables' (Browning and Caulfield, 2011) that lead individuals with autism to come into contact with the CJS. What is therefore lost in using the above definition is the

opportunity to capture data about the difficulties faced by individuals who may well have autism but have not been able to obtain a diagnostic assessment prior to or during the court proceedings, and by individuals who may have only certain features of the autism phenotype.

The requirement that the defendant's autism be disclosed to at least one professional in the court proceedings, and made known to the court decision-makers, means that certain interesting data will not be discussed in this thesis. Multiple factors inhibit the disclosure of a disability in the employment environment for people with mental health problems (Wheat *et al*, 2010) and by adults with autism (Mazurek, 2014). There is limited research on disclosure of disability by defendants in the CJS (Bromley Briefings, 2014) and autism in particular. The very nature of autism means that adults on the spectrum may find it difficult to articulate their diagnosis. Although the use of autism alert cards may facilitate this process in the CJS (Archer and Hurley 2013), there are difficulties around acquiring these cards and achieving consistency in how professionals respond to them. Parents and supporters can also play an important role in determining the nature, timing and extent of the disclosure of autism. For example, although parents can play an important advocacy role in assisting the individual to get a diagnosis, some individuals only receive a diagnosis later in life, as late as retirement, after the death of their parents (James *et al*, 2006). The issue of disclosure for defendants with disabilities, especially 'invisible' disabilities, requires further research. Under Section 15 of the Equality Act 2010, 'Discrimination arising from disability', it is possible to justify unfavourable treatment arising from or in consequence of the person's disability if the public authority does not know or could not reasonably be expected to know that a person has a disability (see HM Government, 2010: para 69). Therefore, these restrictions are necessary to delimit clear parameters of this thesis.

iii) Criminology, the CJS and criminal courts in England

How criminology is defined and what it should encompass as a discipline is a highly-disputed question. Criminology is principally thought of 'as the study of the causes, patterns, and nature of crime itself' (Zedner, 2004: 32). The challenge of resolving these issues moved scholarly attention to the state's response to crime; the discipline therefore has long included the study of crime control, its institutions and its effectiveness (*ibid*: 32-33). This dissertation starts from the premise that the nature of crime and its control are interrelated. Space precludes extensive discussion of the proper parameters of the discipline, and these debates are best found elsewhere (see Bosworth and Hoyle, 2011). Instead, it is contended that because criminologists have always grounded their analysis in 'a nuanced sense of the world as it is, and as it is becoming' (Garland and Sparks, 2000: 2), the development of a more clearly-conceived disability perspective is vital. This must be within the discipline of criminology as a whole, and not just the sub-discipline of critical criminology because the absence of such a perspective leads to 'theoretical blindspots', and – to the extent that criminology can affect criminal justice policy (*ibid*; Loader 1998; 2006) – to discriminatory practice.

Criticism has, rightly, been levelled at the description of a uniform CJS (Zedner, 2010) and, in fact, this is not a system in the true sense but more of a loose association of bodies (Ashworth, 2011b). References made here to the CJS are to the bodies involved in responding to the alleged crime committed by a defendant with autism at 'any stage of the criminal justice process: before arrest, after proceedings have been initiated, in place of prosecution, or when a case is being considered by the courts' (c.f. NACRO, 2006; Bradley, 2009). However, this is not to assume that siloed policy-

making and practice does not still occur. This study is restricted to the governance of defendants with autism in the English CJS rather than England *and* Wales because although the Autism Act 2009 applies to Wales, the original and revised Autism Statutory Guidance (DOH, 2010c; 2015a) does not. The term 'English Criminal Courts' is used here to denote the process from the defendant's first plea and case management hearing at the Magistrates' Court through to any possible referral of the case to the Supreme Court as the final court of appeal for criminal cases in England. However, as this thesis intends to locate the governance of adults with autism in the current policy context, reflecting the strata of the operation of the Autism Act 2009, the fieldwork in Chapters 6 to 8 focuses on the Midlands Criminal Court Circuit.

3. Mind the gaps: the relationship between autism and criminality and autism and the CJS

i) The 'psy' disciplines

a) Prevalence

Two extensive literature reviews have analysed studies conducted in the 'psy' disciplines on the prevalence of offenders with autism (Cashin and Newman, 2009) and whether elevated prevalence evinces an association between autism and violence/criminality (Browning and Caulfield, 2011). Hence, this section focuses on what prevalence studies carried out in the English CJS might tell us about their governance. Presently, no established protocol exists for the process of screening offenders for autism across the many services linked to the CJS (Underwood *et al*, 2013). Consequently, there is no definitive prevalence figure and individuals may be more likely to miss out on appropriate support and diversion. The 'best estimate of the

overall prevalence of autism in England is 1.1%' (Brugha *et al*, 2011), compared to earlier estimates of 1.0% (Brugha *et al*, 2009). This study included AS 'within the concept of a broader spectrum of autism' (*ibid*, 2012: 8). However, those writing on population prevalence in the CJS have mainly looked at offenders with AS, or higher functioning autism (hfASD), rather than the broader category of autism. The DSM did not include AS until the publication of (DSM-IV) in 1994 and so 'many forensic clinicians were not formally trained in diagnosing this condition in adults' (Haskins *et al*, 2006: 374). Perhaps the focus on the prevalence of AS in this context was a response to the availability of this diagnosis whereas, previously, as Haskins *et al* note, there had been a lack of diagnostic paradigm to subsume the clinical features with which [forensic clinicians had been] presented' (*ibid*), coupled with an assumption that those with low functioning autism would be identified at a much younger age, with their 'challenging behaviour' being managed in communal care establishments (such as residential and nursing homes). Further, because individuals with AS are 'associated with more intellectually able and higher functioning individuals than many ASDs, this presents greater issues for their identification and treatment... if they come into contact with the [CJS]' (Browning and Caulfield, 2011).

Studies examining the prevalence of AS among offenders, then, 'have suggested that there is a higher rate of individuals with higher functioning [autism] than is found in the general population' (*ibid*). However, these studies have mainly 'been restricted to forensic hospital settings and have failed to establish the prevalence rates in the general prison population' and it has 'been hypothesised that a significant proportion of individuals with an ASD in custody are undetected or unidentified or are simply misdiagnosed, often with mental health diagnoses' (Cashin and Newman, 2009: 71-72; Allen *et al*, 2008; Schwartz-Watts, 2005). Scragg and Shah (1994) undertook the first

prevalence study within a secure setting. They examined the case notes of the entire male population (n = 392), and interviewed staff and consenting patients in their study at Broadmoor Hospital (1994). Using the diagnostic criterion of Gillberg and Gillberg (1989; 1991) they found that 1.5% (n = 6) of the sample had definite Asperger's disorder and 0.8% (n = 3) had probable Asperger's disorder, giving a prevalence rate of 2.3%. Cashin and Newman point out that 'the prevalence rate of Asperger's disorder may potentially have been significantly higher if the hospital had accepted patients with a diagnosis of a learning disability'. Five years later, of the 1,305 patients screened by Hare *et al* in the three English special (forensic) hospitals, 2.4% (n = 31) had a definite Autism Condition, 21 of whom were classified as AS; and a further 2.4% 'uncertain' cases were identified for whom insufficient information was available to make a clear diagnosis of an autistic condition (1999). No comparative study was done in the general prison population; therefore, there may have been a higher concentration of this group in the forensic settings (rather than in the wider prison estate).

As a result, these studies have been subject to the criticism that they lack validity because their samples are 'highly selected' (Allen *et al*, 2008: 749) and may 'simply reflect sentencing policies and practice, which use mental health, rather than criminal justice, facilities for the detention of violent offenders with ASDs' (Woodbury-Smith *et al*, 2006: 110; Browning and Caulfield, 2011). Interpreting these studies in secure settings as demonstrating an elevated prevalence of AS amongst the offending population as compared to the general population is highly problematic. Despite highlighting this point (*ibid*) neither set of authors tease out what the 'policy and practice' of this era were, nor do they properly differentiate between prevalence studies carried out in England and other jurisdictions (Siponmaa *et al*, 2001 (Stockholm);

Mouridsen *et al*, 2007 (Denmark)) on the basis of potential variations in policies and practices in these countries.

To address their concerns that the earlier findings in secure settings could distort the picture of the criminality of people with AS by representing only the prevalence of very serious offending, Woodbury-Smith *et al* found that offending occurring within people with higher functioning ASD was significantly lower ($p<0.05$) than that of the neuro-typical population group (2006). They used both criteria for the inclusion of participants: first, an 'ASD according to the International Classification of Diseases (ICD-10: WHO, 1992)'; and second, 'normal' intellectual ability, defined as a tested FSIQ of 70 or above on the Wechsler Abbreviated Scale of Intelligence (WASI: The Psychological Corporation, 1999; *ibid*) rather than the DSM. However, their sample size was relatively small (n = 25), recruited in one English Health District, and the comparison group who did not fulfil these criteria (n = 20) were recruited from among the paid employees of a large local company. This means that the self-reported crime within the comparison group may not accurately reflect the distribution of criminality in the chosen locality. The overall finding of Allen *et al* (2008) in the study they carried out in Wales, was 'that there was little evidence to support the notion that offending was a significant problem in people with Aspergers', with 33 of the sample (n = 126) – sought through contact with 98 different services in one healthcare district – found to have 'offending behaviours that had or could have resulted in involvement in the CJS'. The inconsistency in both methodological and diagnostic approaches taken in these prevalence studies has produced dichotomous results (Browning and Caulfield, 2011) and failed to accurately assess the numbers of offenders with AS, let alone those numbers who would come under the wider category of autism that might exist in the English CJS.

b) The association between autism, criminality and patterns of offending

Hans Asperger identified a variety of forms of antisocial behaviour in his seminal study (1994). Wing noted that 4 of the 34 cases of AS to which she referred had committed 'bizarre antisocial acts' (1981). Successive studies within the 'psy'-disciplines (Mawson *et al,* 1985; Baron-Cohen, 1988; Barry-Walsh and Mullen, 2004; Chen *et al,* 2003; Chesterman and Rutter, 1993; Cooper *et al*, 1993; Everall and LeCouteur, 1990; Fujikawa *et al*, 2002; Kohn *et al,* 1998; Haskins and Silva, 2006; Murrie *et al*, 2002; Schartz-Watts, 2005) have since used clinical studies to hypothesise the association between AS and offending (Allen *et al*, 2008), shifting the focus away from likely prevalence numbers within secure settings at any one time. Using case studies of one or more individuals, a number of these use retrospective analysis (Silva *et al*, 2004) to determine whether AS is present in people convicted of serious crime. Their contribution to the 'understanding of issues relating to the prevalence and pattern of law-breaking and offending' is described as 'limited' because none of these studies provides a 'detailed developmental history' making it uncertain whether 'the individuals meet the criteria for a diagnosis of an ASD, rather than some other disorder' (Woodbury-Smith *et al*, 2006: 109).

In the earlier studies which hypothesised this association, the focus was upon AS and violence, not criminality. First, Mawson *et al* speculatively hypothesised that the 'association between [AS] and violent behaviour is more common than has been recognised' (1985: 569). Ghaziuddin *et al* (1991) then examined this hypothesis by reviewing 21 papers, published between 1944 and 1991, relating to people with AS in order to determine the rate of violence among these individuals. Only 3 (2.3%) of 132 patients described had a clear history of violent behaviour. Using less conservative

inclusion criteria for the publications reviewed, they found violence in 11 of 197 cases (5.6%). Comparing this figure to the rate of violent crime in the US population at this time (7%), they concluded that there was no significant association between violence and AS (*ibid*). More recent research has shown that 'patients with an ASD detained in high-security psychiatric care have been found to have lower index offence violence ratings compared to patients with schizophrenia or a personality disorder' (Murphy, 2002). At present, therefore, there is no evidence 'to support the "robust association" between ASD and violent behaviour', evidentially, therefore, 'any association between autism and violence is small and poorly understood' (Murphy, 2010: 463).

Other studies broaden out the original 'hypothesised speculation' to look at the association between AS and other types of offending (Barry-Walsh and Mullen, 2004; Haskins and Silva, 2006; Allen *et al*, 2006). The findings cited above by Woodbury-Smith *et al* are consistent with the argument made by Howlin (2004) that people with ASDs may adhere to lawful behaviour more consistently than their counterparts in the general population, but there is some early evidence of a difference in the patterns of offending. Through the small number of court cases and clinical case studies recorded in the 'psy' literature, there are 'anecdotally' some 'preliminary data to support a portrait of Asperger's offending which is characterised by one of three criminal activities that tend to be engaged in: physical violence, sexual assault, and arson' (Freckleton and List, 2009). For example, despite showing higher levels of compliance with the law generally, the committal of violent acts achieves a slightly higher rating than those reported by their neuro-typical counterparts in a community-based study (Woodbury-Smith *et al*, 2006). Obsessive harassment (stalking) and computer crimes may also be added to these patterns (Chaplin *et al*, 2013), although the incidence of the

latter may be magnified rather than real due to high-profile cases such as that of Gary McKinnon (see Mackenzie and Watts, 2010).

c) The 'symptomatology' of autism and criminality

Many of the aforementioned studies (for example, Baron-Cohen, 1988; Murrie *et al*, 2002; Barry-Walsh and Mullen, 2004) made subsidiary points about the 'individual components' (Haskins and Silva, 2006) of AS/high functioning ASD (hfASD) or 'symptomatology' of autism (Freckleton and List, 2009) which may be associated with criminality for someone on the spectrum. Making a segue from the inconclusive association literature, Haskins and Silva are clear that in describing the features of hfASD 'that would most likely be involved when criminal actions occur' this 'is not to say that having a developmental disorder enhances the likelihood of acting criminally *per se*' (2006: 377-8). Difficulties in '(A) social-communication' may reduce the ability of an individual to be aware of, and reflect upon, the affective, cognitive and perceptual life of others as well as the self (Clarke *et al*, 1989; Abu-Akel, 2003). This characteristic can cause an individual with AS to lack empathy and have problems understanding social cues and poor impulse control (Atwood, 2007). They may, therefore, be 'genuinely unaware of the harm they caused their victims' (Murrie *et al*, 2002: 66) or unable to prevent themselves from causing that harm. Authors have also documented sexual crimes (Haskins and Silva, 2006) and arson (Barry-Walsh and Mullen, 2004) as closely associated with difficulties in '(B) strongly repetitive behaviour' and 'unusually narrow interests' (NICE, 2012: 18; APA, 2013) for offenders with AS/hfASD. Finally, 'difficulties adjusting to rapid and unexpected change' (*ibid*) have triggered heightened anxiety leading, in some cases, to criminal damage and assault (Allen *et al,* 2008).

d) Difficulties negotiating the system

By virtue of AS 'being a pervasive developmental disorder, it is [also] apparent that it has the potential to impact upon almost every aspect of criminal responsibility' (Freckleton and List, 2009: 30) and research has shown that 'people with this diagnosis who do fall foul of the law clearly struggle to negotiate the CJS' (Allen *et al*, 2008: 757). As a consequence, a number of pieces in the 'psy' literature published in the last decade (*ibid*; Murrie *et al*, 2002; Katz and Zemishlany, 2006; North *et al*, 2008) considered how the 'symptomatology' of AS and autism led to problems with individuals on the spectrum negotiating different aspects of the CJS.

In addition to highlighting the role that AS seems to play in their offending, Murrie *et al* discuss the implications that features of AS have for decision-making in the CJS, as well as for disposition and treatment (2002). From their review of six court cases of adult offenders with AS, they suggest that some features of 'Impairments in Social Interaction', including 'Deficient Empathy' and the resultant propensity for 'Immediate Confession', may have relevance to criminal justice decision-making (*ibid*). For instance, the authors propose that CJS decision-makers may respond to the 'deficient empathy' of offenders with AS in one of two ways. Firstly, they may perceive it as a 'neurobiological deficit' which becomes a 'mitigating factor that elicits sympathy from police, prosecutors, or jurors who feel compassion for a person with an impoverished emotional life and see the defendant as congenitally deficient in one of the normal inhibitors against crime'. Conversely, to 'the extent... that deficient empathy is seen as cold, heartless, and remorseless, it may be an aggravating factor, alienating the decision-maker and eliciting fear of future crimes' (*ibid*: 66). A further observation was that 'at least four of the six men were quick to confess to the police', potentially reflecting 'traits ranging from deficient shame, poor judgment, lack of experience, or an

impaired appreciation of the social and legal consequences of a confession, to simple forthrightness, rule-abiding behavior or honesty', which could be of 'considerable significance if such confessions were not fully competent or voluntary' (*ibid*: 68).

North *et al* picked up this issue in their investigation into psychological vulnerabilities during the interrogative interviewing of suspects with hfASD (2008). Although there was no significant between-group differences on the measures of suggestibility, of the 26 individuals with hfASD and the 27 gender- and IQ-matched controls, the group with hfASD were rated as significantly more compliant than the controls in terms of 'the extent to which they yielded to misleading questions or changed their answers following negative feedback' (*ibid*: 329). They also had higher scores on measures of depression, anxiety, fear of negative social evaluation and paranoia. The authors concluded that this group may be 'more prone to respond compliantly to requests and demands' because they are 'more eager to please or to avoid conflict and confrontation than controls' (*ibid*: 331). In some circumstances, the tendency to respond in this way in a police interview may disadvantage a suspect. Psychological tests of suggestibility and compliance could, therefore, be related to police transcripts and the manner in which questions were phrased and how the interviewee responded to challenges (*ibid*). This could supplement an assessment of intellectual ability, providing important information about the strengths and vulnerabilities of an alleged offender (Gudjonsson and Henry, 2003) and help evaluate the legitimacy of self-incriminating evidence obtained during interrogation (*ibid*; North *et al*, 2008).

Barry-Walsh *et al* consider Fitness to Plead and Legal Insanity in England, Australia and the US, arguing that offenders with AS have 'deficits that raise the likelihood that their disorder will render them unfit or be of exculpatory value' given

that, in all five cases reviewed, 'the offending behaviour was not recognised by the offender as being wrong' and the general reduced ability of patients with AS to 'reflect on how their actions may impinge on others' (2004: 96; 105-6). Even though they concede the variability of AS and the 'uniqueness of each individual's capacities' means that some individuals 'will have sufficient understanding to be morally responsible for their offending behaviours', the offending and disposal of people with AS should be placed in the context of the core features of AS by the courts to 'form a basis for sophisticated assessment of the issues of disability and legal insanity' (*ibid*). Freckleton and List go into considerable detail about how 'the nature of Asperger's disorder goes to the heart of determining responsibility for the commission of criminal offences in terms of the intentional element of offending' and 'also impacts at a fundamental level on the evaluation at the sentencing phase of the criminal process' (2009: 35). Further, they recommend that guidance for judges, juries, and magistrates should be issued to counter 'the risks of drawing over-ready (and inaccurate) inferences from the unusual manner' and the 'eccentric, tangential and formal' language of individuals with AS (2009: 31). Theirs is an extremely comprehensive exposition, nevertheless, Freckleton and List move between jurisdictions without a concerted focus on the English CJS. As it was written in 2009, it does not reflect the current clinical and policy move towards categorising this group under 'autism' and the resultant impact that this could have on criminal justice decision-making.

ii) Criminology and criminal justice: interconnecting variables and difficulties negotiating the CJS

Like offenders with learning difficulties, research on offenders with autism is extremely limited within 'mainstream' criminological analyses (see, for example, Macdonald,

2006). Writing in the Journal of Positive Behavioural Intervention, Mayes (2003) discusses issues regarding competence to stand trial, capacity-related defences, mitigation in sentencing, and evidentiary issues, unusually, for persons with *autism* who have become involved with the CJS in the USA either as a victim or a perpetrator. Governance issues are raised only implicitly within this piece, as Mayes suggests a number of implications for practitioners which have parallel relevance for the English CJS.

The 2011 review of the 'psy' prevalence material cited above makes a useful contribution by stating that 'the offending behaviour of their research participants could potentially be attributed to other risk factors commonly associated with offending within the general population such as social circumstances or co-morbid mental health issues' (Browning and Caulfield, 2011: 170). Further, any potentially 'elevated prevalence of AS within offender populations... may be better explained in terms of certain interconnecting variables', including an 'inadequate level of recognition and understanding within the police service, the Crown Prosecution Service (CPS), the Judiciary and the various criminal justice agencies, along with current justice policy', rather than an 'innate predilection towards offending behaviour' (Browning and Caulfield, 2011: 175).

It is this latter 'interconnecting variable' that my own research intends to contribute to, focusing as it does on the governance of adult defendants with autism through criminal justice policy and criminal court practice. Centring on court practice, the research builds on the canon of court-based studies in criminology. The seminal study by Bottoms *et al*, *Defendants in the Criminal Process,* placed the defendant centre stage in research on the criminal courts (1976). They were the first to look systematically at the choices that defendants made in their participation in the English

criminal court process and the quality of justice as it was assessed and experienced by the defendants themselves (1976). Through interviews with the defendants and court case observation, the authors investigated defendants' substantial decisions about plea, mode of trial, representation (legal or otherwise), choice of bail or custody and appeal. Their matrix for 'scheduled routes' (*ibid*: 7) through the court process was useful in guiding the court observation carried out in Phase 2 of the present research (see Chapter 3). Over the course of the last thirty years, criminologists have carefully researched the differential treatment and experiences of women defendants in the criminal court process (see Worrall, 1981). They have also produced accounts of the role of race and ethnicity in sentencing practices in the Crown Court (see McConville and Baldwin, 1982; Crow and Coive, 1984; Hudson, 1989; Hood, 1992) and Magistrates' Courts (Mair, 1986). A comprehensive review of this literature can be found elsewhere (see Shute *et al*, 2005).

After the 1976 study by Bottoms *et al*, much of the subsequent research which takes the defendant as the focal point has concentrated on his or her differential treatment in the conviction and sentencing stages of court procedure by reason of gender (Wilczynski, 1997), race (Kalunta-Crumpton, 1998) and ethnicity (Shute *et al*, 2005). Later research helped to address the absence of consideration of the treatment and experience of female suspects (see Edwards, 1984) by investigating, for example, the impact of sentencing practices on women and their families (Daly, 1989) and whether the sex of the defendant is related to the severity of the sentence in cases dealt with in Magistrates' Courts (Farrington and Morris, 1983). Interestingly, it is research on vulnerable and intimidated witnesses and vulnerable defendants which re-injects discussion of the compatibility between the adversarial values which imbue the whole criminal court process and providing justice for these differentiated groups (see Section

2; Chapters 2 and 3). Thus, in order to answer the main research questions (detailed in Section 1 above), a number of different objectives will be explored across this thesis' nine chapters. Meeting these objectives will demonstrate its relevance as a research project and convey how these disparate bodies of literature will cohere as a body of academic work.

4. Thesis objectives and structure

One of the 'strengths of an interdisciplinary discourse is the cross-fertilisation of ideas between specialisms that facilitates comparative study and knowledge transfer' (Quirk *et al*, 2010: 1). This is an important venture given that the very nature of disability (and autism) is 'complex and calls into question a web of discourses and institutional practices' (Goodley, 2011: xii). The social model's distinction between impairment and disablement enables us to comprehend, on the one hand, the aforementioned 'psy' literature which explores the link between the 'symptomatology' of autism and criminality (the 'impairment branch' of the distinction), in combination with the 'interconnecting variables' which may lead offenders with autism into the CJS; and, on the other hand, the inequitable experiences of defendants with autism (the disablement branch of the distinction). Drawing on critical disability studies, Chapter 2 will develop a clear theoretical framework to understand and critique the instruments and decision-making processes involved in the governance of adult defendants with autism.

Chapter 3 describes the 'cross-method' triangulation used in this research – carrying out different types of qualitative methodology to study the same phenomenon (Hoyle, 2000; Webb *et al*, 1966). A vibrant array of research on the criminal courts in England has given important insights into the operation of justice in the courts for certain groups of defendants (see Baldwin and McConville, 1977; Ashworth *et al*, 1984; Shute *et al*, 2005). This chapter utilises this scholarship to carry out the governmentality

research programme discussed above and informs the three phases of this thesis' fieldwork: textual analysis of policy documents and official documentation of court cases; court observation, including interviews where possible with adult offenders with autism; and semi-structured interviews with practitioners and elite decision-makers.

By examining the wider policy context and integrating qualitative research with criminal justice decision-makers, Chapters 4 and 5 conduct an analysis of how governance from above 'interacts with "governance from below"' (Stenson, 2008: 5). In the circumstances of the shift towards localism initiated by the Coalition government's 2011 Localism Act, and continued by the present Conservative government, navigation between these levels of governance recognises that 'there is discretion and choice' within 'local political cultures... in which political leadership and decision-making are crucial in shaping policy-making and practice' (*ibid*). These chapters triangulate a textual analysis of policy documentation with interviews conducted with elite decision-makers to better understand instruments of governance as applied to adult defendants with autism. In Chapter 4, the discussion moves from national rationales and strategies of governance of offenders with mental health problems and learning disabilities to the application of the Equality Act 2010, and its Section 149 Public Sector Disability Equality Duty, to criminal justice policy and court practice. Chapter 5 brings into focus the developments in autism-specific law and policy: the Autism Act 2009, the Statutory Guidance, *Implementing Fulfilling and Rewarding Lives* (DOH, 2010), and the subsequent 'refreshed' autism strategy (DOH, 2014). It is argued in this chapter that the first Autism Strategy and Statutory Guidance missed the opportunity for coherent policy and practice, as its statutory requirements do not apply to certain providers of public services, such as the courts, and the police and

probation services are only expected to follow its requirements by reason of best practice (DOH, 2010c: 8).

The language and argumentation used by legal counsel, the judge or magistrate, the defendant and witnesses reveal much about the 'wider structures' of 'states, economies and legal orders, and the like' (Burawoy *et al*, 1991: 282). Chapters 6, 7 and 8 detail the rich qualitative findings from observation of the criminal court cases of 8 adult defendants with autism. The nature and extent to which the defendant's autism is considered by the judiciary at the different stages of the decision-making process is examined, including its relevance to fitness to plead; as a mitigating or aggravating factor; the nature and length of sentence and the adequacy of disposal options available to the court for this group. The court observation of lower courts and qualitative interviews explored in Chapter 6 reveal that there is still truth in Galligan's remark that 'the reality of the CJS is numerous associated processes in which decision-makers generally act independently and in ignorance of the actions of one another' (2010; 1987). These disparate actions and siloed working practices are made evident when many of these actors come together in the courtroom and are highlighted by the scrutiny of the court.

Chapter 9 makes the normative case that defendants with autism should be governed through a conceptualisation of disability. This concluding chapter connects the levels of governance and reflects on the interaction between national policy on offenders with mental health problems, learning disability and autism and court decision-making. Building on the intellectual resources garnered from the development of a disability perspective in Chapter 2, it posits that it is necessary to move away from the reductive mad-bad binary to the recognition of this group as disabled citizens. This,

it is argued, would enable a more coherent and dignified approach to criminal justice decision-making involving this group.

Conclusion

Examining the collection of work within the 'psy' disciplines, this chapter has argued that there is no direct reference to theories developed within criminology or critical disability studies. Further, similar to the case of offenders with learning disabilities (LD), there is a paucity of 'mainstream' criminological analyses of offenders with autism. The inception of the Autism Act 2009 and subsequent policy makes a study on the governance of this group particularly relevant. Recent clinical guidelines have augmented this research venture. The NICE *Full Guideline* covers the diagnosis and management of adults on the autism spectrum in the community and in prison (see 2012a: 162-4) and requires the autism strategy group to 'develop local care pathways that promote access to services for all adults with autism, including for people from certain groups' (*ibid*: 168). This includes 'people in the CJS' (*ibid*: 359). This makes it all the more pertinent for criminology to address the changing epistemologies and ensure that it responds to Spivakovsky's call to 'explore the myriad ways by which operations of punishment and punitiveness are being recruited, reconfigured and repurposed across justice arenas in the name of governing the population' (*ibid*) for defendants with disabilities. An integral part of responding to this call is to develop a more clearly-conceived disability perspective within criminology.

Chapter 2 – In search of a theoretical toolkit: the descriptive and normative value of categorising offenders with autism as 'disabled'

Introduction

Foucault, the progenitor of the governmentality approach, 'distinguished two lines of critical philosophy descended from Kant: 1) an inquiry into the conditions of possibility of true knowledge and; 2) a practical, historical critique of our present selves that makes thinkable and assists the creation of other possible ways of living' (1984; O'Malley *et al*, 1997: 506-7). It is to 'this second sense of critique that Foucault attaches his own work' (*ibid*). In this chapter, I will draw upon the intellectual resources available in Disability Studies (see Goodley, 2011), most notably the 'social model of disability', and critical criminology (Baldry *et al*, 2008; Dowse *et al*, 2009; Hudson, 1998b; 2002) to formulate the latter kind of critique and the development of a more sophisticated theoretical model of the governance of offenders with autism in the English criminal courts. As described in Chapter 1, this model, upon which much of critical disability studies is premised, makes a distinction between impairment, a condition of the mind or body, and disablement, a form of disadvantage or restriction of activity caused by the failure to take account of impairment. The present chapter argues that there is descriptive and normative value in proactively categorising these groups as disabled under the social model of disability in order to move criminology away from this false dichotomy in scholarship about offenders with mental health problems, learning disabilities and autism.

As mentioned above, it is important to remember that conduct prohibited by the Equality Act 2010, and its duty to provide reasonable adjustments, applies to criminal

justice organisations (E&HRC, 2015: 13). Further, elements of the social model of disability are already 'grounded' in the Equality Act 2010 in the Section 6 definition of disability and in the iterative process required by the Section 149 Public Sector Equality Duty. Writing in relation to the then Disability Discrimination Act 2005 (DDA), Talbot and the Prison Reform Trust (PRT) found that, in general, there was a failure by both criminal justice staff and those responsible for criminal justice services 'in their duty to promote equality of opportunity and to eliminate discrimination and, as such, [they were] not complying with the requirements of the DDA 2005 and the DED [Disability Equality Duty] in particular' (Talbot/PRT, 2008: 62). The present research found that the Equality Act 2010, under which the DDA 2005 has been subsumed, is still largely overlooked in criminal justice policy and decision-making (see Chapter 4 below). Furthermore, there has been a failure by criminologists and criminal justice scholars to problematise the role and application of the Equality Act 2010 to criminal justice organisations. Consequently, it becomes even more relevant for criminology to evaluate the social model and the application of the Equality Act 2010 to criminal justice organisations. These 'grounded' elements will be discussed in Section 4 below, alongside a brief overview of the Act and related guidance. The development of this theoretical model will also help to provide a critical framework for the qualitative research which will be discussed in Chapters 6 to 8 and will be generative of a normative position about how offenders with autism *should* be governed in Chapter 9 of the thesis.

1. Pre-existing conceptual elements in criminology: doing justice to difference

In the past, the criminological 'mainstream' has failed to adequately differentiate between criminals. Despite recent so-called critical perspectives, inconveniencing 'a

criminology imbued with male, adult, mentally healthy, formerly non-victimised values' (Peay, 2007: 501), few scholars take intersectional approaches. Moreover, even within intersectional approaches, disability is too often considered as an afterthought or not considered at all (Sokoloff and Dupont, 2005; De Coster and Heimer, 2006). The way forward, Baldry *et al* argue, both for criminological theory and criminal justice practice, requires mental health problems and learning disabilities to be moved 'from a categorical or diagnostic attribute to a central location in the conceptualisation of the individual who presents to the CJS' (2008: 42). Peay argues that because the category of the 'mentally-disordered offender' is not fixed – and presupposes a 'category of mentally-ordered offenders' – it should not be considered separately by analogy with race, gender, youth and victims. She warns that this would perpetuate 'the fantasy that we are all whole' and that such disorder is prior to other aspects of identity. Nonetheless, she considers that lessons can be learned from consideration of this and other 'marginal groups' for subject matters regarded as central to criminology (Peay, 2007: 502). It is argued here that a more integrated disability perspective would shed important light on the *dynamic* aspect of disability (see below) and how its trajectories – the intermittency of mental disorder for example – lead to entry to the CJS. Given the sheer numbers of offenders with mental health problems and learning disabilities in the CJS, these are certainly not 'marginal groups', and while their identity is multi-faceted, the specificity of needs created by their disability should be focused upon more sharply, as these create particular experiences that criminology has so far failed to understand effectively.

An analogous argument can be levied in relation to offenders with autism. Autism is a life-long condition (NICE, 2012a) but it is not fixed: key life events can impact on an individual's experience of the condition, leading to increased anxiety and

reduced ability to cope (*ibid*). Thus the work below on the *dynamic* aspect of disability is helpful in understanding the governance of this group on the pathways into and out of the CJS. While the identity of people with autism is also multi-faceted, the specificity of needs created by their disability should be brought to the fore. Conversely, critical disability studies are premised upon the fact 'that the disadvantage typically experienced by those who are disabled reflects primarily the way society defines and responds to certain types of "difference"' (Baldry *et al,* 2008: 31). This relates well to Hudson's work on 'doing justice to difference', and helps to integrate the thesis of Baldry *et al* with broader criminological debates. In a number of articles, Hudson (1998b; 2001; 2003; 2007; 2008) looks at the nature of justice in modern democratic societies, societies which are 'divided by gender, race, ethnicity, socio-economic status, lifestyle, religion and so on' (2008: 276). Because 'citizens of modernity' do not live in homogeneous societies, they must respond to difference and diversity. She differentiates these terms (2007: 158-9) by arguing that 'difference' has negative connotations, implying 'not only dichotomy, but also hierarchy'. On the other hand, 'diversity' has neutral or positive connotations, suggesting 'a range of options from which to choose, a spectrum of lifestyles and attributes to enjoy and appreciate' (*ibid*). Hudson therefore argues that it is imperative for criminology 'to expose and critique the politics and policies of criminalisation and crime control which are grounded on an ideology of difference, rather than on an acknowledgement of diversity' (*ibid*). She does not problematise disability as a social construct and only fleetingly refers to offenders with mental health problems (1998b; 2001), but her work provides useful theoretical tools for reappraising the criminal conduct of offenders with mental health problems and learning disabilities while taking their particular needs into account.

Chapter 1 states that this thesis, in part, will answer Spivakovsky's call for criminologists to 'explore the myriad ways by which operations of punishment and punitiveness are being recruited, reconfigured and repurposed across justice arenas in the name of governing the population' (*ibid*). This will be especially relevant in analysing the use of disposal options in Chapter 7 and 8. Criminologists have, over the last two decades, attributed the 'responsibilisation strategy' (O'Malley 1992; Garland 2001: 124) as central to such re-purposing of punishment and punitiveness. Responsibilisation was central to the broader New Labour agenda which applies authoritarian versions of contractual and communitarian[3] principles by delegating an increasing number of policy functions to families and communities – akin to processes of 'governing through the family' described by Donzelot (1979; Squires and Stephen, 2005: 4-5; see also Chapter 7). Individuals and communities are supported in achieving their aspirations (Squires and Stephen, *ibid*) only if opportunities are seized and in return for their own contributions (Social Exclusion Unit 2001: 3). Reflecting the new 'politics of conduct' (Flint, 2003) which conceives of individuals as active, autonomous and rational agents (Foucault, 1991), 'responsibilisation' strategies therefore achieve governmental aims through self-regulation (Flint, 2006). Consequently, as Nixon *et al* point out, failure 'to conform to normative standards of behaviour' – shaped by the government and the media – make the citizen subject to an increasing range of interventions, disciplining and punitive sanctions (2007: 38).

The rhetoric and operation of the anti-social behaviour order (ASBO) is one such strategy. Rodger notes that the New Labour ideas of 'civil renewal' and 'respect' have seemingly been 'mutated into a plethora of policy ideas circulating around the Conservative-led coalition government's notion of a Big Society'. He draws on

[3] For a detailed philosophical perspective on the problematic application of the social contract to disabled people, see (Nussbaum, 2006).

Luhmann's concept of 'structural coupling' – which 'makes visible the blurring of boundaries between the worlds of welfare, criminal justice and civil society' – to argue that such 'blurring' will 'frame social policy at least in the medium term' (2012: 429). For defendants with autism, responsibilisation strategies represent what Glaser and Deane refer to as the 'normalisation paradox' (1999). 'Normalisation' involves making 'available to [the disabled] patterns of life and conditions of everyday living which are as close as possible to or indeed the same as the regular circumstances and ways of life of society' (Nirje, 1985: 67). With the promise of citizenship comes the same acceptance of responsibility as non-disabled citizens held accountable for their actions through criminal justice sanctions. Consequently, 'a myth of equality' (Glaser and Deane, 1999: 351) develops in sharp contrast to the discrimination and disadvantage actually experienced by defendants with autism. 'Responsibilisation' therefore denotes what Hudson critiques as the 'philosophical expulsion of difference' by Western theories of justice, 'reflected in law's model of the abstract subject of law, with all legal subjects constructed equal in their possession of agency and free will' (2001: 162). Clearly, it is crucial not to argue that defendants with autism should be deemed entirely incapable of taking responsibility for their actions. But there needs to be a more nuanced understanding of responsibility, and recognition that, in reality, many will have limited freedom of choice because of what Hudson called 'personal-socio circumstances' (1998a: 207).

Being aware of the way evolving responsibilisation strategies act to blur the boundaries between social care and social control and are used for defendants with autism is therefore important in answering Spivakovsky's call to recognise the re-purposing of punishment and punitiveness. The case studies of 'Claire' and 'Samuel', discussed in detail in Chapter 8, reveal how social care placements and community

orders perform such responsibilisation. The case studies of 'Joseph', 'Samuel' and 'Mark' also evince processes akin to 'governing through the family' (Donzelot, 1979). Nixon *et al* argue that such strategies often fail to recognise that attempts by parents to 'access special educational support or behavioural interventions' for children whose 'behaviour may be disturbing and distressing' are often thwarted by the difficulty of navigating complex complaints procedures (2007: 45). Rejecting the conceptualisation of such governance as a form of secondary victimisation, Chapter 8 conceives of these strategies as causing collateral damage to the family members compelled into this familial 'netwidening' which extends mechanisms of control beyond the defendant with autism. Such strategies represent what Hudson terms 'an ideology of difference' rather than an acknowledgement of diversity, repressing difference 'in those [subsequently] defined as abnormal [or] incapable or dependant' (Hudson, 2007; 2001). After rendering such ideologies visible, it is necessary to examine intellectual resources which might enable us to create 'other possible ways of living'. Previous court studies, which differentiated the treatment and experiences of certain groups of defendants (see Chapter 1 above), have often failed to connect 'governance from below' – technologies applied to certain groups of defendants in the court process – to macro-level policies. The present research aims to overcome this schism.

2. Critical disability studies and the social model of disability

In the culture of modernity, medical models of disability – influenced by Enlightenment rationality – conceived of disability as a derogation from the norm (Handley, 2003); something that needed to be cleansed and controlled (Hughes, 2002). According a privileged position to medical knowledge in defining disability assumes medicine's 'value-free objectivity' (Handley, 2003: 110). Critics argue (Oliver, 1996; Barnes, 1991; Oliver, 1990), however, that policy prescriptions based upon the medical model

'focus upon rehabilitation and cure to "fit" the disabled individual "into" society as much as possible' (Handley, *ibid*). The 'counter-culture' from which the 'disability movement and the social model of disability and (by extension) disability studies' originate (Hughes, 2002: 578) came from rejection of this 'medicalisation' of disability which had put the 'fate of disabled people solely in the hands of professional experts' (Barnes *et al*, 1999: 67; O'Grady *et al*, 2004). The 'social model' of disability 'is the formalised articulation of a set of "principles"' advanced in the 1970s by a group of disabled activists – the Union of the Physically Impaired Against Segregation (UPIAS) – to counter 'individual' or 'medical' conceptions of disability (Tremain, 2005: 9). Medical models tend to see any social disadvantage experienced by the individual as a result of a direct 'common-sense' causal link to their functional limitation (Handley, 2003: 110). Proponents of the social model, however, make a crucial distinction between impairment and disability: impairment is 'a condition of the individual body or mind (such as experiencing schizophrenia, intellectual disability or brain injury); disability is the 'experience flowing from the presence of impairment, including the range of barriers to full participation that exist in a society which privileges "normalcy" and marginalises difference' (Oliver and Barnes, 1998; Baldry *et al*, 2008: 32). This impairment-disability dyad is sometimes advanced by analogy with the distinction between sex and gender (Shakespeare, 2006a). Such an analytical framework enables an exploration of the 'social, political, cultural, and economic factors that define disability and shape personal and collective responses to difference' (Baldry *et al*, 2008: 32), and hence attempts to redress the power balance, empowering disabled people as citizens with rights (O'Grady *et al*, 2004: 260).

With respect to offenders with mental health problems and learning disabilities, Baldry *et al* submit that the value of the social model is that it permits a

conceptualisation of 'the intersections of the social, systemic and individual dimensions which operate to structure' their experience of criminal justice (Baldry *et al*, 2008: 31). Therefore, the potential for integrating critical criminology and critical disability studies lies in the concept of social exclusion. Perceiving 'crime and social responses to it as deeply political, cultural and critically challengeable matters', critical criminology locates 'the reasons for crime within wider structural and institutional contexts' (*ibid*); including socio-economic, class-based, cultural, racial and gender contexts (Anthony and Cunneen, 2008: 1). Drawing on British Social Exclusion policy, Baldry *et al* (*ibid*: 32) point to 'what can happen when people experience a combination of linked problems such as unemployment, poor skills, low incomes, unstable housing, high crime environments, poor health and family breakdown' (Social Exclusion Unit 2001). This exclusion, 'when combined with other disadvantages, funnel[s] people into the CJS' (Baldry *et al*, 2008: 32-33). Consequently, Baldry *et al* argue (32-33) that this requires 'an iterative process of identifying, understanding and removing obstacles to resources, combined with a deeper analysis of the dynamics of both impairment and disability'.

Some have argued within critical disability studies that the categorical distinction between impairment and disability is problematic because even though proponents argue that impairment neither equals nor causes disability (Oliver, 1996), the 'implicit premise of the model' that one cannot suffer disablement without the existence of an impairment, makes the distinction a 'chimera' (Tremain 2001; 2002). However, by highlighting the distinction between impairment and disablement, the social model allows for a more nuanced understanding of the fact that, as Baldry *et al* note, 'the combination of stressful life events is also likely to be linked to the episodic occurrences of impairment… in both a causative and consequential sense' (2008: 39).

As argued in Chapter 1, the social model of disability and its distinction between impairment and disablement is helpful in comprehending the literature which explores the link between the 'symptomatology' of autism and criminality (the 'impairment branch' of the distinction) in combination with literature on the 'interconnecting variables' leading offenders with autism into the CJS and the inequitable experiences of offenders with autism (the disablement branch of the distinction). It therefore has unitary force; enabling the 'deeper analysis of the dynamics of both impairment and disability' and the impact that they have on the governance of offenders with autism in the CJS.

This thesis does not follow those proponents (see, for example, Oliver, 1990; Barnes, 1998) who, in 'splitting impairment and disability', attempted to sever the link between the two (Goodley, 2011: 27). Instead, it argues that it is helpful to distinguish between the two branches but not to exclude consideration of impairment. Proponents such as Barnes severed this link to turn 'attention away from the personal tragedy model of impairment to the public problems of disablism' (*ibid*) but such a move creates an intellectual impasse arising from the 'reality' of impairment; the relationship between impairment and culture, and the effects of impairment (Goodley, 2011: 28-9). Firstly, following responses by disabled feminists (see French, 1993; Crow, 1996; Morris, 1991) to the 'strong social model' of disability, who asserted that impairment effects such as pain and tiredness were intrinsically disabling, Shakespeare argues that the social model 'can only explain so much before we need to return to the experiential realities of 'impairment' as object(s) independent of knowledge' (Shakespeare, 2006b: 54). These 'experiential realities' are differential between impairments as some 'are static, others episodic, some degenerative and others terminal' (Shakespeare and Watson, 2001). Recognition of the differential experiential realities of adults with

autism not only helps us to understand the criminality and governance of offenders with autism, it also enables a subtler normative account of how they should be governed, offering policy recommendations grounded in an acknowledgement of 'diversity' rather than 'difference' (Hudson, 1998) and validating the approach here of engaging adults with autism at every stage of the field research.

Furthermore, acknowledging the 'reality of impairment' enables an analysis of the dynamic aspects of disability (Burchardt, 2000), which are in turn connected to the increased likelihood of justiciable problems (O'Grady *et al*, 2004), both of which are relevant to criminological theory and provide tools to improve criminal justice practice. Burchardt notes that disability, in general, is still understood only in its *static* sense. Yet, as noted above, disability is not fixed in nature. Research needs to distinguish between 'disability trajectories', avoiding the conflation of 'different experiences of being disabled and improving "the design" and evaluation of effective policies' (2000: 645-646). Where medical research does acknowledge these fluctuations, 'the dynamics of disability from a social policy perspective [i.e. the impairment-disability distinction] remain underexplored' (*ibid*: 649). Burchardt emphasises the need to view disability dynamically in order to permit analysis of the 'different processes by which disabled people become socially excluded'. Such a perspective enables the identification of 'key points in the trajectories individuals follow', supporting more precisely-targeted interventions, for example, during 'the transition to adulthood for those who become disabled in childhood' (2000: 665). In research, a longitudinal view of disability needs to be taken, as those with 'intermittent or fluctuating conditions – especially mental illness – are significantly under-counted in cross-sectional measures' (*ibid*). Burchardt applies this analysis to the employment environment, but such a disability dynamic could analogously be applied to criminological discourses, which would reveal

important insights into the nature and impact of these trajectories of disability upon an individual's criminality and likely desistance, in a similar manner to the age-crime curve. This is not to say that there is an inevitable link between disability and crime but, rather, as Glaser and Deane show in their Australian study on intellectual disability, 'psychosocial disadvantage' can 'lead to involvement in the CJS' (1999: 353).

However, if different groups following different trajectories within the disabled population are not differentiated, 'the disadvantage disabled people encounter will be underestimated' (Burchardt, *ibid*). This means that '...people who are disabled for a relatively short period face less severe pressures on their income and in general experience less severe dislocation from the mainstream' (*ibid*). Consideration of such trajectories for offenders with autism has existed at the peripheries of analysis in criminology (see Browning and Caulfield, 2011) and in the 'psy' disciplines. This underlines the rationale of this thesis to look specifically at the governance of offenders with autism from a disability perspective, rather than through the lens of broader categories such as mentally disordered offenders. This validates the approach taken in this research of investigating the trajectories of this group, through the court observation of the cohort of eight case studies of adult defendants with autism (see Chapters 6-8).

Secondly, the exclusion of a discussion of impairment from an analysis of disability leaves a 'theoretical vacuum' 'which is filled by those who adopt an individualistic and decontextualised perspective' (Goodley, 2011: 28-29). This risks ascription to strict medical models which do not acknowledge that, far from being purely natural, impairments are 'an embodied experience shaped by culture' (Hughes and Paterson, 1997; 2000; Hughes, 1999; 2000; 2002a, b; 2004; Paterson and Hughes, 1999; Jung, 2002; see Goodley, 2011: 28-29). The importance of this point is reflected

in the growth of people with a diagnosis of AS, referring to themselves as 'Aspie'. In self-identifying in this way, they have made a purposive shift away from 'deficit' models of autism towards an 'aspiration' model which highlights the talents of those with 'non-neurotypical' thinking.

Thirdly, Thomas has called for a more dialectical analysis of impairment and disablism because 'in any real social setting, impairment and disablism are thoroughly intermeshed with the social conditions that bring them into being' (2007; see Goodley, 2011: 29-30). This analysis is reflected in the emphasis on the link between 'stressful life events' and 'episodic occurrences of impairment' as described by Baldry *et al* (2008). Such analysis is implicit in the National Autism Strategy's discussion about the kinds of crises which can lead offenders with autism into the CJS (DOH, 2010a: 37; see Chapter 5) but has not been properly translated into criminal justice policy.

O'Grady *et al* argue that different elements of exclusion interact to increase barriers for people with disabilities and perpetuate exclusion, leading to a spiralling of 'justiciable problems' (2004: 261) – such as debt, difficulties with housing and welfare benefits – which can potentially be addressed by the legal system (Genn, 1999). They can have an 'additive effect' compounded by barriers to seeking help from professional organisations (O'Grady *et al*, 2004: 265). Were criminologists to be alert to such differentiating issues, they could address the relationship between the fluctuating impact of autism on the adult on the spectrum, stressful life events and patterns of criminality. Applying a dialectical analysis of impairment and disablism to the governance of offenders with autism in order to tease out the 'additive effects' of the interaction between policy and decisions by elite decision-makers in the CJS is highly pertinent: it resonates with the Equality and Human Rights Commission's development of the concept of 'cumulative impact' (see below).

3. The Equality Act 2010, the Public Sector Equality Duty and the courts

The Equality Act 2010 replaces previous equalities legislation, streamlining all legal requirements on equality that the public, private and voluntary sectors need to follow, and sets out protection against discrimination on the basis of eight protected characteristics for people who use these services: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation. Section 6(1) incorporates the definition of disability (see above) previously found in the DDA 2005 and premised upon the social model of disability (Hunter *at al* 2007) with its emphasis 'on the effect that an impairment has on a person's ability to carry out normal day-to-day activities' (Talbot and Riley, 2007: 155). As previously noted, autism, including AS, would come under this definition. Under the Act, 'service providers', defined as a person (including an organisation) 'concerned with the provision of a service to the public or a section of the public (for payment or not)' (Equality Act, 2010: Section 29(1)), and employers, must treat their service users (and employees) fairly.

In relation to service users/employees with a disability, the Equality Act 2010 prohibits service providers/employers from the following main forms of conduct: direct discrimination by treating a person with a protected characteristic less favourably than it treats or would treat others (*ibid*, Section 13); indirect discrimination in applying to a person with a protected characteristic a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic (*ibid*, Section 19); discrimination arising where a person is treated less favourably because of a combination of two characteristics (*ibid*, Section 14); discrimination arising from disability where a disabled person is treated 'unfavourably because of something connected with their disability when this cannot be justified' and through 'failure to

make reasonable adjustments for disabled people' (see *ibid*, Sections 15 and 21; EHRC, 2010: 4). The restriction in Section 14 is an important one because it prevents a claim of direct and indirect discrimination being combined in one ground and restricts applicants to two grounds where only a combination of two relevant protected characteristics can be included in these grounds. It was a compromise made by the Labour Government 'in the face of opposition from the business lobby… who opposed any provision on multiple discrimination' as being unnecessarily 'burdensome' (Hepple, 2010: 16). It may also be true that analysis of multiple-discrimination would have been cumbersome for the judiciary who have indicated a preference for claims which involve only one protected characteristic because analysing the cumulative impact of discriminatory practices across the intersection of an individual's protected characteristics is difficult to quantify. To an extent, therefore, the current position of the law limits the development of jurisprudence on intersectionality. Although legislative strictures should not circumscribe academic analysis, this does, however, justify the need to focus on disability as a protected characteristic and as a focused perspective in criminology and criminal justice studies. Indeed, the incorporation of the social model of disability into the Act provides a site for analysis of the structural features that affect the entry and treatment of certain groups of defendants. The social model may, therefore, provide a useful mechanism for intersectional approaches in future academic research.

Other prohibited conduct includes: harassment, which involves 'unwanted conduct which has the purpose or effect of violating someone's dignity or which is hostile, degrading, humiliating or offensive to someone with a protected characteristic or in a way that is sexual in nature' (Equality Act 2010, Section 26); victimisation, which involves '[t]reating someone unfavourably because they have taken (or might be taking) action under the Equality Act or supporting somebody who is doing so'

(Equality Act 2010, Section 27); and discrimination arising out of someone 'wrongly [perceiving] them to have one of the protected characteristics' or discrimination because 'they are associated with someone who has a protected characteristic', for example, someone who is caring for a disabled person (*ibid*). Such conduct is also prohibited where a person is exercising 'a public function that is not the provision of a service to the public or a section of the public' (Section 29(6)).

Equality and Human Rights Commission (E&HRC) Guidance makes it clear that this prohibited conduct applies to criminal justice organisations – a 'person or organisation who is involved in the criminal… justice system, whether what they are doing counts as a service or as a public function' – 'service providers' for the purposes of the Equality Act, including: the police; prisons and similar institutions, such as young offender institutions; probation services and criminal justice social work services; national security; criminal courts, civil courts and tribunals (2011: 4-7). The Equality Act also imposes an anticipatory duty for service providers, encompassing the aforementioned criminal justice organisations, to make reasonable adjustments for service users with disabilities. This duty comprises three requirements 'to take such steps as it is reasonable to have to take to avoid the disadvantage where': firstly, 'a provision, criterion or practice of the service provider's' (Section 20(3)); secondly, a 'physical feature' (Section 20(4)) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled; or, thirdly, 'where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid' (Section 20(5)). Where the first or third requirement relates to the provision of information, ensuring that information is provided in an accessible format

is included in the steps which it is reasonable for a service provider to take to avoid disadvantage (Section 20(6)). The anticipatory nature of the duty to make reasonable adjustments means that service providers should not 'wait until a disabled person wants to use a service that they provide before they give consideration to their duty to make reasonable adjustments' (E&HRC, 2010: 103). Consequently, service providers should 'anticipate the requirements of disabled people and the adjustments that may have to be made for them'; this 'applies regardless of whether the service provider knows that a particular person is disabled' (*ibid*: 103-4). The compulsion for service providers – criminal justice organisations for our purposes – to anticipate the requirements of disabled people, strengthens the argument levied in this chapter. Not only is there descriptive and normative value in categorising defendants with autism as citizens with the protected characteristic of disability, there is a legal imperative to do so. The social model of disability is incorporated in the Equality Act 2010. This Act places a legal duty on public service providers to remove barriers which place defendants with disabilities (autism for the purpose of this thesis) at a substantial disadvantage in the courts compared with people who are not disabled.

The Ministry of Justice's (MOJ) own Equality Impact Assessment (EIA) for *Swift and Sure*, which sets out the Government's plans for reform of the CJS, revealed that information is not available on the proportion of defendants in the system who have a disability (2012b: 11) nor do any figures exist for the numbers of such defendants whose case reaches the Magistrates' or Crown Courts. However, there are figures for the numbers of offenders starting community orders and adult offenders received into prison who have a disability. Around a third of prisoners aged 18 and over serving custodial sentences of less than 4 years classified themselves as having a 'longstanding illness, disability, or infirmity of any kind', which is higher than similar estimates of the

general population (*ibid*; MOJ, 2012b: 7). *The Offender Management Community Cohort Study* (OMCCS) gathered data from a sample of 2,595 adult offenders who commenced a community order between October 2009 and December 2010. Fifty-one per cent of this cohort stated that they had a longstanding illness, disability, or infirmity of some kind and the MOJ therefore surmised that it 'is a reasonable assumption that at least some of these people will be disabled as that term is defined in the Equality Act 2010'. The MOJ acknowledge this is indeed a 'large proportion' of the cohort. Therefore, it is somewhat surprising that the academic literature examining the application of the duty to make reasonable adjustments for people with disabilities by criminal justice organisations is restricted. It becomes even more circumscribed for *defendants* with disabilities on their journey through the criminal courts.

Think Autism, the 'refreshed' Autism Strategy for England, discussed in detail in relation to the CJS below (see Chapter 5), dedicates one of its *Priority Actions for Change* to ensuring reasonable adjustments are made to enable adults with autism to benefit fully from mainstream public services (DOH, 2014: 17). Priority Action 4 sets out the expectation that such services '*know how to make reasonable adjustments*', how to *'include people with autism' and* '*accept* [them] *as* [they are]' and that '*the staff who work in* [these services are] *aware and accepting of autism*' (*ibid*). Augmenting the provisions in the Equality Act 2010, Priority 4 details the sorts of reasonable adjustments that could make services accessible for adults with autism in their premises; processes; communications; planning and preparation; and use of new and assistive technologies (*ibid*). For example, reasonable adjustments to premises might involve 'taking account of hypersensitivities and providing quiet or lower-light areas'. These general recommendations about reasonable adjustments that public services should make to their communications and planning and preparation are especially

relevant for adult defendants with autism going through the courts. Apropos communication, suggested reasonable adjustments might include:

> 'avoiding ambiguous questions, not pressurising adults with autism in conversation and being aware of sensitivity to touch; ensuring essential documents and forms are available in accessible formats, in particular, easy read versions and formats that take account of sensory issues in their choice of colours' (*ibid*).

Although no direct reference is made to it here, this recommendation supplements the Advocate's Gateway tool (ATC, 2013) which provides some basic guidance about working with people with autism. The problem is that it seems in practice (see Chapter 6), especially in the lower courts, that defence solicitors and barristers are unaware of these resources or do not use them effectively with their clients who have autism. Chapter 6 describes in detail the poor visibility and audibility from the dock in a Victorian Magistrates' Court where a defendant with autism was tried. It is argued there that the impact of these environmental factors on the exercise of the principle of orality should not be underestimated. In terms of planning and preparation, a suggested reasonable adjustment would be to offer adults with autism the opportunity to visit a public service in advance to familiarise themselves with what to expect. Visiting court prior to giving evidence is in fact given as a specific example of such a circumstance (DOH, 2014: 17). The problem is that autism is often identified only later in the court proceedings. Even when it is known about before the plea and case management hearing, there are no standard procedures for counsel to make arrangements for such a court visit prior to the defendant's first appearance. Where the defendant's autism is known to the counsel, difficulties around court listing and bail arrangements may also mean reasonable adjustments are overlooked (see Chapter 7) and the anticipatory aspect of the duty to make reasonable adjustments is not fulfilled in practice.

Much of the literature written by practitioners about the problems experienced by offenders with autism subject to criminal justice practices does not effectively relate to the duty for criminal justice organisations to make reasonable adjustments for service users on the spectrum. It is unclear whether this is because much of the literature was written before the duty was first enshrined in the DDA 2005 or because they simply did not examine the role of reasonable adjustments in their accounts. The National Development Team for Inclusion (NDTi) report does, however, explain how to 'clarify and embed into practice reasonable adjustments for people with autism and people with learning disabilities in mainstream mental health services' (2013). This report covers specialist mental health provided in forensic and prison services but not reasonable adjustments made by other criminal justice organisations and does not focus specifically on *offenders* with autism as a sub-group.

Thus, asking decision-makers in Phase 1 of the research, about what reasonable adjustments they have made or would be willing to make in their respective roles, and asking defendants with autism about reasonable adjustments they have actually received or requested to receive in Phase 2, formed an important line of investigation in understanding the governance of offenders with autism in the courts (see Chapter 4 and 6, respectively).

Section 149 of the Equality Act 2010 replaces the Disability Equality Duty with the Public Sector Equality Duty (PSED). Nevertheless, the 'iterative process' is still incorporated in the PSED which 'consists of the "general equality duty" which is the overarching requirement or substance of the duty, and the "specific duties" which are intended to help performance of the general equality duty' (E&HRC, 2012: 6). Applying to those 'public authorities' listed in Schedule 19 of the Equality Act and 'other organisations that... are carrying out public functions on behalf of… [these]

public authorit[ies] (*ibid*: 7), the purview of bodies subject to the PSED is narrower than the provisions for prohibited conduct and the duty to make reasonable adjustments. So, although Ministers of the Crown and government departments, the NHS, Local government and the Police are encompassed by Schedule 19, exceptions in respect of the PSED Schedule 18 include, for example, under Section 3(1) judicial functions and functions 'exercised on behalf of, or on the instructions of, a person exercising a judicial function'.

The general PSED requires those authorities, in the exercise of their functions, to have due regard to the need to:

> '(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.' (S 149(1), Equality Act 2010)

Public authorities must have due regard to all three of these PSED aims to comply with their general equality duty (E&HRC, 2012). In respect to the second aim of advancing equality of opportunity, Section 149(3) explains that due regard to this involves the need to:

> '(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.'

Section 149(6) states that 'compliance with the duties in this section may involve treating some persons more favourably than others'. Thus the 'iterative process' to which Baldry *et al* refer, formerly present in the DDA 2005 and incorporated in the social model of disability's aim to 'understand and dismantle the barriers which exclude and limit the life chances of disabled people' (Disability Rights Commission, 2006: 9)

is still entrenched in this Act. Also pertinent to the development of the argument in this chapter is the requirement for public authorities to have due regard to the 'aims of the general equality duty 'when making decisions and when setting policies' (E&HRC, January 2012b: 5-6). Understanding the effect of their policies and practices on people with protected characteristics 'is an important part of complying with the general equality duty' because it can help those public authorities 'to consider whether the policy will be effective for all sorts of different people' (*ibid*). 'Policy' is used as shorthand for the full range of a public authority's 'policies, practices, activities and individual decisions,' falling into three main categories: 'Organisational policies and functions' (for example, 'stop and search procedures'); 'Key decisions' (for example, 'a government department developing new legislation'); 'Policies that set criteria or guidelines for others to use' (for example, a local authority setting criteria about school admissions) (*ibid*: 7).

Even more pertinent for the governmentality approach used in the present thesis is that having due regard across all functions of a public authority 'may also involve assessing the impact on equality of decisions that are made together…' which would mean 'ensuring that [public authorities] have sufficient information to understand the cumulative (or combined) impact of these decisions' (*ibid*: 8). It seems that this 'cumulative impact' assessment needs to be undertaken across policies that a particular public authority has developed but they will also 'need to understand the impact on equality when implementing a policy that has been developed elsewhere' by, for example, other government departments (*ibid*). So, while 'responsibility for the policy itself will rest with the department that developed it', in making choices about how to implement it, the public authority must consider 'whether any mitigating measures or

alternative ways of delivering [their] policies are required in order to minimise any negative impact on people with different protected characteristics' (*ibid*).

The ability of the governmentality approach to attend 'to the nexus between everyday practices and techniques, and more abstract technologies and broader political rationalities' (O'Malley *et al* 1997: 503) connects well with the approach of Section 149 Public Sector Equality Duty and its application to policy and decision-makers. It also validates the explicit inclusion of questions to decision-makers about their normative considerations in the qualitative research carried out in this project. Further, analogies can be drawn between the concept of 'cumulative impact' which has been developed by the Equality and Human Rights Commission (EHRC, 2011) and the impairment-disability dyad discussed by Baldry *et al* (2008). In turn, this validates the thesis' objective of developing a disability perspective within criminology to better understand and critique the governance of offenders with autism in the English CJS.

Conclusion

This chapter has argued that central to the utility of developing a disability perspective in criminology is to provide a theoretical framework to analyse the governance of offenders with autism. There is descriptive value in proactively categorising these groups as 'disabled' under the 'social model' of 'disability'; enabling an enquiry into conditions of possibility – the first of the two lines of critical philosophy descended from Kant as discerned by Foucault. Rioux and Riddle note that 'broader social values and assumptions about disability are embedded in legal understandings, frameworks and jurisprudence' (2011). Such an intellectual venture is timely given the entrenchment of this model in the Equality Act 2010 and the inception of the Autism Act 2009, Statutory Guidance and related policy.

Disability has been 'presumed to be a static state' and there has been 'too little attention paid to conceptualising the impact of the legal construction [or lack thereof] of disability' (Rioux *et al*, 2011: 2). Critical disability studies render visible the fact that people with disabilities have been viewed as 'objects of pity, as recipients of charity and welfare' because of 'the nature of legal and social constructions of the status of disability' rather than as individuals 'entitled to rights' (*ibid*). The theoretical framework set out in this chapter is, therefore, also generative of the normative position discussed in Chapter 8 about how defendants with autism *should* be governed. An important response to the exclusion of people with disabilities from activities of daily living, social and cultural pursuits and the denial of their rights 'is to have recourse to law and for legal interpretation to be considered in light of disability' (*ibid*: 3). Rioux *et al* argue that the human rights principles of dignity, equality, inclusion and participation provide tools to critically assess the exercise of the law itself and 'offer insight into justice for people with disabilities' (*ibid*). Therefore, drawing on this work, Chapter 9 utilises the kinds of 'intellectual resources' available in critical disability studies and recent legislation to develop modes of theorising and forms of empirical enquiry to assist criminology in coming 'to terms with the social and legal worlds that it aspires to comprehend and in which it intends to intervene' (Garland and Sparks, 2000: 2-3).

Chapter 3 – Qualitative research design and methodology

Introduction

There is limited qualitative work[4] (see Talbot, 2010; Chapter 1) on what criminal justice decision-makers know about autism and what informs their decision-making about the governance of adult offenders with autism in English criminal justice policy and criminal court practice. Further, existing research does not consider offenders with autism from a disability perspective. The governmentality approach enables an analysis which captures the interplay of policy and practice; attending 'to the nexus between everyday practices and techniques, and more abstract technologies and broader political rationalities' (O'Malley *et al* 1997: 503). It deploys what Donzelot calls the three concepts of governmentality's research programme – strategies, technologies and programmes of government (1979) – while answering Lippert and Stenson's call to incorporate 'the real' into the governmentality approach (2010). Incorporating 'the real' in criminological research requires us to carefully conduct 'specific case studies using contextually suitable methodologies to dissect effectively moral language and practices from above and below and ultimately to offer them to the public and lay actors for reflection' (*ibid*: 488). This approach is central to the research design of this project, ergo; my qualitative methodology involves 'cross-method' triangulation: using different types of methods to study the same phenomenon (Hoyle, 2000; see Webb *et al*, 1966). These methods are then applied to the governance of adults with autism.

[4] Although there is some qualitative observational work by North *et al* on the problematic nature of police interviewing for individuals on the spectrum and the reliability of statements made by suspects to the police during questioning (2008).

The cross-method triangulation of this research was broken down into three phases. Section 1 of this chapter discusses Phase 1, the textual analysis of policy documents and reported Court of Appeal and Supreme Court criminal cases. Section 2 describes Phase 2, which involved court observation; including interviews, where possible, with adult offenders with autism, family members and their legal representatives. Section 3 outlines Phase 3: semi-structured interviews with practitioners and elite decision-makers. Because of the paucity of autism-specific research on governance and the English courts, it was important to utilise the limited but important criminological literature on the criminal courts in England in developing the methodology for these phases. Retrieval of criminological studies carried out by the courts was conducted by a purposive and thematic literature review. Key texts, *The Trial on Trial* (Duff *et al,* 2007) and *Standing Accused* (McConville *et al*, 1994) were used as starting points to find other seminal texts in this field and to generate themes of literature to research further. Additional themes were identified through studies with analogous qualitative methodologies to this thesis. These themes provided keywords for electronic searches of relevant high-impact criminology journals, SSRN and Google Scholar. As a core set of texts emerged, their bibliographies were reviewed purposively for additional texts. It would be problematic to impose an artificial genealogy on the multifarious literature in this canon but a thematic review of this material was then conducted on the following themes: pre-trial 'shaping'; court decision-makers; differentiating defendants; and vulnerable witnesses and vulnerable defendants. This material was used to develop the theoretical approach and research design, and included qualitative and quantitative studies which have used interviews, surveys, observation techniques and case file documentation to collect and analyse data on the English criminal courts and the actors within them. Ethical considerations, including

confidentiality and informed consent, which arose from the present research are discussed in Section 4.

1. Phase 1 - textual analysis of policy documents and reported criminal law cases

Advancing governmentality research is important in criminology because 'crime, security and justice issues are increasingly central to politics at every level… [and] aspects of criminology can provide intellectual techniques and a knowledge base for public agencies attempting to govern populations' (Lippert and Stenson, 2010: 488; Simon, 2007). In turn, advancing governmentality research in criminology which better incorporates 'the real' means 'embracing social constructionalism's lessons'; in methodological terms, 'by analysing multiple forms of data with a range of methodologies', engaging with a greater analysis of oral discourses and 'giving greater recognition to the interaction between governance from above and sites and practices of governance "from below"'(*ibid*). Phase 1 involved textual analysis of 'governance from above': examining national policy documents and reported criminal law cases tried at Crown Court level and above to inform the methods of data collection on 'governance "from below"' in Phases 2 and 3 of the research.

Hansard transcripts of the debates in both the House of Commons and the House of Lords, for all stages of the passage of the Autism Act 2009 were also analysed; along with all references to all versions of the Autism Strategy and Statutory Guidance, NICE Guidelines (2012a and b) and Quality Standards Bill 2010. Finally, the oral and written questions of the Members of both Houses, who belonged to the Autism Bill Committee 2008/9 and Autism Quality Standards Bill 2010 and the Members of the All Parliamentary Group for Autism, were searched by the subject matters 'autism',

‘autistic’, ‘Asperger’, ‘learning disability’, ‘mentally disordered offenders’, ‘mental health problems’, ‘defendants’ and ‘crime’.

Data collection of *legal cases*, as differentiated from the *case studies* discussed in Phase 2 below, refer to those found in the All England Law Reports, where ‘[l]egal principles are enunciated and embodied in judicial decisions that are derived from the application of particular areas of law to the facts of individual cases’ (Legal Dictionary, 2012) and recorded with a neutral citation number by Her Majesty’s Courts and Tribunals Service (HMCTS). Searches for Court of Appeal case law involving adult defendants with autism were conducted in Westlaw and LexisNexis in the ‘free text’ search box using the search terms ‘autis!’ or ‘Asperger!’. Results were then narrowed by selecting criminal courts and confining the search period from December 2009 to March 2015. A sub search of all sources using ‘autis!’ or ‘Asperg!’ was conducted in LexisNexis and SSRN to retrieve additional journal articles citing cases involving autism in order to trace any other important Court of Appeal cases that may not have been reported. General articles citing relevant cases may also appear in Medlaw Journals (http://medlaw.oxfordjournals.org/); this was also checked to cross-reference previous searches. The free text search results were then individually filtered by the researcher to find cases involving a defendant with autism. As such, cases involving a victim with autism were excluded, as were cases involving a defendant who had a family member with autism and cases where the defendant was not, ultimately, found to have autism or medical records of their autism had been falsified. These exclusions left a cohort of 72 reported Court of Appeal cases where the adult defendant had autism. Analysis of these Court of Appeal and Supreme Court Cases in Phase 1 provided an understanding of the Criminal Courts as a site of governance for adult

defendants with autism to inform methods of data collection and thematic analysis in Phase 2 (see below).

Phase 1 undertook the textual analysis of policy documentation and use of Dedoose software, to code and analyse the sample of reported criminal cases retrieved through these searches. This provided the opportunity to explore whether there were any evolving programmes, strategies and technologies of governance for adult defendants with autism. The coding used a mixture of theoretical and grounded approaches. The research questions discussed in Chapter 1 were distilled into codes, such as *description of autism*, *dangerousness*, *vulnerability*, *mitigation* and *disposal at sentencing,* and then 'open coding' was used to discern emerging themes like *adequacy of expert evidence* and *appropriateness of prison* by 'pulling together real examples from the text' (Ryan and Bernard, 2003: 280). This coding technique also enabled me to develop a court observation matrix to use in Phase 2 of the research and to formulate questions to be asked in the semi-structured interviews in Phase 3.

Various limitations meant that reported cases found on legal databases were only those at the Court of Appeal and Supreme Court levels and this led to the decision to focus this thesis' analysis on court observation in the lower courts. It was not possible to conduct a free text search of Crown and Magistrates' Court cases on the larger databases like Westlaw or LexisNexis with key terms to find out in how many Magistrate Court cases the defendant had autism. It was therefore impracticable to obtain an exhaustive data set of the number of cases involving adult defendants with autism over a fixed time period. In order to obtain files for cases in both the Crown and Magistrates' Court, it is necessary to know the defendant's name in order to request their case files. So, while some may view the sample size retrieved in Phase 2 as small, these limitations made the Court Case Observation in Phase 2 essential to the analysis

of oral discourse in the sites of governance in the lower court; providing a valuable contribution to research in this field.

2. Phase 2 - case studies

Phase 2 involved the court observation of eight adult defendants with autism through their criminal court process over an extended period of time, in some cases, up to two years. The court observations were supplemented, where possible and appropriate (see section 4.b) below), with interviews with the defendant, their parent or carer, solicitor and/or barrister. In some circumstances, other professionals involved in the case were interviewed, such as the defendant's Offender Manager or social worker. 'Case study' is used here to mean '*an intensive study of a single unit for the purpose of understanding a larger class of (similar) units'* (Gerring, 2004; author's emphasis). A unit connotes a 'spatially bounded phenomenon' – here, an individual with autism – 'observed at a single point in time or over some delimited period of time' (*ibid*: 342).

Case studies are included in the research for several reasons. Firstly, because of the paucity of criminological literature on this topic, understanding the governance of offenders with autism in the English CJS has had to be largely 'exploratory'; aiming to constitute a 'generative moment' in the empirical research in this area (*ibid*: 349). Case studies enjoy 'a natural advantage' (*ibid*) here, evincing a 'descriptive end product' which is useful in providing 'information about the unit of analysis at the centre of the research' (Jupp, 2000: 19). As exemplars of the governance of offenders with autism at different stages of the CJS, they provide evidence from its disparate areas in order to build a picture about the extent of coherence at various stages of governance. Furthermore, attempting to answer Lippert and Stenson's call to incorporate 'the real' into the governmentality approach, case studies are used to provide insight into a topic which includes a 'multiplicity of shifting issues' and choices, along with a 'plurality of

truth claims' (2010: 488). Because of the multiplicity of shifting issues, analysis here cannot be exhaustive and so it is hoped that, beyond illustrating the reality of the governance of this group, these case studies will stimulate points of discussion for the reader and inspire future research.

The West Midlands was chosen as the primary area for case study retrieval. The Region covers 33 local authorities (7 Metropolitan, 3 County, 4 Unitary and 19 District Councils) and includes both rural and urban conurbations and a population of 5.4 million (Medland/ONS, 2011). It was chosen because of its geographical diversity and because through my previous role as Policy and Legal Officer at Autism West Midlands, I had already built up contacts and knowledge of the region and established professional relationships with practitioners there. Once it became clear that collecting sufficient case studies systematically was going to be problematic (see below), I also attempted to retrieve cases in Oxfordshire through the Thames Valley probation service and Oxfordshire County Council. Like the West Midlands, courts in this county are part of the Midlands Court Circuit and are geographically proximate; maximising the feasibility of these retrieval methods.

i) Retrieving the case studies sample

At the time of writing, there was no standard screening or survey tool used across England to gather data on individuals entering the criminal court system with autism; consequently, this study could not use systematic sampling methods to retrieve representative case studies of adults with autism in the English Criminal Courts. This meant that, in order to retrieve a sample of case studies, contact was made with a number of 'gatekeeping' organisations: a) the Autism Alliance charities; b) criminal justice agencies and criminal justice practitioners; c) solicitors' firms and barristers'

chambers. The barriers to collecting case studies via each of these agencies are outlined below. Adult defendants with autism and parents and carers of adults with autism were recruited directly or by self-selection through third party professionals or organisations. The decision to recruit participants through third parties, such as solicitors and barristers, rather than direct advertising through, for example, social media, was made for a number of reasons. One of the requirements of the research was that the defendant's autism must be disclosed to at least one professional in the court proceedings and made known to the court decision-makers in order to ensure a nexus with the analysis of governance. This is because it was important to understand how this group was governed when decision-makers were *aware* that the defendant had autism and to minimise the risk that my presence during the court observation might influence the outcome of the case by alerting decision-makers to the fact that the defendant had autism where this was not already known to the court. Accessing an assessment for diagnosis of autism can be difficult and time-consuming. The temporal limitations of my research meant that it would not have been feasible to include individuals who self-identify as having autism but had not received a diagnosis before the disposal of their case or persuaded the court of the need for expert evidence to this effect.

a) Successful retrieval methods

Recruitment of defendants for case studies had to involve seeking their or their family's consent to observe their case. The process of this recruitment/permission through third parties was done by potential participants being identified by their barristers and solicitors, criminal justice professionals or charities who were providing advice and services to them, following initial written and telephone requests to these agencies. Where the third party identified individuals who fulfilled the criteria for the case

studies, they were asked to share both types of Participant Information Sheets (see Section 5ii) below) and Consent forms and gain initial permission to take part in the research from the participants. Continued consent was checked once I had made contact with the individual with autism or their parent or carer.

Charities may only hear about an individual coming into contact with the CJS in 'special' or 'difficult' cases; nevertheless, they often play a vital 'frontline' role in identifying problems in service provision before service providers themselves and were an important resource to retrieve case studies. An email and paper copy letter was sent out to the National Autistic Society (NAS) and all 12 CEOs of the Autism Alliance Charities requesting specific case-study samples, and regular contact was maintained with Autism West Midlands throughout the course of this research. Three of the eight case studies were retrieved through autism-specific charities.

The Autism Statutory Guidance says that '[l]ocal authorities, NHS bodies and NHS Foundation Trusts should develop local commissioning plans for services for adults with autism'; in doing so, they should collect information locally about the 'number of adults known to have autism in the area' (DOH, December 2010: 24-5). Further, they were each required to appoint a local lead for autism and set-up a local autism partnership board. The Scrutiny Report for Birmingham City Council identified the need for better data on adults with autism in the CJS 'as a basis for better commissioning and better safeguarding'. In particular, they found that, at present, there is limited 'reliable data on the numbers of autistic people who are... [e]ncountered by the Crown Prosecution Service... and seen by the courts' (BCC, 2012: 6). Two cases were identified through Members of local authority Committees in Birmingham and Oxford.

All barristers' chambers in the West Midlands were contacted by letter of introduction to the senior Clerk and a follow-up telephone call. The same strategy was used for 38 Birmingham-based solicitors' firms. Although response rates were low, three of the eight cases were retrieved through this process. Two further rounds of follow-up emails and telephone calls were also made during the period of September 2012 and October 2013. Two further potential case studies were identified via this route but because of the sensitive nature of the defendants' offences, their families told the defendants that they did not want them to give permission to take part in the research. This was, in part, due to a fear of repercussions for them. When retrieving cases using this method, like sampling from charitable organisations, there is a possibility that the advocate is already dealing with the client's autism and related needs more sensitively or the 'special' nature of that client may be unrepresentative of cases involving defendants with autism more generally. However, this limitation was outweighed by the necessity to gather at least exploratory data on the governance of adult defendants in the lower courts and the difficulty of systematically identifying this group through criminal justice agencies and impossibility of searching electronic databases.

b) Access dead ends

A number of other access routes were attempted to retrieve further case studies, including via the police, Magistrates' and Crown Courts and the CPS and, the then Probation Service. These routes ultimately led to dead ends and difficulties in the systematic identification of adult defendants with autism through these agencies led to the small sample size. These cul-de-sacs in research, however, generated data on the issues being investigated here. They reflect the fragmentation of the CJS and the limitations at each stage of the process in effectively identifying and tracking defendants with disabilities generally, and with autism in particular.

For example, a report on the West Midlands police showed that although their ten Local Policing Units had paper forms with a 'tick box' for suspects who have autism, this 'key information... is not computerised, summarised or reported anywhere' (BCC, 2012: 14). Nevertheless, over the course of 16 months, from February 2013 to June 2014, I worked with this force to pursue access and a method of case study identification. I was finally given security approval to work with Specific Custody Units in March 2014 but it was not feasible to retrieve cases due to limitations and barriers around disclosure within the remaining fieldwork period. To an extent, the timing of my research in this regard was unfortunate. The roll-out of the Liaison and Diversion programme (see Chapter 4) means that similar research may be become more viable as street triage (see DOH, February 2014) gains traction. The introduction of a centralised database in Police Custody Units in the West Midlands 'will record whoever receives healthcare in custody' and this should 'improve clinical governance', especially where there are 'frequent flyers' (Civil Servant, Research interview). It will also help doctors and nurses to 'pick up on first episodes… where someone is identified as autistic in custody for the first time' (*ibid*). Consequently, 'if there is criminal justice activity' and the person has been identified as having autism, the police should then be made aware of this and 'liaison and diversion [will become] relevant'.

Following the recommendations of the Bradley Report in 2009, the CPS produced its *Report on the Prosecution of offenders with mental health problems or learning disabilities* (Magill and Rivers/CPS, 2012). This research focused on 'prosecutors' decision-making in cases involving mentally disordered offenders'; and 'information sharing and exchange between the CPS and partner agencies'. Magill and Rivers' report recognised the limitations in sampling case files on offenders with mental health problems and learning disabilities because the electronic Case Management

System (CMS) and Management Information System (MIS) did not have a specific 'flag' for offenders with mental health problems and the category of 'disability' does not distinguish between 'physical and mental disability' (*ibid*). Instead, they had to get individual prosecutors to identify cases which matched their research criteria for these groups over a restricted period of time. The offender's disability was only recorded in two of the 65 case files, drawn from four selected CPS Areas in England; in all other cases, the disability was recorded as 'Unknown'. The Central and Western Sector of the West Midlands CPS covers Birmingham and the Black Country; dealing 'with over 48,000 cases in the Magistrates' courts and 6,000 Crown court cases' (CPS website, 2012). Therefore, despite the challenges inherent in identifying cases through the CPS electronic data systems, it was expeditious to work with individual prosecutors to identify cases involving adult defendants with autism; especially as their report recommended continuing to 'work with the police to improve the completeness of monitoring data on the disability of offenders'. The CPS' National Policy Unit declined my access application in 2012 as they were unable to support students' doctoral research in this way due to limited resources, although they later approved an interview with a Senior Prosecutor.

Listing Officers and Court Clerks at all 25 working Magistrates' Courts in the wider West Midlands were also contacted directly over the telephone and with follow-up written correspondence. The Court Clerks and listing officers described the difficulty faced by the courts in identifying defendants' disabilities before the trial – even with defendants in a wheelchair 'turning up on the day with no prior warning' – as they were only likely to be told about the defendant's autism by the police, prosecution or defence, on the date of the case listing because the police now input case information into the listing system (Telephone Conversation, Field Notes). Further, they doubted

that they would have the resources to contact me in advance of a case being listed (*ibid*).

These difficulties in systematically identifying adult defendants with autism, illustrated here, reflect the endemic problems of identifying this group in the CJS. This creates a barrier to accurate information reaching decision-makers at various points in the criminal process and properly informing their decisions.

ii) Court case observation

Court case observation included shadowing the defendant with autism and their solicitor/barrister during adjournments in proceedings, observing their case from the public gallery of the court and conducting informal semi-structured interviews with these parties. Although criminal courts are open to the public, access is a matter of degree. Special rules prevent discussing the case with jurors (in the Crown Court) and observing the process of sentencing decisions made by the Magistrates and Judiciary (Baldwin, 2007: 375). Access to informal discussions and exchanges that occur between various parties during adjournments were also restricted; given the difficulty in identifying cases, it was not feasible to obtain permission and, ultimately, access to these discussions. Nevertheless, court observation proffers numerous benefits. It is a site which makes the intersection of multiple issues and criminal justice pathways (of both the defendant(s) and victim(s)) visible and observable. It may even be the first time since the original criminal event that all parties involved are in close proximity to each other. Subtle and sometimes unrestrained exchanges between parties may reveal much about the parties themselves and the decision-makers involved in their case. Hence, it was a valuable environment to gather data on the 'interconnecting variables' (Browning and Caulfield, 2011) which lead adults with autism into the CJS.

The disparate criminological literature on the English criminal courts was useful as a guide to the court observation and in coding fieldwork notes. Many of the earlier studies were particularly useful, as there has been a paucity of fieldwork in the courtroom in recent decades. For example, the framework for ‘scheduled routes’ through the court process, used by Bottoms *et al* in their seminal study (1976: 7) was particularly informative for data collection. Through court observation and interviews with the defendant, they investigated defendants’ substantial decisions about plea, mode of trial, representation (legal or otherwise), choice of bail or custody and appeal (*ibid*). Understanding scheduled routes is especially important for adult defendants with autism as they move erratically through the court system and, sometimes between the court, mental health and adult social care (see Chapters 6-8). Lord Bradley’s ‘simplified diagram of the offender pathway’ for offenders with mental health problems and learning disabilities was also useful in this regard (2009: 24).

Research on the exercise of the police and prosecution’s discretion (Ericson, 1982; McBarnet, 1981; McConville and Baldwin, 1981; McConville, Sanders and Leng, 1991) has demonstrated ‘that the prosecution case is not the result of discovery of some objective reality, an entity which exists outside and apart from the process itself; rather, prosecution is a process in which cases are *constructed’* (McConville *et al*, 1994: 10). *Standing Accused,* however, was the ‘first major study of the organisation and methods of criminal defence lawyers in England and Wales’ and found that ‘the nature of criminal defence practice… is overwhelmingly reactive in character and incorporates methods which parallel and even mock those of the police and the prosecution’ (*ibid*: 70). This research could not look extensively at the construction of the defence case but these studies alerted me to the need to analyse the logics by which solicitors and barristers argue the relevance of the defendant’s autism at different stages of the case.

Shapland's research, with 30 barristers, into the process of constructing mitigation (1981) 'suggested a considerable variation in the factors selected and put forward by [barristers] in mitigation and a considerable variation in [their] knowledge of and views about different kinds of sentence' (Ashworth *et al*, 1984: 45). Speeches in mitigation were also found by Ashworth *et al* to be 'influential on the determination of the sentence', leading those authors to warn that 'any analysis of sentencing decisions which neglects to study [such] speeches... is likely to be defective' (*ibid*). Consequently, I decided to focus on the role of aggravating and mitigating factors in the case study observations (see Chapter 7). Ashworth *et al* employed a number of strategies to discern why judges sentence in the way that they do: they undertook interviews with 25 judges; asked the judges to provide their sentencing decisions on a sample of 'sentencing vignettes'; completed periods of observation of court cases and 'attachment' to individual judges; and conducted document analysis of the sentencing records of these judges to understand how they approached sentencing and past practices. This combined approach helped to overcome the individual shortcomings of each isolated method and provided a thorough examination of the processes that they explored (*ibid*), and influenced the triangulated methodology used in this thesis.

Jacobson and Talbot produced a comprehensive review of the treatment of vulnerable defendants within the criminal courts of England and Wales and the use of Special Measures for vulnerable defendants 'in recognition that court proceedings can be particularly difficult for these individuals' (2009). Consequently, the use of Special Measures for adults with autism is not the central question of this research. Rather, data on Special Measures was collected as an indicator of the way defendants with autism are governed and whether this group is consistently identified as being vulnerable or disabled (see Chapters 4 and 6).

3. Phase 3 - semi-structured interviews with elites and criminal justice practitioners

Phase 3 involved conducting semi-structured interviews with elite decision-makers and practitioners. The research questions discussed in Chapter 1 and the grounded themes which emerged from research in Phases 1 and 2 were used to develop the interview schedule for semi-structured interviews. Semi-structured interviews enabled me to make thematic comparisons while allowing 'more opportunity for probing and giv[ing] the respondent considerable freedom to expand on a given question' (Huitt and Peabody, 1969: 28-29). It also reduced the risk of 'potential power imbalance between researchers and their elite interviewees' (SSH IDREC, 2008: 4) where the interviewee's agenda could more easily dictate interview content. The objective of this part of the qualitative research was to provide substantive evidence of what rationale, if any, drives the governance of adult defendants with autism at the national policy and legislative level. Elite decision-makers were chosen because of the senior 'public role they hold', such as 'Government Ministers… associated with a particular piece of legislation' who 'are likely to have had more influence on political outcomes than general members of the public' (Richards, 1996: 199). Other practitioners were 'chosen not because of their particular role but because of their general position', such as senior psychiatrists or prosecutors (SSH IDREC, 2008: 4).

The fifteen interviewees included Senior Civil Servants at the DOH, senior psychiatrists who had acted in an advisory capacity for autism-specific policies, Members of the House of Lords and Members of Parliament, the CPS, Court of Appeal judges and magistrates and senior police officers. These individuals were identified through purposive selection, based on research conducted in Phase 1 and followed by snowball sampling across the hierarchy of the CJS to give:

> 'an insight into the mind-set of the actor/s who have played a role in shaping the society in which we live and an interviewee's subjective analysis of a particular episode or situation' (Richards, 1996: 199-200).

Interviewees were not selected to represent generalisations of how all decision-makers in their particular professions perceive the issues explored in this thesis but because their specific 'features or characteristics… enable[d] detailed exploration and understanding of the central themes and puzzles which the researcher wishe[d] to study' (Ritchie *et al*, 2003: 78). They were recruited through a personalised letter of invitation, explaining the importance of their contribution to this research, followed by emails and then telephone calls to secure the interview.

All interviews, except those conducted by telephone, were carried out in person. Face-to-face interviews were chosen over written correspondence to assuage the risk of 'potential power imbalance', enabling researchers 'to manage senior people… so that they do not terminate interviews early' (SSH IDREC, 2008: 4).

4. Ethical considerations

i) Anonymity and confidentiality

Assuring anonymity and confidentiality was essential in Phases 2 and 3 of the research. Anonymity was guaranteed to participants in both phases as the respective Information for Participants, and the University of Oxford guidelines on special considerations for data on film/video/CD/audiotape were followed (2012: 1). The reporting of all data and results conformed to the principles of anonymity and confidentiality. As a result of the uneven profile of cognitive abilities of adults with autism (Charman *et al*, 2011:13), such as special interests and language patterns, and variation in experience of hyper/hypo-sensitivity issues (Atwood, 2007; Baron-Cohen *et al*, 2010), there are many features which make them unique. Consequently, for final publication of this thesis, I

will include ‘swapping’ – ‘matching unique cases on the indirect identifier’ and ‘adding random variation to indirect identifiers’ (CUREC, 2012: 2).

ii) Informed consent, mental capacity and minimising risk

Chapter 2 made the case for a more coherent disability perspective in criminology. Broadening the purview of criminology to better consider disability should not be limited to the content of substantive research; it should also involve increasing opportunities for researchers with disabilities and facilitating better participation in research of people with disabilities who come into contact with the CJS – whether as victims, witnesses or defendants. Dupont notes:

> ‘[G]iven the fact that so much criminal justice research focuses on some of society’s most disenfranchised groups… there should be more dialogue in our profession about ethics related to the study of marginalised individuals and communities’ (2008: 201).

Working with adults with autism highlighted to me the importance of participatory action and the role of reflexivity in research in order to facilitate their involvement in making policy recommendations. Participatory research embodies ‘the idea that research can, and should, be empowering and directly useful to research participants’ but has been ‘limited to the margins of a few social science disciplines’ (*ibid*). Service user engagement is a central consideration of recent autism-specific policy developments (DOH, 2010d; NICE, 2012a: 15) and the British Society of Criminology recommends that researchers should consider ‘discussing research findings with participants and those who are the subject of the research’ (*ibid*: 3). Hence, it was important to ensure that the paradigms of Participatory Action Research and Service User Engagement were incorporated into the approach taken to participant consent.

Obtaining informed consent of adult defendants with autism and their families was paramount in getting permission to follow an individual’s case through the courts.

However, adults on the spectrum can have impaired executive function (Goldberg *et al*, 2005; Hughes, Russell and Robbins 1994; Landa and Goldberg 2005) which affects working memory – the 'ability to maintain or hold information "on line"' (Attwood, 2007) – and repetitive patterns of behaviour and interests (see APA, 2013). The approach of the Mental Capacity Act 2005 is to assume individuals have capacity unless there is sufficient evidence to the contrary. Further, compared with 'neuro-typical' individuals, adults on the autism spectrum have difficulty in making decisions where those decisions have to be made quickly, outside their routine and/or involve talking to others (Luke *et al*, 2012). Such difficulties can be exacerbated by increased levels of anxiety and depression (*ibid*: 7). The following strategies, recommended to better support adults with autism in decision-making, were implemented in the process of obtaining ongoing consent:

> 'addressing general stress and anxiety present at the time of the decision;
> providing additional time to make decisions;
> minimising irrelevant stimuli;
> presenting closed questions;
> providing encouragement and reassurance;
> and acknowledging the person's strengths in decision-making' (*ibid*: 8).

Further, the time given to consider whether individuals wanted to participate was broken into two stages. When potential participants with autism had been identified by a particular agency (see above), follow-up written or telephone contact was made. Subsequently, reasonable time was given between initial identification, the request to participate, and the decision to consent to participation before the court appearance, which I observed. Every effort was made to ensure that this was a period of one week. Where this was not possible, for example, where their court listing was brought forward, the individual was given a minimum of 24 hours to consider their consent to participate.

The Mental Capacity Fact Sheet for Social Scientists emphasises that it is 'important to avoid the possibility that compliance is wrongly taken to imply consent' and that '[d]emonstrable steps should be taken to ensure that the respondent is able fully to comprehend or retain information about a research study' (DOH, 2009: 4). Therefore, I started from the premise that a potential case study subject had the capacity to decide whether they consented to partake in the research. It has been recognised that positive action can be taken by researchers to increase capacity by, for example, presenting information as separate elements instead of an uninterrupted form (Nind, 2008) and by adapting social and environmental factors (Harris, 2003). Therefore, reasonable adjustments were made to the format and communication of information materials and the process of determining informed consent. Informed consent was obtained from all parties by giving participants a *Participant Information Sheet,* written in both standard and 'Easy Read' versions prior to the signing of the consent forms and also immediately before interviews. The Easy Read documentation included *Change Pictures* (2012), with the relevant image placed next to each block of text, to explain the content of that text. The text was formulated to meet the *Flesch Readability Test* criteria for readability and Mencap's accessible language principles (Mencap, 2009; DOH, 2010g).

These documents were also explained orally by the researcher when first given to the participant, again, prior to signing the consent form, and immediately before any interview. Time was also allowed for the individual to process information about the interview and after each question on the consent form, because of the tendency of individuals on the spectrum towards literal interpretation (Happe, 1993). 'Checking questions' were asked about what the participants understood the research to involve, why they were asked to participate and what the interviews with them would be used

for. Participants were then asked if they consented to partaking in the research and to signing a consent form available in both standard and Easy Read forms.

The same process was taken in obtaining consent to conduct interviews with case study subjects. Participants were made aware that breaks could be taken during the interview and, to establish ongoing consent, the interview was periodically paused to check that they were happy to proceed. This protocol reflects provisions in the Mental Capacity Act 2005 Code of Conduct that decision-making should be delayed until a time when the individual is less anxious. In cases where an individual was deemed not to have competence to give informed consent to take part in interviews, permission to make that decision was not sought from other parties because empowerment through participation is central to the paradigm of my research. In line with the DOH Guidance on 'research which does not wish to involve people without capacity', reasonable steps have been taken to prevent the inadvertent inclusion of such people in interviews (2009: 5). However, where in all situations the individual was deemed not to have competence to give informed consent for the researcher to take part in the *court observation*, such consent was garnered from parents/guardians of the person with autism. This differentiation was made because of the public nature of the court proceedings and the public benefit of the research; had this not been the case, the research was at risk of excluding cases where fitness to plead was an issue; such as that of Joseph (see Chapters 6-8).

Measures were also taken to minimise risks of negative consequences of participation for participants with autism, their parents and carers by protecting the anonymity of the subjects of the case studies and reducing levels of anxiety and distress. The risk of distress could have arisen where defendants, their parents or carers recalled the events which led to the defendants with autism coming into contact with the

CJS. Information was given to signpost participants to agencies that provide advice and support; participants with autism and their parents or carers were also permitted to have a supporter present during the interviews – this may have been a family member, friend or advocate. My Participant Information Sheet explained that I already had professional experience working with this group; this was vital to reassure them of my credibility and facilitate access. However, to ensure that my involvement did not affect the material outcome of the case, participants were informed that I was unable to give any substantive advice about their case or comment on its outcome. This was repeated throughout the observation process. In order to sustain my professional credibility, it was occasionally necessary for me to signpost individuals to publicly available documentation, such as the Autism Statutory Guidance or NICE Guidelines. Although it was crucial to ask preliminary questions about the basic facts of the case and arrangements of court proceedings, I only interviewed the defendant, their parent or legal representative after sentencing proceedings were complete.

Adults with autism can express challenging behaviour (see NICE, 2012) which could have posed a risk to the individual and, potentially, the researcher's physical safety. 'Challenging behaviour' is a:

> '[a] term used to describe behaviour that is a result of the interaction between individual and environmental factors, and includes stereotypic behaviour (such as rocking or hand flapping), anger, aggression, self-injury, and disruptive or destructive behaviour. Such behaviour is seen as challenging when it affects the person's or other people's quality of life and or jeopardises their safety.' (NICE, 2012b: 46)

This potential risk was heightened due to the stressful nature of court proceedings and, in some circumstances, the type of crime that some of the participants may have been accused of, such as violent sexual assault. Triggers for this behaviour encompass:

> 'the social environment (including relationships with the family… and friends);
> the physical environment, including sensory factors;

> coexisting mental disorders (including depression, anxiety disorders and psychosis);
> communication problems; changes to routine or personal circumstances' (*ibid*: 8).

I was careful to discuss potential triggers with the defendant's solicitor, barrister or other agency that had identified the participant, along with the defendant's parents or supporters. I also made adjustments to the 'amount of personal space given' or adaptations to the sensory environment of places where I conducted interviews, in order to avoid these triggers.

Conclusion

The limitations inherent in systematic sampling of case studies, as outlined in Section 2 above, mean that the observed case studies may not be representative of the governance of all cases involving adult defendants with autism. However, because of the paucity of criminological literature on this topic (see Chapter 1), understanding how defendants with autism are governed through criminal justice policy and criminal court practice has had to be largely 'exploratory'; aiming to constitute a 'generative moment' in the empirical research in this area. Allowing a 'flexible, exploratory approach' (Palys and Atchison, 2008: 145), Phase 1 provided the opportunity to generate themes to be explored in Phase 2 and formulate questions to be asked in the semi-structured interviews in Phase 3.

It is difficult to describe the disparate research on the criminal courts in England as a cohesive body of material, with each study building on the last to reflect a linear progression of knowledge about these important public institutions. This is partly because the English criminal courts are complex social institutions administering justice through a variety of actors, for a variety of offences and to a diverse range of victims, witnesses and defendants. It is also because much of the research starts from different

theoretical perspectives. Nonetheless, a vibrant array of research has given important insights into the operation of justice in the courts. Over the last approximately fifteen years, there has been a reduction in the use of court case observations, surveys and interviews in criminological studies of the courts. Instead, there appears to be a trend towards greater use of qualitative and quantitative analysis of pre-sentence reports (see Gelsthorpe and Raynor, 1995; Cavadino, 1997), case files and court reports in investigating the mechanics of the courts and the roles of participants in the court process. The question of whether this trend reflects more restricted access for research professionals by governmental bodies, the appetite for analysis of much larger data sets, or the more limited availability of financial and other resources for multi-method longitudinal projects is complex, and could be the subject of an entire research project. Whatever the reason for this apparent decline, there is a risk that the sort of rich data, gathered by studies such as the 'pilot study' by Ashworth *et al*, Baldwin and McConville's *Negotiated Justice* and McConville *et al*'s *Standing Accused,* are not captured. Consequently, as criminologists and citizens, we may miss out on the insights these types of studies provide on law in action and the extent to which we can say with certainty that justice is being done in our contemporary criminal courts. The need to reverse this decline thus validates the use of court observation in the present research.

Participants' aspirations for change and their desire to tell their story to 'put things right' are documented as the reasons motivating their involvement in qualitative research in criminal justice institutions such as prisons (Bosworth *et al*, 2005). Maximising the public benefit of this research has been a guiding principle in the development of the methodology and planning the substantive content of this thesis. The involvement of elite interviewees and practitioners in this research may encourage these groups to consider the issues raised in the course of the interview schedule;

potentially improving the exercise of the professionals' role. Engaging individuals with autism in the process of observing their cases and interviewing them has informed the normative approach of understanding how this group of offenders should be governed within the CJS, as well as being 'empowering and directly useful to [the] research participants' (Dupont, 2008: 200). By combining textual analysis, a rich set of eight case studies and fifteen elite interviews in one research design, it is possible to illustrate a contemporary picture of the governance of adult defendants with autism and inform the development of a normative framework to determine how they should be governed.

Part 1 – The governance of adult defendants with autism in criminal justice and autism-specific policy

Chapter 4 – Disability and vulnerability: the policy context of liaison and diversion

Introduction

A potential barrier to interpreting data gathered during court proceedings may be the pre-trial 'shaping' of cases in the earlier stages of the criminal proceedings (Baldwin, 2007: 383). It is unsurprising, therefore, that some of the early literature on the courts was not on the trial process proper but on the procedures and decision-making involved in this pre-trial 'shaping'. Researchers have undertaken careful examinations of the pressures placed upon defendants to plead guilty (Baldwin and McConville, 1977), the impact of legal advice and assistance when defendants are in custody at police stations (Sanders, 1989; McConville and Hodgson, 1993) and the correlation between motivation for arrest and conviction (Phillips *et al*, 1998). It is because of the important role performed by pre-trial shaping that this Chapter explores the influences of the broader policy context towards offenders with mental health problems and learning disabilities and reflects on the relevance of this context for adult defendants with autism. This chapter, therefore, triangulates a textual analysis of policy documentation with interviews conducted with elite decision-makers[5] to better understand instruments of governance as applied to adult defendants with autism. This approach facilitates an understanding of the connection between 'wider structures', in particular 'legal orders'

[5] Excerpts of interview responses are quoted in italics, followed by the professional status of the interviewee in square brackets.

relating to defendants with disabilities, and decision-making about defendants with autism in the court process, as explored in Chapters 6-8.

The Liaison and Diversion agenda, borne out of the recommendations of the Bradley Report 2009, developed in parallel to the Equality Act 2010 and the Autism Act 2009 (see Chapter 5). It is this agenda which made offenders with mental health problems and learning disabilities, including autism, a locale for the attention of policy-makers. Examining the policies which inform the context of pre-trial shaping and disposal, therefore, informs an understanding of how the Liaison and Diversion agenda is attempting to assess these groups at the earliest opportunity (Centre for Mental Health, 2014). Following the 2010 general election, the then Coalition government 'accepted the direction of travel set out by Lord Bradley's review… and for the recommendations to be carried forward into the cross-departmental Health and Criminal Justice Programme' (NHS England, 2013: 2). A series of subsequent policy documents, Reports, and Commissions have proceeded the Bradley Report, working to implement its recommendations (see CPS, 2010; MOJ, 2011; Judicial College, 2013; Adebowale, 2013; HM Inspectorate of Probation and HM Inspectorate of Prisons, 2015; DOH, 2015b) and following an initial £50 million investment, a full rollout is now scheduled for 2017 (DOH, 2014d). Section 1 examines these developments. Section 1(i) contextualises these developments in the shift towards localism, which plays an important role in the current political context.

One of the precepts of the governmentality approach is that how groups are categorised determines how their conduct is governed. As we saw in Chapter 2, people with autism come within the definition of disability used by the Equality Act 2010; conduct prohibited by this Act and the duty to provide reasonable adjustments applies to 'criminal justice organisation[s]' (E&HRC, March, 2011: 4-7). Chapter 1 set out the

six subsidiary research questions which flow from an analysis which takes a governmentality approach (*ibid*: 5; Rose *et al*, 2006). In posing the first subsidiary question**,** 'Who or what is to be governed?', this research sought to discern how the categories of defendants with mental health problems and learning disabilities were applied to defendants with autism. It also explored whether they were considered in terms of their status as citizens with disabilities under the Equality Act 2010 or whether they were more commonly conceptualised as dangerous, 'risky' or vulnerable. Section 1(ii) charts how, in the construction of Liaison and Diversion Services, there is a shift from the original Bradley Review category of offenders with Mental Health and Learning Disabilities, which included defendants with autism, to a broadening out of this group to the category of *vulnerable defendants*. This can be called a rationality of government comprising epistemological 'assumptions and a particular idiom that enables a problem to be translated into language that then makes it amenable to intervention' (Rose, 1999; c.f. Gilling, 2010: 1143).

Although the conceptualisation of these groups as *vulnerable defendants* may assist in improving attitudes towards and awareness of their needs, use of this conceptualisation is problematic from the perspective of the social model of disability. Many defendants, including those with autism, incorporated into this categorisation of vulnerability have the protected characteristic of disability. These different categories do not sufficiently relate to each other and attract different sets of policies, procedural protections and substantive outcomes: vulnerability on the one hand, and disability on the other. Section 2(i) argues that the divergence between these categories derives from the origin of the concept of the 'vulnerable adult' and its close association to the 're-balancing' of the CJS towards the victim (see Home Office, 2005). Section 2(ii) explores elite interview responses on the theme of vulnerability and explores whether it

is an appropriate concept for defendants with disabilities. What emerges from analysis of this policy agenda and elite interviews is the dominant rationality of ‘vulnerability’ in the development of policy in this area. The relationship between the conceptualisation of vulnerability and disability in relation to defendants is under-researched. Thus while there is a body of literature on the governance of offenders with mental health problems and learning disabilities through strategies and technologies based around their ‘risk’ and ‘dangerousness’ (see Seddon, 2008), these rationalities were not central to the framework of developing the Liaison and Diversion services. Therefore, this chapter only discusses these rationalities to the extent that they were embedded within The Operating Model for these services (NHS England, 2014a).

Section 3 presents interview data on how elite decision-makers perceived the role of the Equality Act 2010 in relation to defendants with disabilities in the CJS. It also portrays when and whether elite decision-makers perceived adult defendants with autism as having the protected characteristic of disability under the meaning of the Act. The interviews revealed that the concept of vulnerable defendants perpetuates an oblique amnesia that many defendants included within this categorisation have the protected characteristic of disability under the Equality Act 2010. This includes defendants with autism. In turn, this perpetuates asymmetrical access to Special Measures and Intermediaries between victims and witnesses and such defendants. It further results in an abrogation of responsibility towards these defendants in accessing legal protection under the Equality Act 2010 in the criminal courts. Analysis of these data elicits the extent to which there was coherence between the legal framework provided by the Equality Act 2010, whose ambit covers ‘criminal justice organisation[s]’ (E&HRC, 2011: 4-7), and policies directed at defendants with mental health problems and learning disabilities. Accordingly, it is argued that because the

concept of *vulnerability* has its origins in the protection of victims and witnesses and the 'rebalancing' of the CJS towards the victim, this rationality of government continues to delimit the ability to extend services and support to defendants with disabilities, as categorised as vulnerable defendants, including those defendants with autism.

1. The Liaison and Diversion Agenda: the locale for policymaking around offenders with mental health problems and learning disabilities

i) Background: a shift towards localism

Examining the governance of defendants with autism within the discipline of criminology is especially pertinent given developments in the wider legal and policy context. The 'responsibilisation strategy' (O'Malley, 1992; Garland, 2001: 124; Squires and Stephen, 2005: 4-5), as applied to people with disabilities, discussed in Chapter 2, was modified by the Coalition's manifestation of a personalisation agenda; introduced through legislative and policy changes in Health and Adult Social Care (DOH, 2012; Local Government Group *et al*, 2010; Health and Social Care Act 2012) and through welfare reforms (DWP, 2010; Welfare Reform Act 2012) which are now at the heart of commissioning services and support for people with disabilities under the Conservative Government. Many of these changes were built on the Big Society agenda (Cameron, 2010; 2011). This agenda is considered a vague slogan by some (see Mulgan *et al*, 2010), criticised by others as an insidious smokescreen for austerity measures (see Evans, 2011) and as a mask to hide the State's withdrawal from central areas of public policy (see Reiner, 2013). It has been critiqued elsewhere for its 'hands off' approach

(Nicholson, 2011) which assumes ‘that citizens are “competent” and “capable” and should be able to do the things the state “used to do”’ (Lent, 2011); leading Goodley to ask what becomes of the ‘citizen who is judged to fail to match up to the dominant ideal-type?’ (2011).

The implementation of this agenda in law (Localism Act 2011) and policy (see DOH, 2010d&e) has heralded significant alterations in the relationship between the disabled citizen and the state (see Lewis, 2011) and led to a greater diversity of organisations involved in the governance of offenders with mental health problems and learning disabilities. Thus, the former Coalition Government of 2010-15 and the present Conservative government’s style of localism – bound up with the Big Society agenda – have had a pervasive impact on the way that government departments have made policy over the last six years. The emphasis on ‘“localism” allows local councils and community organisations to make decisions about local services and significantly influence their work’ (Holdaway, 2013: 220). Elite interviewees described localism’s significance, following the change of government in 2010, in shaping the Department of Health’s implementation of the Liaison and Diversion agenda and Autism Strategy:

> *‘There’s a different approach… particularly [in]… the operational side of health [which] is run at arm’s length from the Department… there is a perceptible difference in [the Coalition] government’s view towards cross-governmental working and cross-government issues… [W]ith this government, some of the architecture which existed previously about cross government issues doesn’t exist anymore and the kind of nominal lead that certain departments had on some cohorts that is slightly, tacitly not really happening…’* (Senior Civil Servant 2).

This shift was also ascribed to *‘the reduction in central government department’s size’* (*ibid*)**.** One example, given by interviewees, of the Labour government’s ‘architecture’ which the Coalition abolished, is Public Service Agreements (PSA’s). Although these were perceived as being *‘of variable effectiveness... They were at least a mechanism to*

get people together on a shared set of outcomes' (Senior Civil Servant 2, Interview). This shift was cited as significant for Liaison and Diversion:

> *'…where we have gone slightly off course… [was] certainly at the beginning of this government, the pushing everything down to the localism approach. Again, that's another thing that's moved away from PSA's'* (Senior Civil Servant 1, Interview).

It was not that there was a change in strategy with regards to this policy '*but a change in approach which makes what you are trying to achieve and how you achieve it quite different'* (Senior Civil Servant 1). The Coalition government approach was described as '*less direct… [with] less scope to be central and use central command – certainly [in the DOH]'* (Senior Civil Servant 2).

This shift from 'central command' down to the 'localism approach' has driven a differential implementation, across local authorities, of the roll out of Liaison and Diversion Services and of the Autism Strategy (2010; 2014). As discussed in Chapter 5, only 4% of local authorities assessed themselves as having achieved the outcome of ensuring adults with autism received support in the CJS (NAO, 2012: 28). Therefore, variability in health and social care provision, driven by localism, is likely to affect the 'interconnecting variables' which lead defendants with autism into the CJS. This is also likely to influence court practice because the adequacy of local social care assessments and the availability of hospital placements affects the use of disposal options such as Section 37 of the Mental Health Act 1983, Mental Health Treatment Requirements and Community Orders (see Chapters 6-8; especially Samuel and Claire's cases).

ii) The development of the Liaison and Diversion Agenda

In 2007, Jack Straw, as Secretary of State for Justice, commissioned Lord Bradley to undertake an independent review of 'the extent to which offenders with mental health problems or learning disabilities could, in appropriate cases, be diverted from prison to

other services' (Bradley, 2009: 7). Potential barriers to diversion were to be explored, and Lord Bradley was tasked with making recommendations to government, particularly on the organisation of effective court liaison and diversion arrangements and the services needed to support them (*ibid*). In the absence of rules governing the point at which 'diversion' could occur, Lord Bradley broadened this original remit of 'diversion' in its 'traditional sense – i.e. schemes set up in courts' (to move policy and practice beyond their typically isolated development) – and advocated a diversionary agenda which considered 'the whole offender pathway' (2009: 7). Building on NACRO's definition of 'diversion' as a decision-making process and the National Policing Improvement Agency's (2008) definition which covers 'diversion' from the CJS as a whole, he defined diversion as (*ibid*: 15-16):

> 'A process whereby people are assessed and their needs identified as early as possible in the offender pathway (including prevention and early intervention), thus informing subsequent decisions about where an individual is best placed to receive treatment, taking into account public safety, safety of the individual and punishment of an offence'.

Lord Bradley undertook the mapping of 'offender pathways' (2009: 24) in relation to offenders with mental health problems and learning disabilities within the CJS of England and Wales. The Report made 82 recommendations relating to the application of the concept of diversion to these groups at different points on these pathways. He uncovered incongruence between organisations, revealed in part by the variety of definitions applied to these groups. Furthermore, the processes of identification, assessment and diversion of such offenders were 'happening too far along the criminal justice pathway' (*ibid*). This meant that assessment was not at its most timely for problem-solving, leading to a lack of proper information-sharing between organisations and common understanding about assessment tools and identification (Bradley/Westminster Policy Forum, 2009). The impact of this was poor

'continuity of care,' with 'no-one taking responsibility at each point along the pathway for the individual['s] needs, so people [were] being passed from organisation to organisation…' (*ibid*: 7).

A 'flurry of activity' (Peay, 2013) greeted his report as criminal justice organisations discharged their obligations under its recommendations. The MOJ established the National Heath and Criminal Justice Programme Board and a Delivery Plan was produced (see DOH, 2009). As jurisdiction shifted from the MOJ to the DOH, this Delivery Plan set out the 'programme of work' to implement the Report's recommendations. The 'single biggest change' they proposed was to establish Liaison and Diversion Services to work with the police and the courts to ensure that mental health problems and learning disabilities 'are identified as early as possible on the offender pathway' (*ibid*: 40).

Since 2009, sustained work has been done to keep this policy agenda on the political and organisational map. After the general election in 2010, the intention to implement the Bradley Report recommendations had been reaffirmed by the Coalition Government (NHS England, 2014; MOJ, 2011), and three bodies were set up to try to monitor the progress of liaison and diversion with a view to a national roll-out of the pilot schemes in 2015/16. The Bradley Group, comprised of organisations from the voluntary sector, has helped the government to shape the framework in which liaison and diversion services will be established. In addition to this body, the Care Not Custody Group and The Bradley Commission were also established, both chaired by Lord Bradley. The former looked at the alternatives to custody as part of liaison and diversion services. The latter was set up by the Centre for Mental Health (Centre for Mental Health, 2014: 5). This Commission took certain aspects of the original Report, which required further attention, and gathered evidence to establish what the core

elements of the Liaison and Diversion agenda should be. These issues have included a particular focus on black and ethnic minority communities, where there is a high prevalence of people with mental health and learning disabilities in the CJS; transition and maturity of offenders, to highlight the complications of services arranged by age rather than '*the complex circumstances that individuals find themselves in*'; and other issues such as employment and women (Member of the House of Lords, Interview).

An assessment of the extent to which Lord Bradley's original recommendations have been acted on can be read elsewhere (Centre for Mental Health, 2014). The purpose of this section is to examine under 'what logics' adult defendants with autism are governed with respect to criminal justice-specific policies pertaining to offenders with mental health problems and learning disabilities. These policies, operating at the interfaces between these systems, play an important role in governance throughout the 'offender pathway' of adult defendants with autism, particularly in the court system (Bradley, 2009; DOH, 2009; Adebowale, 2013; DOH, 2014). The implementation of the Autism Statutory Guidance (DOH, 2010) also sat within the jurisdiction of the DOH during the development of the wider Liaison and Diversion agenda. Yet, as discussed in Chapter 5, its statutory authority over the CJS was limited in legal terms. Consequently, the elite interviews sought to elicit the relationship between the Autism Statutory Guidance and the wider policy initiatives for defendants with mental health problems and learning disabilities and how the diversionary approach, as outlined in the Bradley Report 2009 and operationalised in the Liaison and Diversion Services, applied to defendants with autism.

Interviewees recognised the imperative that the 'link' between health, social care and the CJS should not be broken. This imperative is borne out of the recognition that the development of policies for offenders with mental health problems and learning

disabilities must involve the CJS as part of a '*wrap-around*' response in order to sustain public support for the evolving Liaison and Diversion Services (Member of House of Lords, Interview). This is why understanding this context is so important in appraising the logics which inform decision-making surrounding defendants with autism in the criminal court process. Because the Liaison and Diversion programme was set up *'at the time when localism was pre-eminent',* fifty or so schemes from across the country *'were selected to capture data, but without any standardisation about what the scheme was about, unfortunately, after two years of capturing that data we found that we couldn't compare apples and turnips!'* (Senior Civil Servant 1). So, from 2014, the Liaison and Diversion Service Standard Service Specification (2013/14 NHS) ('The Service Specification') was introduced *'to try and get a better angle on the evaluation of the service'* (*ibid*). The Standard Service Specification establishes the core requirements for the Liaison and Diversion services that are currently being piloted in 10 areas, which cover 13 police forces. The then Home Secretary, Rt Hon Theresa May MP, said the aim is for them to 'be rolled out across England by 2017', with the support of '£25 million of government funding commissioned from NHS England', and set out the purpose of these pilots:

> 'This is to help us better identify and assess the health issues and vulnerabilities of all offenders at the first point of contact with the police and the CJS. The scheme funds mental health professionals in police stations and courts who offer assessment and referral services to those that need them, as well as support and advice to custody staff.
>
> In addition, these professionals will work with criminal justice partners and Magistrates to support the most appropriate justice outcomes, such as mental health treatment requirements' (11/07/2014).

The Service Specification's 'threshold' category of 'vulnerability' covers 'those with mental health, learning disability, substance misuse and other vulnerabilities'

(NHS England, 2014b: 4). It goes on to list the 'service users most likely to be referred to and benefit from the service', including those with:

- 'Complex, severe or persistent health needs;
- Learning disabilities;
- Substance misuse issues;
- Severe or complex emotional/behavioural difficulties requiring mental health and social care support that require enhanced specialist community intervention as part of an integrated multi-agency package of care;
- Homelessness;
- Risk including domestic violence, MAPPA, safeguarding issues;
- Service users in acute crisis with eating disorder, depression, risk of suicide, psychosis, escalating self-harm, personality disorders;
- Service users from a minority ethnic or minority cultural background including travellers' (*ibid*; 10).

Defendants with autism are also specifically included elsewhere in this document. The Service Specification requires the Core Liaison and Diversion Team to screen and address the needs of defendants with an 'autistic spectrum' condition and the work of the Extended Workforce Team must cover people with autism (*ibid*: 6; 7). The Service Specification, along with the *Liaison and Diversion Operating Model 2013/14* ('The Operating Model'), detail the new national delivery of Liaison and Diversion to be trialled in 10 areas across England (NHS England, 2014a&b). The Operating Model sets out:

> 'An all-age service across all sites available to all points of intervention in the youth and criminal justice pathways addressing a wide range of health issues and vulnerabilities [must] **be relevant to those with protected characteristics as set out in the Equality Act 2010**' (NHS England, 2014a: emphasis added).

Thus 'vulnerabilities' are the starting point in determining access to these services and not the pertinent protected characteristic, such as disability. Here, as elsewhere in The Operating Model (see NHS England), this language of 'relevance' to those with protected characteristics under the Equality Act 2010 is weak and does not denote the language of rights.

The Core Team workforce requires that the Liaison and Diversion services include an Adult Liaison and Diversion Practitioner, Learning Disability Practitioner and Speech and Language Therapist. Additionally, '*there are some* [Liaison and Diversion Services] *that offer specifically a referral pathway for people with autism'* (Senior Civil Servant 1). This will depend on the competencies of the particular local Extended Workforce Team. These teams are intended to provide extended capabilities which 'will come from the "knitting together" of L&D with existing services, through the use of a coordinated approach to area and local commissioning' (NHS, 2014: 19). Such 'existing services' should include 'Psychiatry; Psychology; Social Work; Learning Disability and Autistic Spectrum; Police; Probation; and HMCTS' (*ibid*). Thus what we can see in The Service Specification is a shift from the original Bradley Review category of offenders with Mental Health and Learning Disabilities, to a broadening out of this group to the category of *vulnerable defendants* under which defendants with autism are subsumed.

The 'Core' Liaison and Diversion Service ('the L&D Service') involves the screening and '*identification of defendants who meet the threshold of vulnerability'*. This is followed by a health assessment and *'referral to suitable services and then a limited period of case management and follow up by the core service'* (Senior Civil Servant 1). The Service Specification and Operating Model documents (NHS England, 2014a; b) provide further detail of this service model and care pathway. Some key points are worth referencing here. Although criminal justice agencies, such as defence lawyers, the CPS or the courts, can make a referral to this service, the L&D Service's own identification and referral function will involve checking 'the details of those in scope of the liaison and diversion service against relevant local NHS databases to identify those known to services' (NHS England, 2014: 5). Consequently, this is not a

whole population screening of, for instance, all defendants whose case reaches a plea and case management hearing in court. Instead, use of the term 'screening' appears to mean *both* the initial *identification*, by the L&D Service and other agencies, of individuals who may benefit from the Service, *and* using the most relevant 'screening tool' at a specific 'screening appointment' to assess the defendant for 'a wide range of health issues and vulnerabilities'. The purpose of the first stage of screening of the individual, or rather *identification*, 'through the relevant health database', should:

- 'Identify the need for involvement of the liaison and diversion practitioner;
- Identify levels of risk;
- Identify levels of urgency;
- Identify needs based on a review of any documentation and database checks;
- Identify the need for any further screening or assessments' (*ibid*: 7).

Following identification at this first stage, the defendant will be offered the second stage 'screening appointment'. In the circumstances where the 'offer of a screen is accepted and concerns are raised during the interview, or the screening tool shows evidence of mental health, learning disability, substance misuse and other vulnerabilities' then a report is provided to the court, once the assessment has been completed. This report will identify 'the vulnerability of the person and their ability to plead and/or participate in court proceedings, along with recommendations to the court' (*ibid*). What is slightly concerning is that if 'the offer of a screen is declined then a case note entry may be recorded (if the person is known to services)' and 'a "risk alert form" is completed with relevant details but indicating refusal to be screened and this is passed to custody/detention staff with no further action taken' (*ibid*). This is problematic. While no further deliberate action may be taken, the very fact that a "risk alert form" has been completed and allowed to lie on the person's file may impact upon decision-making in relation to their case and lead to the application of strategies of risk management. Further, these details of the technologies of this approach reveal that

identification and assessment of vulnerability, along with access to procedural protection, reflect a medical not a social model of disability. Rather than subjects with rights, this approach is imbued with the understanding that vulnerable people are objects of social protection and medical treatment.

Subsequent to this second stage screening, individuals identified as needing the involvement of the Liaison and Diversion practitioner will be offered an 'holistic assessment(s)' 'to identify any needs they have in regards to Mental Health, Learning Disabilities, Drug and Alcohol, Physical Health and Social Care' (*ibid*: 8). The information garnered from this assessment and the earlier screenings will be communicated by the Liaison and Diversion Practitioner to other criminal justice agencies. The purpose of this 'information flow' is to 'provide timely, relevant information to key decision makers in criminal justice agencies to inform outcomes along the youth and criminal justice pathways' which will 'ensure that reasonable adjustments are made that enable individuals to understand and engage in youth and criminal justice proceedings' (*ibid*). This development could certainly begin to change the culture amongst professionals in the pre-trial and court process; offering a real opportunity to do justice to difference for those identified as benefitting from this service. However, the Service Specification does not build in informed consent as a prerequisite of this information sharing. While 'defence lawyers' are one of the named agencies, the Service Specification does not discuss how or whether the Liaison and Diversion Practitioners will work with them to ensure this data sharing is in the best interests of their client and does not prejudice the case. This is vital to ensure that these services incorporate the social model rather than the medical model of disability and because of the potential impact on changing epistemologies (see section 3(iii) below). These changing epistemologies will be entrenched by the fact that the L&D Services

are expected to treat and manage individuals ‘within a whole care pathway approach with services working collaboratively to ensure that individuals receive a coordinated approach to address their health and social care needs and their offending behaviour’ (ibid: 5).

The *Mental Health Crisis Care Concordat* (the ‘Concordat’) is intended to be the blueprint for the ways in which statutory and voluntary services work together with NHS Offender Health within this ‘whole care pathway approach’ and to bolster the operation of Liaison and Diversion pathways. Published in January 2014, the Concordat was produced by the DOH as ‘*the interface between mental health and the policing services – essentially for people who weren’t offenders’* (Senior Civil Servant 1). The impetus for the Concordat builds on the Coalition Government’s mandate to NHS England to achieve a parity of esteem between mental health and physical health, and ‘close the health gap between people with mental health problems and the population as a whole’ (DOH, November 2013: 15). The *raison d’être* for the Concordat was to better support ‘*a particular group or section of society [that] is reaching crisis point at a disproportionate rate, or accessing mental health services through involvement with the CJS at a high rate, [and that] needs to be identified and addressed by commissioners*’ (Senior Civil Servant).

This reflects the recognition of the ‘interconnected variables’ noted by Browning and Caulfield (2011), which lead adult defendants with autism into the CJS (see Chapter 1). One of the elite interviewees explained the origins of the Concordat:

> *‘[It] started from concerns of the police that veer between ...picking up a lot of people who haven’t committed a crime or if they have, it’s not very serious, but we think their needs are really mental health… coupled with… an awful lot of offenders [who] have substance misuse problems… so… we [decided to do]… a concordat [on]… the interface between mental health and the policing services – essentially for people who weren’t offenders.*

…[W]hen you start to talk to local services about that they say: "well it goes wrong when you don't have very responsive mental health services". The Concordat has… developed into a Mental Health Crisis Care Concordat… 250 plus national services… [have signed] up to what would make a service 24/7...

[T]he more we have got into it the more… we have got into the wider vulnerabilities in these discussions to make sure they get the right service as quickly as possible… The intention… is that we and the Home Office will take that… to local areas and… see how they are going to make it happen locally… It's not all about the police… it's about… the person who rings the crisis team saying "I need some help" and by the time they are rung back they've been sectioned… I really hope it is going to make a big difference to the service that people are going to receive' (Senior Civil Servant 1).

Chapter 6 discusses the problems that arise when multi-agency engagement either does not happen or happens too late along the criminal justice pathway. These case studies came to court prior to the roll-out of NHS England's new operating models for L&D Services and before the advent of the related 'Concordat'. It will be interesting to see how these sorts of cases, discussed in Chapter 6, are dealt with in the future.

However, there is cause for pessimism about the extent of real change for cases involving adult defendants with autism. The focus of the L&D Service has better operationalised the *liaison* arm of the Liaison and Diversion agenda. This better reflects the deontological objective of Lord Bradley's definition of diversion as a 'process whereby people are assessed and their needs identified as early as possible in the offender pathway' (2009: 16). The teleological objective of gathering this information to inform 'subsequent decisions about where an individual is best placed to receive treatment' has been sidelined. In other words, diversion *out of* the CJS at various points along the pathway is not the objective:

'the court system understands it better because the court system is quicker and better… [at the assessment] *but I think the police thought that... [Liaison and Diversion] was going to be a service that was going to come into the police station and mop all these people up. Whereas it's much more this is the point at which a health professional can come and make sure that your vulnerabilities are being met'* (Senior Civil Servant 1).

The implication is that these 'vulnerabilities are being met' *within* the CJS. This focus on *liaison* reflects the imperative to maintain the 'link' between health, social care and the criminal justice system. Again, this is reflected in the Service Specification which states that '[d]iversion should be interpreted in its *wider sense*, referring to both diversion "out of" and "*within*" the youth and criminal justice systems' (NHS, 2014b: 4, emphasis added). The Service Specification goes on to make clear that access to Liaison and Diversion services by individuals meeting the threshold of vulnerability 'does not imply that they will avoid appropriate sanctions imposed by the youth and criminal justice systems, **but that the process will be better informed, and access to appropriate health and social care interventions will be improved**' (*ibid,* emphasis added).

The emphasis on *liaison* is also manifest in the 'Key Core Team Responsibilities' for the Services' Adult liaison and diversion practitioners. This does not include diversion but describes the function of *liaison* as including informing decision-making; writing reports; providing input to pre-sentence reports; advice on making reasonable adjustments; information exchange with community services; appropriate health promotion and informing and mobilising multi-agency care (*ibid*: 18). The inclusion of the responsibility to provide advice on making reasonable adjustments in the requirements for the Core Team is to be welcomed. However, although Liaison and Diversion Practitioners are supposed to note the ability of the vulnerable defendant to 'participate in court' (see above), it is odd that there is no mention whatsoever in the Service Specification or Operating Model of supporting vulnerable offenders in obtaining the use of Special Measures or of getting support from Intermediaries. This is particularly strange given that, as mentioned in Section 1 above, Lord Bradley had recommended that '[i]mmediate consideration should be given

to extending to vulnerable defendants the provisions currently available to vulnerable witnesses' (2009: 61).

Interviewees suggested that this focus on diversion 'within' the CJS is driven by the MOJ's proclivities:

> '*…in the CJS… there's a definite, almost a real silo mentality because some of the Ministers in Justice haven't liked the description of Liaison and Diversion Services… [they] don't like the Diversion bit because it suggests to them that the individual is being diverted away from the punishment they deserve for the offence they have committed. So I think sometimes there are different paradigms that are [being used]… So it can be quite difficult'* (Senior Civil Servant 2).

This is despite the fact that one of the central aims of the service is to 'ensure an individual's ability to participate effectively in the criminal justice process' and 'improve health and criminal justice outcomes' (NHS England, 2014b: 5).

What is disappointing is that there is no definition of or guidance about how to meet an individual's eligible social care needs in The Service Specification for Liaison and Diversion. This is surprising as it could have referenced the then forthcoming Care Act 2014 which had undergone its third reading in Parliament at the time the Operating Model and the Service Specification were published. This Act is highly relevant in this context as it defines the requirements for local authorities to meet the care needs of children and adults. Not only does the Care Act 2014 provide requirements of how to meet these needs (Section 8) and legislate for the reformed eligibility criteria for social care (Sections 9-13), it also updates the aftercare requirements (Section 75) following the discharge of a patient who may have been detained under a Hospital Order under the Mental Health Act 1983 and provision for an adult being released from prison (Section 76; Chapters 8 and 9). Without a more detailed statement of need on the incorporation of the Equality Act 2010, it may be that medical rather than social models of disability will prevail in the L&D Services as the concept of vulnerability dominates. Chapter 8 considers how cases could have benefitted from a more coherent and

integrated approach. One example is that of ‘Samuel’, an adult with autism who was given a Community Order which stipulated that he could only use public transport if he was accompanied by an adult aged over 18 who knew about his previous convictions. Samuel had no adult social care support from his local authority. He was ashamed of his convictions and did not want other people to know about them. This meant that his mother, who was in her seventies, had to travel everywhere with him. The lack of social care support and the restrictive nature of the Community Order in Samuel’s case lead to an imbalance between protection of the public and restriction of his freedom and, indeed, that of his mother’s. The case is also illustrative of the problem of governing defendants through the service language of vulnerability rather than of the rights which flow from the status of being citizens with disabilities.

2. Vulnerable or disabled defendants?

i) Understanding the divergence

The concept of the ‘vulnerable adult’ derives from a Consultation Paper, *Who decides?*, issued by the Lord Chancellor’s Department (1997). It refers to a person who is aged over 18 and:

> ‘who is or may be in need of community care services by reason of mental or other disability, age or illness; who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation’ (Home Office and DOH, 2000: 8-9).

It was entrenched in the provisions for and definitions of vulnerable and intimidated witnesses in Part II of the Youth Justice and Criminal Evidence Act 1999 and in the joint guidance issued by the Home Office and DOH (2000), *No Secrets*. Under this Act, the vulnerable and intimidated witnesses eligible for Special Measures include children under 17 (section 16 (1)(a)); those witnesses whose quality of evidence is likely to be

diminished by reason of mental disorder, significant impairment of intelligence and social functioning (Section 16 (2)(a)(i), (ii)) or a physical disability or a physical disorder (Section 16 (2)(b)). Witnesses likely to experience particular fear or distress in testifying are also eligible, by reason of the nature and circumstances of the offence, and the age of the witness (Section 17(2)(a), (b)). Interestingly, the court may also consider a number of other matters in deciding whether the witness is likely to experience particular fear or distress, namely, their social and cultural background and ethnic origins, domestic and employment circumstances and religious beliefs or political opinions of the witness (Section 17(2)(c)(i), (ii) and (iii)), along with any behaviour towards the witness by the accused, the accused family members or associates of the accused, or any other person who is likely to be an accused or a witness in the proceedings (Section 17(2)(d)(i), (ii) and (iii)). Finally, victims and witnesses of sexual offences are eligible for Special Measures unless they wish not to have access to them (Section 17(4)).

Introducing the first mandatory Special Measures for vulnerable and intimidated witnesses, the Youth Justice and Criminal Evidence Act (YJCEA) 1999, when 'taken as a package' of measures, signified 'the most radical rewriting of the orthodox rules for treatment of witnesses in the adversarial trial system in the common law world' (Hoyano, 2009: 345). Special Measures for these vulnerable and intimidated witnesses, introduced by the YJCEA 1999, consisted of screens in the courtroom between the witness and defendant (Section 23); giving evidence over live TV link (Section 24); giving evidence in private (Section 25); the removal of wigs and gowns by counsel and the judiciary (Section 26); video recorded evidence-in-chief (Section 27); video recorded cross-examination (Section 28); examination of a witness through an intermediary (Section 29) and aids to communication (Section 30). The *No Secrets*

guidance was intended, in part, to bolster the provisions of the Act by developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse (Home Office and DOH, 2000).

No Secrets set out how commissioners and providers of care services should protect vulnerable adults through the development of local multi-agency codes of practice. Agencies responsible for the codes of practice, underpinned by this guidance, included the police and 'other relevant law enforcement agencies (including the CPS)' (*ibid*: 14). These agencies were expected to protect two corpora of vulnerable adults: those individuals receiving adult social care and support and vulnerable or intimidated victims and witnesses. Thus the category of *vulnerability* acted as a driver for access to Special Measures Directions in the courts and multi-agency bodies working between criminal justice, health and social care organisations in respect to these corpora of individuals. Consequently, in criminal justice policy and practice, vulnerability became bound up with concepts of 'victimhood' and the 'rebalancing' of the CJS towards the victim (see Home Secretary *et al*, 2002). In light of this, it is easy to see the legal, conceptual and cultural difficulties in the development of the concept of the vulnerable *defendant*. Whilst impairment is a central feature to each of the three factors determining the eligibility of witnesses who may access Special Measures on the grounds of incapacity (see Section 16, YCJE 1999), this categorisation ties the concept of vulnerability closely to the group of victims eligible for these measures on the grounds of risk of harm and exploitation.

A number of studies have assessed the effectiveness of the implementation of these Special Measures. These are reviewed in Chapter 1 and include the study produced by Jacobson and Talbot, which is a review of the treatment of vulnerable defendants within the criminal courts of England and Wales 'in recognition that court

proceedings can be particularly difficult for these individuals' (2009). As discussed in Chapter 1, one of their main recommendations was that the HMCTS should ensure that all its provision complied with the then Disability Discrimination Act 2005, such that courts are fully accessible to vulnerable defendants. The 2009 study on Special Measures (Jacobson and Talbot) and the subsequent Report, *Fair Access to Justice?,* sets out the legal framework governing these defendants in the courts and makes a comprehensive set of recommendations about better implementation of the measures for vulnerable defendants (Talbot/PRT, 2012).

Consequently, the use of Special Measures for adults with autism was not the central question of this research. Rather, the present research sought to understand the relationship between the categories of vulnerable and disabled defendants and how defendants with autism are being characterised. The legislative and common law asymmetry of protections for vulnerable defendants is discussed elsewhere (see Hoyano, 2009; 2015). What was clear from the present research was that this asymmetry is exacerbated by the misunderstandings of professionals and the operation of court practice (see Chapter 6). One of the sources of the misunderstanding in this area may derive from the drafting of the original *No Secrets* Guidance (Home Office and DOH, 2000). Although the Appendix of *No Secrets* signposts readers to the Disability Discrimination Act 1995, it does not expressly state the confluence of its protection and that legislative schema. Differentiating the origins and conceptualisation of *vulnerability* and *disability* as a protected characteristic helps to make sense of the divergent development of protections afforded to vulnerable witnesses. In particular, it helps us to make sense of the concept of the vulnerable defendant on the one hand and, on the other, those protections available to disabled persons when using the services of

criminal justice organisations through the Disability Discrimination Acts of 1995 and 2005 and the subsequent Equality Act 2010 (Home Office and DOH, 2000).

ii) Vulnerability: an appropriate concept for disabled defendants?

As will be seen below, it is clear that this divergence between the categories of vulnerability and disability has also contributed to confusion about the application of the Equality Act 2010 to defendants with a protected characteristic of disability. What emerged from analysis of the policy surrounding Liaison and Diversion, along with the data gathered in the research interviews, was that the attraction of using the concept of vulnerability in developing criminal justice and clinical governance strategies towards certain groups of defendants was its expansive and flexible nature. Vulnerability encapsulates the multiplicity of complex health conditions and 'problematic' socio-economic circumstances presented by individuals coming into contact with these services. These common factors need an expansive concept which allows service led intervention because as these interviewees put it:

> *'If we think about health and care things, this department [of Health] [leads on] a range of vulnerabilities… Someone could have learning disability, autism, dementia…'* (Senior Civil Servant 2).
>
> *'Obviously for younger people, a lot of other vulnerabilities are to do with family circumstances'* (Senior Civil Servant 1).
>
> *'…[I]t wouldn't be feasible for all staff and all services to have in depth training in all those areas; you've got to recognise who are the critical people and think about… [how] to raise awareness and understanding'* (Senior Civil Servant 2).

In the research interviews, therefore, there was a sense that police and other agencies were more comfortable in responding proactively to the concept of the vulnerable defendant rather than a defendant with a specific impairment, such as autism, or the notion of a defendant with a disability. This idea is well-expressed by one Senior Civil Servant who said:

> *'[Senior Police] are talking a lot more about [the Autism Strategy], in relation to the training at the police training college about…* ***knowing how to react to vulnerability rather than the Adebowale talk about training in Mental Health.*** *[They're] saying that "we don't want to turn police officers into sort of quasi-mental health professionals, we want to turn police officers into people who… think a) about… [the person's] vulnerabilities and b) they know how to react to them"; so… [it's] not just about health really'* (emphasis added).

For the police, the concept of vulnerability has more resonance as its opaque quality prevents the need for the police to become '*quasi mental health professionals*' (*ibid*) and instead just to '*know how to respond to the situation in front of them*' (Senior NHS-Police Inspector), whatever the underlying cause of that behaviour or vulnerability might be. With regards to the Adebowale Report (2013), Senior Civil servants described one of the other main areas of interest to them as being the implications this report has for the use of restraint. From an understanding of when it is necessary '*through to*' whether:

> *'…some people's vulnerability is made much worse by [police officers] in uniform, [officers] who hold [a defendant] down [and officers] who crowd [the defendant]. …[I]t's about seeing the person as a whole person rather than regarding them as behaving oddly and [therefore] need[ing] to be held down'* (Senior Civil Servant 1).

The predominance of the concept of vulnerability sits awkwardly with the principles which underpin the social model of disability. In the context of disability hate crime, scholars have argued that it is inherently disablist to refer to disabled persons as vulnerable because it automatically conflates disability with vulnerability (Quarmby, 2011). One interviewee expressed their concern about the conflation of the two categories:

> '*It goes back to this point that… former DPP, Ken Macdonald understood: …this misuse of the concept of "vulnerability"; …he fully rejected the idea that disabled people are per se vulnerable. They may end up in situations where they become vulnerable. Their disability may mean they can't get away from a scene as quickly as other people or whatever… But he quite rightly warned against the glib assumption that if you just say they are vulnerable people then you start asking the questions: "well, why are they going out at night?" "Why are they going clubbing?" "Why aren't they back at home?"… It's the old argument*

about rape – "why do women go out? "Why are they dressed like that? …I think that is the wrong way to look at disability and to understand that disabled people don't get up in the morning and say they are vulnerable. They say – "yes, I have got a disability but I'm a human being and I've got a right to access mainstream life like everyone else". Yes, there are some things that I have to access with care but why should I be sectioned off because I am "vulnerable" in a generic sense?' (Member of Parliament)

Connotations of weakness have led others to mount the critique that the designation of groups as vulnerable, in their provision of services and the deployment of their responsibilities, is an inherently paternalistic process undertaken by the powerful majority group (Roulstone *et al*, 2011). Nevertheless, vulnerability is a concept which is still perceived as helpful by academics and criminal justice decision-makers alike. Chakraborti and Garland argue that a vulnerability-centred approach in the context of hate crime, for example, does not automatically establish an association with disability and features of defenceless passive victimisation (2012: 507). Instead, this approach directs attention towards those individuals who fall through the cracks in current policy frameworks and facilitates better recognition of the intersectionality of identities that can be targeted by perpetrators of hate crime. Finally, they posit that the lens of vulnerability is important in the global context of austerity measures which make cuts to welfare and public services (*ibid*: 507; 509). Analogous arguments were made by architects of the Liaison and Diversion services who are particularly anxious that they:

'address vulnerabilities outside mental health because otherwise it all becomes a conversation about mental health which might not be the most risk to somebody who has come into contact with the police and the CJS' (Senior Civil Servant 1).

This quote acknowledges the structural factors and the wider interconnecting variables that may lead defendants with mental health problems and learning disabilities into the CJS. However, it is contended that the social model of disability provides a better

analytical framework than the concept of vulnerability in enabling the exploration of the 'social, political, cultural, and economic factors that define disability and shape personal and collective responses to difference' (Baldry *et al*, 2008: 32). This model provides a counterweight to the aforementioned connotations of weakness imbued in both legislative and professional conceptualisations of vulnerability. As discussed in Chapter 2, the social model of disability attempts to redress the power imbalance, empowering disabled people as citizens with rights (O'Grady *et al*, 2004: 260). The impairment-disability dyad of the social model is helpful in achieving this by shifting the analysis away from individual weakness towards an 'iterative process of identifying, understanding and removing obstacles to resources' (Baldry *et al*, 2008: 32-33). As discussed in Chapter 6, one of the unforeseen consequences of the dominance of the rationality of vulnerability is that, in criminal justice practice, defendants with disabilities are dislocated from the legislative protections which are available to them as citizens with a protected characteristic of disability.

3. The protected characteristic of disability: the perceived utility of the Equality Act 2010 for defendants with disabilities

This research aimed to determine whether defendants with autism were considered in terms of their legal status as citizens with disabilities under the Equality Act 2010 (Chapter 1). The intention was to discern to what extent there was coherence between the legal framework provided by the Equality Act 2010, whose ambit covers 'criminal justice organisation[s]' (E&HRC, 2011: 4-7; Chapter 2), and policies directed at defendants with mental health problems and learning disabilities. Further, it was hoped to establish what operative role the Act had on decision-making about policies and practices in relation to adult defendants with autism and to capture how interviewees consider and apply the provisions for citizens who have the protected characteristic of

disability when they come into the CJS as defendants. What the responses below reveal is a lack of understanding, which demonstrates the need for better implementation of this legislation by criminal justice organisations. Across the strata of interviewees in this research, most acknowledged the relevance of the application of the spirit of the legislation in the CJS *per se*, but there was a lack of specific knowledge about the provisions of the Act for defendants from the CJS and particularly in court. Some interviewees were only aware of its application where it '*has been proven that people haven't [been compliant with it]'* (Senior Civil Servant 1):

> *'Yes, I think that's the awful thing about the Equality Act, you only register non-compliance…'* (Senior Civil Servant 2).

There was a clear sense that '*these things take time to change and people do talk about it much more which does mean that there's more awareness'* (Senior Civil Servant 1). Interviewees also differentiated the awareness about its application for different categories of disability:

> *'I think there is still a lack of awareness of where people have a mental health [problem] whether [this… is covered or should be defined as a disability and I've certainly been in discussions where people have been confused whether it is or isn't encompassed. And I suspect that's true of other non-physical disability, that people are not clear whether it is included or not. …[S]omeone said to me once: "well the universal symbol for disability is a picture of someone in a wheelchair". People find it hard…to think in terms of disability more broadly than that. You know, they might get as far as sensory impairment but getting any further is a stretch'* (Senior Civil Servant 2).

Whilst many saw the Bradley Report had been influential in directly and indirectly highlighting the relevance of the Equality Act 2010 to the court process, there remained a lack of awareness and confusion about the Act's role in this context. For example, interviewees responded that '*…it's difficult to comment on that question*' (Senior Civil Servant 1)*;* and '*you're better asking the courts and what they think about it. [There's] probably more information they can provide*' (Senior Civil Servant 2). Interviewees often paused before responding to the question, saying things like:

'*In terms of whether we should have cognisance of the duty under the Equality Act in a criminal justice process, I've got to say yes because that's what it's about but having said ethically that's the right answer, I'm not sure what that means in practice*' (Senior NHS-Police Inspector).

In some cases, respondents gave no answer or said '*No, sorry, I don't think I can answer that question*' (Chief Crown Prosecutor). One, rather tellingly, retrieved their mobile device, scrolled down the legislation on its screen and said:

'*well if you look at it, the protected characteristic of disability, you are protected at work, in education and as a consumer when using public services. I would have thought that the definition will cover attendance at or appearance in court…'* (Member of Parliament).

While, on the one hand, it may be impracticable to expect all senior decision-makers to have exhaustive legal knowledge on the application of this Act to the CJS, the important work being done on improving the interfaces between health, social care and criminal justice makes this awareness all the more pertinent. This is particularly the case if we believe it is normatively important to sustain the social model in these contexts and move away from the predominance of the medical model of disability. Yet, as the following excerpt shows, there is still a discrepancy in institutional paradigms based on the predominance of the medical model:

'Mental health is in itself a disability and when you talk to NHS colleagues about diversity and equality, they will talk about… gender issues [but] [t]hey won't talk about mental health because they see that as a clinical condition. If you look at where ACPO cited their work around mental health and disability, it was in an equality and diversity work stream so they're coming at it from a different agenda' (Senior NHS-Police Inspector).

Further, interviewees did not think that the Equality Act 2010 was at the forefront of the minds of the decision-makers in court:

'I don't think it is at all. I think it might be in terms of the victim or the witness but I think when it comes to the defendant itself I don't think it is thought of…' (Member of Parliament).

When prompted about whether the provisions of the Act should take more of a central role, there was the view that *'it could do but I don't think any of us want to use these things as a sort of cloak to allow defendants with a disability to escape responsibility'* (*ibid*). Uncertainty about whether or not the provisions applied to *defendants* with disabilities was a recurrent theme in other interviews too. The implicit assumption was that the application and relevance of the Equality Act's reasonable adjustments and 'duty to pay due regard', for example, operated differently for defendants than for victims. There was an assumption of differential applicability of the Equality Act 2010: that applied to victims and witnesses with disabilities and not defendants. It seems that this is borne out of a canteen culture (c.f. Fielding, 1994) which is based on the asymmetrical application of Special Measures for victims and witnesses and not defendants. Perhaps it is because these measures foreground procedural adjustments for vulnerable defendants, that the Equality Act 2010 and its requirements surrounding reasonable adjustments are overlooked. The duty to provide reasonable adjustments in the Equality Act 2010 is, in fact, asymmetric *towards* people with disabilities: 'the differential treatment of people with disabilities is necessary to achieve equality' (Fredman, 2011: 98; Chapter 2). It expressly recognises 'that, instead of requiring conformity to the able-bodied norm, modification of the environment or of existing policies or practices is essential if people with disabilities are to have genuine equality of opportunity' (*ibid*). Thus, reasonable adjustments should be made 'whether as witnesses or parties in civil proceedings or defendants in criminal proceedings' (Judicial College, 2013: 1; emphasis added).

Another subtext to emerge in elite interviews was that practitioners adopted different approaches depending on the association between the defendant's autism and their offending. In other words, the assumption was that access to protection as a person

with a disability under the Equality Act 2010 may depend on whether the impairment in question was a direct cause of the individual's criminality:

> *'It's a fundamental question in my mind… Do we treat people with autism differently depending on whether it was a driver of the offence? What you're effectively saying is we want to reduce re-offending; we want to provide a better service for people with mental ill-health because… by addressing those health inequalities we will also be reducing crime… [I]t is predicated with almost the unwritten assumption that it is mental health that is in part one of the drivers of the offending and what we're talking about here is something that, therefore, particularly around autism is something that may not be part of the offending cycle of the rationale of the offending'* (Senior NHS-Police Inspector).

This interviewee went on to explicate three scenarios in the treatment of defendants, based on whether autism: a) '*definitely is*' such a '*driver*' of the offending; b) it definitely is not a driver of the offending; c) and when '*you don't know whether it has a relationship to the offending or not*'. In relation to the first formulation, where there is an association between the defendant's offending and their autism, the interviewee framed that as a '*Liaison and Diversion issue and that decision has to be made in the round*'. The interviewee also noted that in relation to '*those clinicians where we're developing a skill set, do they know how to identify autism or know who to refer to? I'm not sure*'. The paucity of treatment and probation programmes for defendants with autism is discussed elsewhere (Archer and Hurley, 2013) and as Chapters 7 and 8 show, the dearth of specific clinical knowledge available at earlier stages of the CJS has a material impact on the disposal options available for this group.

In the second scenario – the '*person who has committed the offence but they happen to have autism*' – this interviewee said rhetorically:

> '*Do I think they should be treated differently under those circumstances because of the Equality Duty? …I suppose the Liaison and Diversion process would respond but you're already picking up on my gap in terms of knowledge... I know what Liaison and Diversion is in terms of the service it needs to provide but actually I could not describe to you the decision-making process that a mental health clinician should make in coming to a decision…*' (Senior NHS-Police Inspector).

This material highlights some important issues about the apparent legal and conceptual disconnect between the Liaison and Diversion agenda and the duty to challenge discrimination and promote equality for citizens who have the protected characteristic of disability under the Equality Act 2010 and for defendants with autism in particular. This interviewee noted that that 'is where the gap is':

> '*I think it will be interesting, as [Liaison and Diversion] go through this process [of implementation]… how the courts will react… it all comes back to the question of how flexible is the CJS from a cultural perspective? …[B]ut we'll have to back it up with some other stuff and quite meaningful interventions or adjustments… If it has been solved then it needs to be marketed; if it hasn't, then it needs to be solved and then marketed*' (Interview).

The researcher was asked directly by the interviewee what reasonable adjustments had been detected in court observation for adult defendants with autism. The example of the defendant sitting outside the dock, next to their counsel and an appropriate adult was given. The interviewee responded that '*those are on an ad hoc basis made by a well-meaning judiciary'.* The clear implication was that there needed to be a more coherent and systematic resource to describe the sorts of adjustments that could be made. Certainly, the Equal Treatment Bench Book (2013) and Equality and Human Rights Commission Guidance (2012) currently fall short of providing sufficiently comprehensive guidance for defendants with disabilities more broadly (see Chapter 2). The likelihood of a cultural shift will be difficult to predict given the state of flux caused by changes to Legal Aid, *Transforming Rehabilitation* (MOJ, 2013) and the Criminal Prosecution Service's balancing towards the victim based on a misguided view that the rights to a fair trial are 'a zero-sum game' (Hoyano, 2015). Without promoting awareness that these defendants have the legal status of citizens with disabilities, progress will continue to be protracted in this area.

The second category identified by the interviewee was '[t]*he person who has autism but we're pretty clear that it has nothing to do with the offending…*' (Senior NHS-Police Inspector). With regards to this category, he asked:

> *'What does that mean in terms of the Equality Duty? I've never considered that… I'm not disputing it. [But] [w]hat does that mean? That we should consider it, yes, but in practical terms? If you [consider] the CPS…[who have] their decision making process and… the police, [who have] their decision-making process… [What does it mean?] I think in terms of the way that they're handled by the police it comes back to disproportionate impact again and what that means…'* (*ibid*).

Finally, in the last scenario, where there is a defendant that *'we're not sure about, I'd give them the benefit of the doubt…'* (*ibid*). For this interviewee, the differentiation between the three scenarios was not one based on any prejudice they held against the third group, where autism was not the driver of the offending. Instead, it evinced a concern with practical outcomes:

> *'It's all well and good saying that we will treat people differently but if there is no practical way of treating people differently then I don't know. I'm disappointing myself in not knowing the answer. Is it even helpful to carve them up into the three cohorts – those that do, those where we're not sure and those that don't? …I've seen many policies go through that don't actually reach the ground. I suppose I would want to understand what… in terms of making that reasonable adjustment because the CJS has got the balances and the woman with the blindfold on… the CJS needs to make those balances but I'm just wondering what practical things we can do and how flexible the CJS is because it is a notoriously inflexible system' (ibid).*

The Equality Act's Section 6 definition of the protected characteristic of 'disability', as supplemented by Schedule 1, does not incorporate the concept of a deserving and un-deserving disabled person, nor does the Equality Act 2010 import the concept which predicates the disabled person's access to its protections on whether the individual self-identifies as a disabled person. There are issues around the reasonable identification of the service user's disability by the public authority (see Chapter 2).

However, the Equality and Human Rights Commission Guidance on the application of this legislation to 'criminal justice organisation[s]' does not envisage a

schema of provision for disabled defendants that differentiates protection on the basis of the association between the service user's disability and their alleged or actual offending (2012). Also, the Equal Treatment Benchbook states:

> 'Adjustments to court and tribunal procedures may be required to accommodate the needs of persons with these mental disabilities whether as witnesses, parties in civil… proceedings or *defendants in criminal proceedings*' (Judicial College, 2013: 1; emphasis added).

To that extent, it is not 'helpful to carve them up into three cohorts'. Nevertheless, the interviewee's narrative articulates a set of assumptions that were evident in the culture of the court process and were consistently observed in the fieldwork for this research (see Chapter 6).

Unfortunately, however, the waters have been muddied by the interpretation of the Upper Tribunal Administrative Appeals Chamber of Regulation 4(1) of the Equality Act 2010 (Disability) Regulations 2010 ('Regulation 4(1)') in the recent case of *X v The Governing Body of a School (SEN) [2015] UKUT 0007 (AAC)*. Regulation 4(1) outlines other conditions which are *not* to be treated as impairments for the purposes of the meaning of disability under Section 6(1) of the Equality Act, including 'a tendency to physical or sexual abuse of other persons' (4(1)(c)). *X v The Governing Body of a School* was an appeal by the parents of a child, "S", against the decision of the First-tier Tribunal (Health, Education and Social Care Chamber (Special Educational Needs and Disability)). The First-tier Tribunal had dismissed the appellant's claim of disability discrimination against S, their daughter. The discrimination claim involved a school employee who gave S, a child with autism, six fixed-term exclusions of up to four days when S, a six-year-old child, was violent to teaching staff and other children over a three-month period. The issue on appeal was the interpretation of regulation 4(1) and whether it applies where the conditions specified therein arise as a consequence of an impairment that is *already* protected under the provisions of Section 6 of the Equality

Act 2010 (*[2015] UKUT 0007 (AAC)*: para 6). The Upper-tier Tribunal dismissed the appeal because they were satisfied that S's behaviour demonstrated a tendency towards the physical abuse of other persons, which amounted to an excluded 'condition' under regulation 4(1). They dismissed the argument, made by the appellant's counsel, that regulation 4(1) 'only applies to "freestanding" conditions and not to consequential symptoms of an already protected impairment' (*[2015] UKUT 0007 (AAC):* para 62).

In doing so, they found that the Article 1 definition of disability, of the United Nation Conventions on the Rights of Persons with Disabilities added little to the analysis (*ibid*: para 51). Instead, by reason of paragraph 7.3 of the Explanatory Memorandum to the 2010 Regulations, they read the prescribed conditions of regulations 4(1) as having been excluded by Parliament for 'public policy reasons', for example:

> 'to avoid providing protection for people where the effect of their condition may involve anti-social or criminal activity and thus have an impact on others, whether by potential or actual harm to their health and safety, or to their property' (*ibid*: para 40).

Drawing on the Equality Act 2010 Guidance (see Office for Disability Issues, 2012: paragraph A13), they held that it was not Parliament's intention 'to exclude only a free standing impairment and not the manifestations of an already protected impairment' ((*[2015] UKUT 0007 (AAC):* para 93). They found that 'regulation 4(1) does apply where the conditions specified therein arise in consequence of an impairment that is already protected under the provisions of section 6 of the 2010 Act' (*ibid*: para 101). Therefore, because the alleged discrimination – the school's fixed term expulsion – was a result of the excluded condition, 'tendency to cause abuse', under regulation 4(1), S was not entitled to the protection of the Act in relation to the discrimination she experienced even though this tendency was a consequence of an already protected impairment, S's autism (*ibid*: para 92). However, the court did find that the First-tier

Tribunal had erred in law in 'failing to make sufficiently specific findings of fact about any tendency to physical abuse' ([2015] UKUT 0007 (AAC), para: 115).

Pursuant to determining whether a person has a 'tendency to physical… abuse', the Upper-tier Tribunal said that this is an issue of fact and the Tribunal must consider the circumstances of the individual case. They set out guidance in this regard, stating that, firstly, there 'must always be an element of violent conduct' but this conduct on its own was not sufficient to amount to a 'tendency to physical abuse'. Rather, 'the greater the level of violence, the more readily it will fall within the meaning of "physical abuse"' (*ibid*: 116). Secondly, because the regulation is concerned with the manifestation of behaviour, 'there is no requirement for any knowledge on the part of the perpetrator that what they are doing is wrong' (*ibid*: 117). Thirdly, it was noted that a finding of physical abuse in the absence of some sort of misuse of power or coercion 'would… likely… require careful justification' (*ibid*: 118). Fourthly, while children are included within the ambit of regulation 4(1)(c), 'the child's development is a factor which will be considered in deciding whether or not that particular child has a condition to bring it within the remit of the regulation' (*ibid*: 119). Finally, in their fifth point of guidance, and most worryingly, the Upper-tier Tribunal said that:

> 'It is not necessary for a tendency to physical abuse to be manifested frequently or regularly. It may be that the tendency is only displayed in response to certain trigger events, but that does not mean that it is not present at other times' (*ibid*: 120).

They did, thankfully, limit the interpretation of the regulation so that 'it is only to the extent that such disorders manifest themselves in the tendency identified in the regulation that they are excluded' from the Equality Act 2010's protection (*ibid*: 94; 131). Therefore, the person would still be protected in relation to any discrimination which is *specifically related to the actual impairment* under Section 6 that does not arise from the excluded effects of their condition under regulation 4(1).

Although the decision of the court was made in the context of the education system, there is a risk that analogous arguments could be run with respect to bodies within the CJS. If the court had not restricted its decision in this way, there would have been a risk that the application of the Equality Act 2010 to bodies within the CJS, with respect to people with autism who are shown to have any of the excluded conditions under regulation 4(1), may have rendered its protection entirely obsolete. This would be contrary to the Equality and Human Rights Commission's Guidance (see 2012c), the Equal Treatment Benchbook (Judicial College, 2013) and the Advocate's Gateway Toolkit on autism (2015). Nevertheless, the interpretation of regulation 4(1)(c) by the court *in X v GB of a school* is problematic. It would be easy to see how – without properly understanding that the application of regulation 4(1) is an issue of fact relevant to the individual circumstances of a particular discrimination claim – misinterpretations of this case could perpetuate the misconception that the Equality Act 2010 does differentiate protection on the basis of the association between the defendant's disability and their alleged or actual offending. Moreover, the Upper-tier Tribunal's fifth point of guidance on the meaning of 'tendency to physical abuse' (see above) is in conflict with the 2012 NICE Guidance on working to reduce triggers for challenging behaviour for people with autism. The Upper Tribunal's interpretation could act as a disincentive to public bodies to make environmental changes that would prevent this kind of tendency towards abuse being triggered. It also undermines the spirit of the Concordat (DOH, 2014) and the draft *Revised Autism Statutory Guidance* (see Chapter 5) on such behaviours. The spirit of these documents is best reflected in the following statement from *Think Autism*:

> 'It is possible for people with complex needs and autism to be supported appropriately to live in the community. They have equal rights to a fulfilling and rewarding life as anyone else.' (DOH, 2014a: 37)

Further, as we saw in Chapter 1, there is insufficient evidence in the 'psy' literature to show that there is an association between autism and violence. These tendencies are not core attributes that would lead to a diagnosis of autism. Instead, the 'psy' literature is careful to explain that there are certain circumstances in which the symptomatology of autism may 'likely be involved when criminal actions occur' but this 'is not to say that having a developmental disorder enhances the likelihood of acting criminally *per se*' (Haskins and Silva, 2006: 377-8). This is exactly why criminology needs to attend to the wider debates in critical disability studies to better critique restrictions to the legal definition of disability and its understanding of the aetiology of behaviour which may be considered as criminal.

The beginning of this section set out the purpose of investigating the application of the Equality Act 2010 in the court process: to establish what operative role the Act had on decision-making about policies and practices in relation to adult defendants with autism. Many interviewees noted the role of reasonable adjustments and, as discussed above, highlighted the gap that they perceived between the requirements of the Equality Act 2010 in relation to defendants with a disability and the practical application of its provisions in the criminal justice process and the courtroom in particular. Interviewees also identified the specific lacuna in relation to its application to defendants with autism, for example:

> *'I suppose… reasonable adjustments could be used more frequently and… [in terms of]… what would be more appropriate [for] persons with autism, maybe that is already covered but the fact that we needed the Autism Act suggests that the previous legislation was not enough or [had] highlighted [this issue] as being relevant'* (Senior Forensic Psychiatrist 1).

Yet, as will be seen in Chapter 5, the restricted jurisdiction of the Autism Act 2009 failed to cross-reference provisions of the then Disability Discrimination Act 2005 or reflect the provisions of the Equality Act 2010, which were being developed

contemporaneously to the Autism Act, in extending its statutory application to criminal justice organisations.

4. Liaison and Diversion and changing epistemologies

The 2009 Bradley Report's recommendations and the subsequent Liaison and Diversion agenda have the potential to significantly change the ways in which the English CJS responds to offenders with mental health problems and learning disabilities, including those with autism. They present clear challenges to the epistemological framework within which criminology has developed; making the need for a clearer disability perspective particularly germane. Baldry *et al* argue that, by integrating the traditionally distinct disciplines of critical criminology and critical disability studies, we can re-conceptualise the complex matrix of concerns which affect the marginalised group of offenders with mental health problems and learning disabilities and thus represent:

> 'an interconnected and fluid continuum encompassing social, systemic, community, institutional and criminological processes with individual experiences of impairment, disability and social discrimination, disadvantage and exclusion' (2008: 31).

The mapping of offender pathways within, out of, and often back into the CJS is a useful starting point in recording this 'matrix of concerns'. Such projects inevitably introduce 'a range of dilemmas which cross boundaries from the theoretical, methodological, ethical and political, to the institutional and personal' (*ibid*). It is argued here that the 'dilemmas' to which Baldry *et al* refer are borne out in practice with respect to some key changes heralded by the diversionary approach taken in The Bradley Report and a number of its central recommendations. Thus, there is value in importing the intellectual resources of critical disability studies into the criminological mainstream, and not merely into critical perspectives. This raises some important issues for future criminological research and policy implementation.

‘Dividing practices’ have historically influenced the longstanding political tensions between the DOH and the MOJ (Seddon, 2007: 61). The Bradley Report built on broad definitions of mental health problems and learning disabilities: broader than strict medical models but not directly referring to the social model of disability in the then DDAs of 1995/2005. In doing so, it demarcated a new ‘dividing practice’ for governing offenders in these categories. It is significant, therefore, that while the MOJ commissioned the Report, and the Government set up a Health and Criminal Justice Programme Board to oversee delivery of its recommendations (DOH, 2009: 14) – comprising cross-government departments and agencies – ultimate competency for implementing the Report lies with the DOH which has the main responsibility for funding (Bradshaw/Westminster Policy Forum, 2009)). Augmenting the transfer of prison health services in 2003 to PCTs (DOH, *ibid*), the increased responsibility given to the DOH and NHS England in implementing the Report’s recommendations means that medical models of mental health problems, learning disabilities and autism have prevailed as they have been subsumed under the broader category of vulnerability. The relevance of such models is not entirely dismissed, but they should be supplemented by the kind of analysis found in critical disability studies which shows that they are not based on value-free ideology.

Moreover, this shift does not mean that criminological theorising about crime control, its institutions, and its effectiveness should end when the offender is diverted out of the CJS. On the contrary, the diversion into health and social care services adds to developments over the preceding four decades which have undercut the viability of the specific ‘institutional epistemology’ of criminology within which it has operated for most of its existence, i.e. the institutions of the criminal justice state (Garland and Sparks, 2000: 19). Responses which divert vulnerable defendants ‘within’ and ‘out of’

the CJS are still modes of regulating crime, and will have an impact on how crime is experienced by both offender and victim. As argued in Chapter 2, a clearer disability perspective could help criminologists to reconsider the nature of the criminality of offenders with autism and indeed of the crimes with which they are involved. The broadening of the Liaison and Diversion Services beyond offenders with mental health problems and learning disabilities to cover the 'threshold' category of vulnerability – which includes defendants with autism – embeds this dividing practice for these defendants.

Conclusion

In attempting to envisage a disability perspective for criminology, this thesis does not take an abolitionist approach to prisons in relation to the policy implications of such a perspective; instead, it has taken one guided by a principle of penal moderation (Loader, 2009). It could be argued that the Liaison and Diversion agenda, advocated by The Bradley Report and established by the new Liaison and Diversion Services, is a step towards this moral approach. However, support for the Liaison and Diversion agenda is qualified by heightened awareness that new institutions and Liaison and Diversion Services could reflect old problems present in the CJS. Studies within criminology on 'mentally-disordered' offenders have periodically documented the fact that 'problems of due process dog the diversion arena' (Peay, 2007: 507). Such concerns are not wholly assuaged by the L&D Service Specification. The issue of due process is not mentioned in NHS England's *Operational Model* (2014). In developing these services, boundaries need to be drawn to prevent oppressive control by alternative modes of regulation. In diverting individuals *within* and *out of* the CJS, there needs to be consideration of the increased risk of 'net-widening'. This is why a disability perspective is necessary for the development of models of justice which inform the

treatment of offenders with disabilities as they move between the complex pathways of health, social care and the CJS.

Defendants with autism are affected by these dividing practices, coming under the remit of both the Equality Act 2010 provisions and as a specific sub-group included in the vulnerable cohort covered by the Liaison and Diversion Agenda. One reason for this disjuncture is that the different categories applied to these defendants attract different sets of policies, procedural protections and substantive outcomes. Rather than citizens with disabilities, they are characterised as *vulnerable* in the policy framework which underpins the establishment of the Liaison and Diversion Services. Although not given primacy in this framework, technologies of identifying risk are also present in the L&D Service Specification. The restructuring of the Probation Service (see Chapter 5) around the risk level of defendants may lead to an expanded focus on risk in the Liaison and Diversion agenda going forward, and this is an issue which should be monitored in the future.

The conceptualisation of these groups as *vulnerable defendants* may assist in improving attitudes towards and awareness of the needs of these defendants. However, use of this terminology may actually perpetuate the asymmetrical access to, for example, Special Measures and Intermediaries for *vulnerable defendants* in contrast to *vulnerable victims* and *witnesses*. It also seems to sustain an oblique amnesia that many individuals have protected characteristics under the Equality Act 2010 and thus facilitates an abrogation of responsibility towards these defendants in accessing this Act's legal protection (see Chapter 2). Beyond legal protection, this oblique amnesia created by the predominance of the rationality of vulnerability sustains the dominance of medical models of disability and the mad-bad binary. The predominance of the broad category of vulnerability also obfuscates the social model of disability which, as we saw

in Chapter 2, is embedded in parts of the Equality Act 2010 and entrenched in the UNCRPD. This masks the paradigm shift made by this important international legislation in 'comprehensively and emphatically [viewing] persons with disabilities as subjects with rights, rather than objects of charity, medical treatment or protection' (Fredman, 2011: 98).

It is true that, as discussed in Chapter 2, the Equality Act 2010 does not entirely 'measure up' to the UK's international commitments to the UNCRPD (Butlin, 2011), particularly in transposing the social model into legislation. In light of interpretation of regulation 4(1) by the court in *X v Governing Body of a School*, one can see some appeal for criminal justice policymakers to bypass utilising concepts of disability and instead base their policies on the rationality of vulnerability. However, as the primary source of domestic equalities legislation on disability, it provides an important starting point for understanding when and whether defendants are conceptualised from the perspective of this particular legal status. It creates space for a criminological critique from a disability perspective, informed by critical disability studies and the social model of disability. Chapter 5 considers how the statutory requirements of the Autism Act 2009 do apply to bodies within the CJS and furthermore, how this Act's statutory parameters do not mirror the reach of the Equality Act 2010. While the Autism Act's *Statutory guidance for Local Authorities and NHS organisations to support implementation of the Adult Autism Strategy* (the 'Revised Statutory Guidance') (DOH, 2015b) does stretch to the interface between health, social care and the CJS, the paradigm does not treat adults with autism who end up in the CJS as 'subjects with rights'. Instead, the focus is 'on Liaison and Diversion services, which will identify and refer people to help and support for a range of vulnerabilities, including autism…' (DOH, 2014b: 45).

Chapter 5 – The Autism Act 2009, Statutory Guidance and related policy

Introduction

The inception of the Autism Act 2009, along with its accompanying Autism Strategy (DOH, 2010a; 2014) and Statutory Guidance (2010d; 2015a) have brought the issue of the provision of effective services for adults with autism to the fore in public policymaking (DOH, 2010a&c). As outlined in Chapter 3, the material in this chapter records a 'history of the present' (Seddon; 2007; Foucault, 1991) by integrating an analysis of qualitative data taken from legislation and policy documents with a thematic narrative informed by interviews with elite decision-makers.

A number of central themes are examined in this chapter. The Autism Act 2009 was going through Parliament contemporaneously to the Equality Act 2010, and the original Autism Strategy, *Fulfilling and rewarding lives*, explicated that it was 'built on the Bradley Report' and 'other policies' (See DOH, 2010a: 19). Yet, the original Statutory Guidance, *Implementing fulfilling and rewarding lives* (2010d), did not comprehensively relate to the Bradley Report (2009) or the subsequent DOH policy on liaison and diversion (DOH, 2009), as discussed in Chapter 4. This is interesting because while the Bradley Report had originally been under the jurisdiction of the MOJ, the operationalisation of its recommendations shifted to become the responsibility of the DOH. Section 1 of this chapter, therefore, asks why the remit of the Autism Act 2009 and accompanying Statutory Guidance (DOH, 2010d) was not extended to cover bodies in the CJS in order to mirror the statutory remit of the Equality Act 2010. This Section also looks at the changing rationales when implementation of this policy shifted from administration by the Labour to the Coalition government. Finally, it asks why the

requirements of the Statutory Guidance were not extended to the offender management functions of the DOH and those bodies working on behalf of the department in this regard. Although the statutory requirements of the original Statutory Guidance did not apply to bodies within the CJS (see below: Section 3), the DOH's Local Self-Assessment Framework – produced to support local authorities, NHS organisations and their partners to implement the Statutory Guidance – did contain the Quality Outcome of 'ensuring adults with autism are no longer managed inappropriately in the CJS' (DOH, 2011: 7). Section 3 interrogates what interviewees thought appropriate management of adult defendants with autism might look like in practice, in order to elicit what logics drive the governance of this group.

In 2014, the DOH published a 'Refreshed' Autism Strategy for England, *Think Autism*, and the *Revised Statutory Guidance* in June 2015 with 'an increased focus on areas such as criminal justice' (DOH, 2015a: 4). Section 3 assesses what strategies and technologies of governance are included for defendants with autism in *Think Autism,* and how these are integrated into the *Revised Statutory Guidance*. It is argued in this chapter that the first Autism Strategy and Statutory Guidance missed the opportunity for coherent policy and practice as its statutory requirements do not apply to public bodies within the CJS. The courts, police and probation services are only expected to follow its requirements by reason of best practice (DOH, 2010c: 8). Even for the institutions where the Statutory Guidance has statutory force, its provisions are weakened by the absence of the language of mandate. The 'refreshed' Autism Strategy, *Think Autism* (DOH, 2014; see section 3), has assisted to a limited extent in considering issues affecting defendants coming into contact with the CJS more closely, but it has still left many of the more significant issues unresolved.

The interconnectedness of the health, social care and criminal justice systems was noted in Chapter 4. The failure of local authorities to provide adults with timely diagnoses, assessment and support were the *raison d'être* for the Autism Act 2009 and subsequent policy work stream. Early intervention and support was seen as a way of preventing the kinds of crises which may lead this group to come 'into contact with the CJS' (DOH, 2010a: 37). Despite the great progress instigated by the Autism Act 2009 and Autism Strategy, the statutory status of the *Revised Statutory Guidance* has not been extended to cover public bodies within the CJS, meaning that recourse to this guidance does not effectively alleviate the inconsistent and problematic processing of the cases of adult defendants with autism in the criminal courts. Chapters 6-8 discuss the knowledge deficit of criminal justice decision-makers in adult social care provision and how this plays a role in increasing criminalisation of adult defendants with autism. This chapter, therefore, aims to lay a foundation for that discussion, in explaining the disjuncture in the interfaces of these systems and the incoherent approach to the governance of this group.

1. Mind the gaps: the Autism Act 2009 and bodies within the CJS

i) The Autism Act 2009 and 2010 Autism Strategy and Statutory Guidance

Widely welcomed and frequently celebrated as the first piece of legislation to focus on a specific disability, the Autism Act 2009 was brought to Parliament as a Private Members Bill by Conservative MP, the Right Honourable Cheryl Gillan (HC Deb 21 January 2009, c754WH) after she came top of the Backbench Business Committee

Ballot. The Autism Act 2009 places two main requirements on the Secretary of State for Health. The first requirement is to produce an 'autism strategy' which meets

> 'the needs of adults in England with autistic spectrum conditions by improving the provision of relevant services to such adults by local authorities, NHS bodies and NHS foundation trusts' (Section 1(1)&(2)).

Secondly, in order to secure the implementation of the autism strategy, the Secretary of State is required to issue guidance to local authorities on the exercise of their social services functions and to NHS bodies and foundation trusts in the 'exercise of their functions concerned with the provision of relevant services' (Section 2; 2(a&b)).

The first national Autism Strategy 2010 set out the agenda for long-term change to achieve the goal of a society that accepts and understands autism. It also aimed to create opportunities to help individuals on the autism spectrum to live fulfilling and rewarding lives. The strategy identified five specific areas for action between 2010 and 2013:

> '1. increasing awareness and understanding of autism among frontline professionals;
> 2. developing a clear, consistent pathway for diagnosis in every area, which is followed by the offer of a personalised needs assessment;
> 3. improving access for adults with autism to the services and support they need to live independently within the community;
> 4. helping adults with autism into work, and;
> 5. enabling local partners to plan and develop appropriate services for adults with autism to meet identified needs and priorities.'

It highlights that adults on the autism spectrum often only 'come to the attention of services when they reach crisis point [including]: a severe mental health problem, physical illness, homelessness **or coming into contact with the CJS**' (*ibid*: 37; emphasis added). When the needs of adults on the spectrum are recognised earlier, and are responded to with autism-specific strategies and support, 'crisis can be prevented; this is beneficial not only to them and their families but also to wider society' (*ibid*). Despite the Autism Strategy's frequent references to the problems experienced by

adults with autism entering the CJS (DOH, March 2010: 37; 43-4; 68) and the focus on awareness raising in the Delivery Plan to include the DOH working through their 'National Learning Disability Offender Steering Group to roll out autism awareness training to all staff in the criminal justice sector' (DOH, 2010c: 13), the requirements in the subsequent Statutory Guidance only apply to local authorities and NHS bodies (DOH, 2010d). Therefore, other public providers of public services, such as the police and probation services 'are not legally required to have regard to it' (DOH, 2010c: 8). Instead, they are encouraged to follow the guidance to 'help improve the delivery of the services they provide' (*ibid*).

As the Autism Act 2009 only explicitly mentions local authorities, NHS bodies and NHS foundation trusts as subject to the guidance, for the purpose of implementing an autism strategy, to improve the provision of relevant services to adults with autism (sections 1&2), it would be difficult to extend the 'duty to act' (section 3) to other public bodies without revising the Act itself. Thus, although the Autism Act 2009 is a hugely positive step forward, this piece of legislation could have mirrored the Equality Act 2010 to apply across public bodies more broadly or at least have been extended to cover the exercise of certain functions of criminal justice agencies. This is especially pertinent given the recognition by The Bradley Report (2009) of the problems arising from siloed disciplinary working (see Chapter 4) for offenders with learning disabilities and mental health problems, including offenders with autism. Indeed, the Health and Criminal Justice Programme Board's 2009 Delivery Plan for the Bradley Report acknowledged the 'interdependencies' of the health, social care and criminal justice sectors and their associated policy areas and recognised that 'this plan is published in the context of many other Government initiatives and should not be viewed in isolation' (DOH, 2009: 17). It went on specifically to cite 'the future strategy for adults with

autism spectrum conditions (currently being developed)’ as one such example (*ibid*: 18).

Further, had the scope of the 2010 Statutory Guidance’s requirements been extended, more coherent practice across the boundaries of health, adult social care and criminal justice could have been facilitated. For example, the requirement that general autism awareness training should be available for everyone working in health and social care with the aim of ensuring that staff are ‘able to identify potential signs of autism and understand how to make reasonable adjustments in their behaviour, communication and services for people who have a diagnosis of autism or who display these characteristics’ (DOH, December 2010: 13) could have helped to overcome some of the problems recorded in the literature discussed elsewhere in this thesis (see Chapters 1, 6 and 7).

The 2010 Guidance says that ‘[l]ocal authorities, NHS bodies and NHS Foundation Trusts should develop local commissioning plans for services for adults with autism’; in doing so, they should collect information locally about the ‘number of adults known to have autism in the area’ (DOH, December 2010: 24-5). From the research reviewed in Chapter 1, we know that prevalence data is inconclusive and, as the first Autism Strategy noted, adults on the autism spectrum often only ‘come to the attention of services when they reach crisis point [including]: ...coming into contact with the CJS’ (DOH, 2010a: 37). Therefore, if the data collection requirements had been extended to the police and other criminal justice bodies there would be a clearer picture of where (and how) offenders with autism are governed within the CJS.

The 2010 Statutory Guidance also required that ‘[e]ach area should put in place a clear pathway for diagnosis of autism, from initial referral through to assessment of needs’ and the 2012 NICE Guideline sets out a model care pathway as part of a new clinical guideline for adults with autism ‘concerned with the diagnosis and management

of adults on the autism spectrum in the community and in prison' (DOH, March 2010: 14-15; NICE, March 2012: 13). Amongst their extensive recommendations, NICE states that Autism Strategy Groups should be responsible for developing, managing and evaluating local care pathways that 'promote a range of evidence-based interventions at each step in the pathway and support adults with autism in their choice of interventions' (*ibid*: 162). This involves promoting services for all adults with autism, including 'people in the CJS' (*ibid*: 168). These pathways should 'provide an integrated programme of care across all care settings... [and] establish clear links (including access and entry points) to other care pathways...' (*ibid*: 162). To ensure effective provision of care and support for adults with autism, NICE recommends that representation from the CJS is included in this multi-agency group. So, even though service providers in the CJS are only *encouraged* to follow the Statutory Guidance to achieve best practice and are not subject to its statutory requirements, this NICE Guideline will potentially increase the overlap between the governance of adult offenders with autism on clinical and criminal justice pathways. Taken in conjunction with the general diversionary agenda for offenders with mental health problems and learning disabilities, these Guidelines augment challenges already made to the 'institutional epistemological' (see above) framework that has developed within criminology (see Garland and Sparks, 2000: 19; Chapter 4 above) legitimating the governmentality analysis undertaken here.

ii) The shaping of the 2009 Act: understanding why bodies within the CJS were excluded

Given that at the time the Autism Act 2009 progressed through Parliament there was a bustle of legislative and policy-making activity in relation to the Equality Act 2010 and the Liaison and Diversion agenda, why was the remit of the Autism Act 2009 not

extended to cover bodies in the CJS? Analysis of the Parliamentary debates about the 2009 Autism Bill and elite interviews reveal that this was, in part, due to the influences of the National Audit Office (NAO) and NAS reports, along with the nature of the legislative instrument which led to its introduction to the house. It was also influenced by legislative pragmatism driven by the limited time available to achieve Royal Assent for the Private Member's Bill and the looming 2010 general election.

The origins of the substantive content of the Autism Bill in its 2009 form can be charted back as far as 2000, when the parents of a child with autism, Ivan and Charika Corea, began an autism awareness campaign and worked with the Labour government to initiate the first 'autism awareness year' in 2002 (HC Deb 9 Jan 2002, c226WH). By 2008, the Autism Awareness Campaign UK, in collaboration with the NAS and other leading autism charities, were successful in securing two Early Day Motions, 1359 and 705, calling on the government to launch a cohesive 10-year national strategy for autism and the setting up of an Autism Taskforce to address the serious education and health issues facing parents, carers and people with autism and AS (HC Deb 26 April 2007; 15 January 2008). Building on the work already done by the Autism Awareness Campaign UK, the NAS's report *I Exist* (2008) played an important role in shaping the substantive content of the proposed national autism strategy and in calling for related guidance. The NAS had, in 2005, published a *Guide for Criminal Justice Professionals* who may come into contact with people on the autism spectrum – as victims, witnesses, suspects or offenders – but this issue was not integrated into the *I Exist* report. It focused on four core areas where changes needed to be made in Health and Social Care in order to transform the lives of people with autism. These were: counting the national prevalence of autism and recording data on the number of adults with the condition at the local authority level; better assessing the needs of adults with autism through

improved access to diagnosis and social care assessments; increased funding of local support services for this group, and improved leadership in government through the introduction of statutory guidance to improve commissioning at local authority level (NAS, 2008).

In turn, the report also influenced the remit and content of parliamentary questions on autism that year (HC Deb 25 Feb 2008, c1189WH), along with the Adults with Autism Bill 2008 (HC Deb 20 May 2008, C163WH) and the later 2009 Autism Bill, which was ultimately enacted. Angela Browning MP's first reading of the prior Adults with Autism Bill 2008, under the Private Members' Ten Minute Rule, was an early attempt to convey to the House the need to change the law in this area. The *I Exist* report had highlighted the discrepancy 'between the increasing recognition of the need to provide support to people with autism and the action taken to meet that need' (HC Deb 20 May 2008, c163WH). Once the 2009 Autism Bill began its journey through the Commons, the NAS worked with both the DOH and the Department for Children, Schools and Families 'to develop the new policies' that were central to the Parliamentary debate on the Bill (Phil Hope MP, HC Deb 27 Feb 2009, c539WH). The expert external reference group, which included a coalition of fifteen charitable organisations led by the NAS's Mark Lever, drew heavily on *I Exist's* four areas for change to develop the 'four pillars of reform' in the proposed strategy, (HC Deb 27 February 2009 cc483;543-4). The first pillar was 'better specialist and mainstream health services' and the second was to '[tackle] social exclusion, including employment…' The third pillar was 'improved choice and control for adults with autism, not least through the much better personalising of services… and the fourth [was] improving the skills and knowledge of the staff who work with adults with autism' (*ibid*).

The NAO report, *Supporting people with autism through adulthood,* also heavily 'informed discussions' around the 2009 Bill (HC Deb 29 April 2009, c5WH), in particular, in providing an evidence base for the first and second pillars noted above. It focused on 'the extent of existing services and how they meet the needs of adults regarding health, social care, employment and carers' (HC Deb, 27 Feb 2009 c523WH). It assessed the efficiencies in public spending in these areas and found that the costs of increased funding of specialist autism services in these areas could 'over time be outweighed by overall public expenditure savings' (NAO, 2009: 5). Although the NAO's survey showed that there were some court diversion services at that time which aimed to minimise the inappropriate entry of vulnerable adults into the CJS, such services 'were reported in only 33 per cent of areas, and less than one in eight of these have specialised autism support' (*ibid*: 25). It further noted that the limited research available suggested that 'high-functioning autism and AS may be disproportionately represented among the prison population; and that a proportion of these detentions could potentially have been avoided through appropriate early intervention and case management' (*ibid*: 51). Unfortunately, however, the NAO's economic model did not 'take into account potential savings from avoiding inappropriate interactions with the CJS' (*ibid*). Certainly, parliamentary debates on the Bill raised the issue of extending its substantive contents beyond these four pillars and expanding its statutory remit. In the second reading of the Bill, Dr Stephen Ladyman MP remarked that '[s]urprisingly, the four pillars do not include law and order and the CJS' (HC Deb 27 Feb 2009, c544WH). He went on to request that Phil Hope MP, the Minister of State at the DOH, ask the Home Secretary and the Lord Chancellor to 'issue the same sort of guidance as he is talking about for the health services and social care to the people responsible for dealing

with autistic people when they enter the criminal justice system.' In response, Phil Hope MP agreed that he had 'raised an excellent point':

> '…I dare say that members of the external reference group… will take into account both the plea that he has made about a possible further pillar of reform and his suggestion of what that pillar might be… the national external adviser… is particularly concerned about what happens to those people with autism who end up in our CJS as offenders. Their needs are not understood and they are in completely the wrong place to deal with the issues that they have to deal with in their lives. My hon. friend is knocking on an open door, and I will ensure that his comments are drawn to the attention of the appropriate people' (*ibid*).

On the Autism Bill's third reading in the Commons, Ann Keen MP, the then Parliamentary Under-Secretary of State for Health, noted the Bradley review was 'worth mentioning' and that the government would 'be convening a special event that focuses on the CJS and autism as part of the programme of stakeholder engagement to support the consultation on the strategy' (HC Deb 19 Jun 2009, c578WH). On its second reading in the Lords, Baroness Tonge also raised the issue:

> 'A huge problem faced by adults with autistic spectrum disorder [is that] some people do not have the condition recognised when they are children. As they move into adulthood, sadly, some end up in the criminal justice system and, even worse, can often go to prison. What are we doing to identify these people before they get into trouble?' (10 July 2009: Column 894)

As we saw in Section 1(i) above, the entry of adults with autism into the CJS never became a fifth pillar of the strategy. Instead, the 2010 Strategy depicted such entry as a failure in the operation of the health and social care systems when an individual had reached 'crisis point'. The influence of the substantive considerations of the *I Exist* report and evidence base available to the NAO in developing their model for maximising the efficiency of public expenditure on specialist services for adults with autism prevailed. These materials were crucially important in revealing that in the four pillars originally identified, legislators were 'starting from an extremely low base', particularly as the NAO had reported that 74% of local authorities did not have a

‘commissioning strategy for adults with autism’ and ‘that will be one of the biggest challenges to shifting the culture’ (Browning, 19 Jun 2009: Column 550). This was also true of employment, where ‘the Department for Work and Pensions has a long way to go to get up to speed’ (*ibid*). There is a sense, therefore, that the ‘low base’ in existing service provision led to legislative pragmatism. In the end, this overtook the objective of legislative coherence in terms of the ambit of the Act.

Such pragmatism is also likely driven by the type of legislative instrument that the Autism Bill was, and the timing of its passage through Parliament. Debates in Hansard reference the concerns of members of both Houses that, as a Private Members Bill brought by a backbencher, it had more limited parliamentary time than a Bill brought by a cabinet member would have (HC Deb 27 Feb 2009, c494WH; 29 April 2009, c6WH; 13 May 2009, c29WH). Consequently, there was a risk that it would not reach Royal Assent in time for the last Parliamentary session before the 2010 General Election campaign began (*ibid*: 27 Feb 2009, cc495-6WH). Further, while the Labour government supported the autism strategy and statutory guidance, already set in play by the Early Day Motions and earlier Adults with Autism Bill 2008, they thought the same outcomes could be achieved without recourse to legislation, so as not to create ‘the risk of rigidity, inflexibility and inability to deliver change that might be unintended consequences of’ this measure (Phil Hope MP, HC Deb 27 Feb 2009, c540WH). Indeed, at the second reading of the 2009 Autism Bill, the Labour Government had already made ‘cast-iron reassurances about the Government’s intentions’ to produce an autism strategy and statutory guidance (*ibid*: c540WH). They believed that these outcomes could be achieved by properly including people with autism in other inter-departmental initiatives and the Guidance could, instead, be placed on statutory footing under section 7 of the Local Authority Social Services (LASS) Act 1970 (*ibid*:

c544WH). The Government was defeated and the Bill went through to the third reading. Consequently, by the first sitting of the Bill Committee, it was made clear that the Autism Bill garnered 'cross-party support' (Rt Hon. Cheryl Gillan MP, HC Deb 29 April 2009).

That the strategy and the statutory guidance were incorporated into this primary legislation may have been a feature leading to the ultimate ossification of the range of public bodies covered by these measures. In its final manifestation, the Autism Act 2009's prescription about the content of Statutory Guidance issued under section 2(5) excluded reference to the CJS. Under section 2(1)(a), the Act prescribed that when issuing guidance to secure the implementation of the autism strategy, it was issued to local authorities within their meaning under the Local Authority Social Services Act 1970 and 'to NHS bodies and NHS foundation trusts about the exercise of their functions concerned with the provision of relevant services' (Section 2(1)(b)). This was done in order to ensure that local authorities and NHS Trusts would be subject to judicial review if these bodies did not follow the Autism Statutory Guidance. Why was this technicality important? Parliamentarians were keen that the guidance had 'bite'. Utilising the Section 7 provisions within the Local Authority Social Services Act 1970 was helpful in this regard, as Phil Hope MP explained to the House:

> 'Section 7 of the Local Authority Social Services Act 1970 gives the Secretary of State powers to issue general guidance. Local authorities are then required to exercise their social service functions in accordance with that guidance. Over the years, a body of case law has established that this requirement is more than simply taking account of any guidance under Section 7. Local authorities are expected to act in accordance with such guidance unless they can show compelling reasons not to do so. A local authority that ignored guidance issued under Section 7, or arbitrarily chose to disregard it, would be acting unlawfully and could find itself subject to judicial review or default action by the Secretary of State. Thus, although not law in the same way that regulations are law, the obligation to act in accordance with section guidance is very strong and such guidance is commonly referred to as statutory' (HC Deb 27 February 2009, cc481-548WH).

The reliance on the Local Authority Social Services Act 1970, however, makes it difficult to extend the ambit of the statutory guidance to public bodies in the CJS. This may have caused inadvertent ossification, with the provision being interpreted as an exhaustive list of statutory bodies under a duty to act. Responses from elite interviewees (see below) indicate that this prevented further statutory extension in *Think Autism* (DOH, 2014a) and the *Revised Statutory Guidance* (DOH, 2015b). A more coherent approach in terms of application to public bodies could have been achieved by applying the approach taken in Section 3(5) of the Autism Act (Northern Ireland) 2011. This section is drafted so that the 'Department' 'may make regulations as regards the content of the autism strategy'. Under Section 4(1), 'Northern Ireland department' is given in list form and includes 'the Department of Justice'.

Strangely, the Equality Act 2010, which started its journey as a Bill through the House of Commons on 4th April 2009 – just over two-and-a-half months after the Autism Bill 2009 – was not discussed specifically in either the Commons or Lords' debates on the Autism Bill; nor, indeed, were the provisions of the 2005 Disability Discrimination Act. There may be something in the fact that responsibility for the Autism Bill 2009 sat with the DOH, where conceiving individual impairments in terms of medical models of disability prevailed, rather than as disabilities as defined in equality legislation (see Chapter 4 above). It is noteworthy that the Report stage and third reading of the Autism Bill in the Commons was on 19th June 2009. Considering that, by this time, the Equality Bill had progressed through 16 sittings at Committee stage, it is peculiar that the debate in the Commons on the Autism Bill pays such scant attention to it. Although autism is regularly referred to as a 'disability', its legal status under the then Disability Discrimination Act 2005 or the then forthcoming Equality Bill 2010 was not discussed directly. Perhaps this was because the timing was so precarious:

there may have been a lack of clarity about the final enactment of the disability provisions that had been in the Disability Discrimination Act 2005 as they were to become subsumed into the Equality Act 2010. Therefore, it may have been easier to legislate on autism on its own terms. Whether it was right for the Bill to prioritise the needs which arise from one particular impairment, autism, was a concern raised in debate (Sharon Hodgson MP, 27 Feb 2009, c486WH).

Perhaps the lack of focus on the disability provisions in the DDA 2005 and in the Equality Act indicates that there were fears that the momentum for improvements for people with autism would be slowed down by attaching provisions to this legislation. It may have also risked losing the focus on the specific impairment of autism to the prevailing multifarious needs of disabled people as a generic category. There is some evidence to suggest that these concerns were justified. The Equality Act 2010 did not come into force until 1st October 2010, with some provisions and guidance delayed until April and September 2011. A key term search of the legal databases LexisNexis and Westlaw between the period of October 2010 and January 2014 has been conducted to ascertain the number of cases involving individuals with AS where the Equality Act 2010 had been used in the 'legal arena' (Foster, 2014). This study found that, with regards to AS, the Equality Act 2010 has not 'made a great impact' on how courts deal with individuals with AS in case law. In the 'legal domain' of the CJS, in the period reviewed, there was only one such case involving AS (2014: 62).

iii) Extending the scope of the Autism Strategy and Statutory Guidance after Royal Assent of the Autism Act 2009?

Research interviews, undertaken with senior civil servants and clinicians, revealed that policy-makers did consider widening the parameters of the statutory requirements of the

Autism Statutory Guidance to apply to the DOH in exercising its functions in relation to offender health and to public bodies in the CJS. Senior Clinical Advisors wanted the Statutory Guidance ‘to mirror the [Autism] Strategy’:

> *‘…I recognised that people with autism were not recognised in the CJS and it was not working but there were no resources or expertise and therefore we focussed on the health and social care system.’*

There was a sense that drafters ‘*were under time pressure [and] had to do a lot of consultation*’ and they never ‘*caught up with Bradley*’ (Senior Clinical Advisor) in the process of developing the Statutory Guidance, despite this being considered in Parliamentary debate. A research interview with Lord Bradley revealed that, when asked what role he had in contributing to the 2010 Autism Strategy and Statutory guidance, he responded:

> *‘Me personally? None. I wasn’t asked. Just to put that in context, my report was commissioned by the government as an independent review with particular terms of reference which was completed and reported to the government who then ran with the recommendations made. Those were not specific to any particular condition and therefore I was not charged with particular activity further than that.’*

It is pertinent to note that the Autism Strategy (DOH, March 2010) and the first year Delivery Plan (DOH, April 2010) were published under the Labour Government before the 2010 General Election, while the Autism Statutory Guidance (DOH, December 2010) was drafted after the election under the Coalition Government. It is clear that this had an impact on the ambit of the Statutory Guidance as it was being drafted after the 2010 election, which meant:

> ‘*People were unsure what would happen with the change of government. We wanted to still capture what the next government would like to do. We did go to meet other government departments e.g. communities and local government; we tried to work with the [MOJ] but it was hard to get meetings with them. It came down to [difficulties] of cross department working and we were under too many time pressures’* (Senior Civil Servant 1).

As the administration of this policy shifted from the Labour to the Coalition government, implementation moved away from being led by central government departments towards localism (see Chapter 4):

> '*The government pre-2010 was a government that did things at a national level rather than regulate at a local level, for example, valuing people, [Mental Health] service contracts, establishing NICE; national standards for policy and then distilling through networks. This new government want[ed] local priorities and understanding that what is right in central London is different to rural Gloucestershire. [It wants] [l]ocal resource diversion. The Autism Strategy was written by the government for a national level and the Statutory Guidance was written for local level driven upwards*' (Senior Clinical Advisor).

This, however, has had implications for efficient progress:

> '*And you know although we hold the ring as a department on issues like learning disability and autism, the way in which we do that is much softer now – it's much more about influencing and negotiating, we can't just say well we're the lead department on this, it doesn't really hold much water…*' (Senior Civil Servant 2).

They were also aware that the NICE Guidelines were going to focus 'around challenging behaviour', which describes:

> 'behaviour that is a result of the interaction between individual and environmental factors, and includes stereotypic behaviour (such as rocking or hand flapping), anger, aggression, self-injury, and disruptive or destructive behaviour. Such behaviour is seen as challenging when it affects the person's or other peoples' quality of life and or jeopardises their safety.' (NICE, 2012b: 52)

It is nevertheless surprising that the important issue of responding to such 'challenging behaviour' was left to NICE Guidelines. They provide clinical guidance without statutory effect 'intended to improve the process and outcomes of healthcare' (NICE, 2012a: 9). As a consequence, drafters of the Statutory Guidance:

> '*focussed on training, diagnosis, general mental health service responsibilities. [They] were so focussed on these issues and reasonable adjustments in the GP service that, at the time, it felt like it was too much to do or to ask. We wanted a win on some things and the feeling was, well that can be looked at when that [time] comes. We needed to take one step at a time*' (Senior Clinical Advisor).

Interviewees expressed their regret that the statutory parameters of the Guidance were constricted in this way. Defendants with autism who are currently in prison were seen by the Senior Advisor to the DOH to be disadvantaged in terms of their access to diagnosis and assessment. They thought that '*people underestimate how much people with autism in prison in particular are subject to abuse'* and '*how much their offending behaviour is related to their core diagnoses'* (*ibid*). This lack of awareness has an impact on resource allocation because criminal justice decision-makers 'will say "*that costs money and this group is only small…" [but] there are more people than you would expec*t' (*ibid*). As discussed in Chapter 2, recent prevalence research is inconclusive but suggests that levels in prison are higher than the general population. The most recent study found that at least 10 people out of the 800 prisoners screened in Brixton Prison were found to meet the criteria for a diagnosis of autism (Underwood *et al*, 2013). Elite interviewees felt that if the statutory requirements of the Guidance did cover organisations in the CJS then the '*prison staff would better understand the health needs of someone with autism*' (*ibid*). Without the parameters of these requirements being extended, interviewees were concerned that prison staff would not be compelled to make reasonable adjustments for them.

One of the general criticisms of the Statutory Guidance has been the weak language of mandate adopted during the drafting process. This is likely to have been one factor in barring the extension of remit to criminal justice organisations. One of the Senior Clinical Advisors, who worked with the team drafting the Guidance recalled that:

> '*We wanted to put in some obligation. But the whole statutory document was written to make sure that there was [sic] no mandated phrases. It then had an equality impact assessment and this all had to go to the Treasury'* (Research Interview).

The developments introduced by the 2014 'refreshed' autism strategy, *Think Autism*, and the 2015 *Revised Statutory Guidance* are discussed below. Interviews took place before publication of *Think Autism* and the *Revised Statutory Guidance*. The 'duty to act', under Section 3 of the Autism Act 2009 only applies to local authorities and NHS bodies, pursuant to their section 7 duties under the LASS Act 1970. So, although the 'refreshed' Strategy includes more in-depth priority actions on criminal justice-related issues, interviewees suggested that it would be unlikely that the *Revised Statutory Guidance* would be extended to apply to criminal justice organisations:

> *'I don't even know whether that is possible, I'd have to get the lawyers' advice but certainly don't think that we have got any plans to do that at this stage. I certainly think the intention is that the scope of it won't be much broader than it already is. It will certainly be more of a refresh and a revisit'* (Senior Civil Servant 2).

This has been borne out in practice because the *Revised Statutory Guidance* does not extend the scope of its statutory requirements. The *Revised Statutory Guidance* only 'recommend[s] that other providers of public services, such as providers of services to support people into employment, police, probation and the CJS look to follow the guidance to help improve the delivery of the services they provide to adults with autism…' (DOH, 2015: 10). In echoing the 2010 Guidance that by following the guidance 'those bodies could help improve the delivery of the services they provide' (*ibid*), it appears that what was intended to be a non-exhaustive list of bodes with a duty to act has in fact ossified into an exhaustive list.

Although there is not a duty to act under the Guidance, nor via reform of the Autism Act 2009, there may '*well be… existing statutory obligations to [criminal justice organisations] to do this' (Member of Parliament)* under the Equality Act 2010, because autism is a disability as defined by Section 6 of the Act. An alternative interpretation is that it is possible to invoke the Public Sector Equality Duty (PSED) in

Section 149 of the Equality Act 2010 to require criminal justice organisations to follow the Statutory Guidance in order to comply with their general equality duty to have due regard to the need to:

> '(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it' (S149(1), Equality Act 2010).

To put it another way, the material in the *Revised Statutory Guidance* adds detail to what it means to achieve these three PSED aims for individuals with autism; individuals who have the protected characteristic of disability under the Equality Act 2010. In this way, the Guidance can be read to provide further detail to the provisions of the Equality Act 2010 on what it means to be protected against indirect discrimination under Sections 13, 14, 19, and direct discrimination under Section 15, and the nature of reasonable adjustments for people with autism under Section 21 of the Act.

A senior Member of Parliament extolled the virtues of utilising this interpretation:

> *'I'm always one for not passing new laws when there's no need to at all if possible and… to use what we've got. I think that would be a fertile line of inquiry and see if we can invoke those provisions under – it's the 2010 Equality Act.'*

This may be especially helpful if it is not viable to redraft Sections 2(1) and 3 of the Autism Act 2009 itself to mirror the spread of public bodies which are included under the Equality Act 2010. Further, in light of the more detailed coverage of criminal justice related issues in Priority Challenges 5, 12 and 13 of *Think Autism* (see below), the Secretary of State for Health should be compelled to make such an extension in carrying out their statutory appraisal of the 'extent to which the guidance has been

effective in securing the implementation of the autism strategy' (Autism Act 2009, Section 2(3)).

For this to be practicable there would have to be a clear determination from the MOJ for an extension in the scope of the guidance. In addition to these points about legal interpretation, interviewees noted a number of other barriers that would limit the ambit of their drafting of the *Revised Statutory Guidance*. Not surprisingly, the availability of both financial and professional resources were cited, including the availability of sufficient training, the time available for professionals to interact with individual defendants and sufficient specialist expertise (Members of Parliament; Senior Clinical Psychiatrists; Senior NHS-Police Inspectors). For example:

> *'There is also a lack of capacity in the system to actually deal with people when they may be on sentence, and certainly a lack of capacity in the system to… ensure that [support services for] mental health and learning disabilities – [which] obviously includes [autism]… – are actually available to people on a daily basis'* (Member of the House of Lords).

Public opinion was identified as a potential problem if autism was being used as 'an excuse' or 'get out of jail free card' (Member of House of Lords; Member of Parliament; Senior NHS-Police Inspector). However, as long as there was effective public education, interviewees thought that the public would appreciate that better identification and diagnosis of autism in the CJS would lead to more effective support and a reduction in re-offending (*ibid*; Senior Clinical Psychiatrist 1):

> *'As long as we keep that in our minds – without trying to use disability as some sort of barrier to responsibility – …I think the public themselves would say "we want a CJS that is efficient" and that is acting in the public interest. …[T]herefore making sure the public interest test takes into account disability, then I think the public would say: "yes, I understand that that's the right thing to do"'* (Member of Parliament).

The Autism Act 2009 uses the 'umbrella' term for autism to include AS and high functioning autism. Chapters 6–8, on the governance of adult defendants with autism in Magistrates' and Crown Courts, describes the issues which arise from the

misconceptions made by criminal justice professionals of the autism spectrum as a scale of severity. Therefore, interviewees were also prompted on whether the spectrum nature of the condition posed a potential barrier to extending this policy's coverage. Responses expressed the importance of raising public awareness about the condition in this regard. Elite interviewees also raised the following as a barrier to properly implementing an extended Statutory Guidance to cover criminal justice organisations, in relation to the different paradigms of the health and criminal justice systems:

> *'…the focus of the CJS is on the act that has been perpetrated, the offence. It's the action rather than the person whereas the health and social care system is supposed to be about the person; although it's often about the condition rather than the person but it is more about the person than the act or the offence so you have a fundamental clash of perspectives and it's not necessarily a criticism of [professionals] in those systems but that's the way those systems, for perfectly logical reasons, are designed'* (Senior Civil Servant).

This suggests a clear dissonance between the clinical and criminal justice paradigms. Giving an example in respect of defendants who receive a diagnosis of a mental health condition, the following excerpt expresses how this discord around categorisation affects the governance of these individuals:

> *'It's almost like once you've got a mental health diagnosis, it could be anything from depression through to schizophrenia through to personality disorder, they [the MOJ] see them as all the same. We're having an issue at the moment around whether if they have gone into a mental health hospital, whether they have to go back into the prison system and the ability to actually see this as something that needs to have a continuity of care so it's either: [1] they need to stay in the mental health hospital because we [the CJS] can't possibly care for them… because they have got mental health problems; or [2] if they are ready to be discharged they can just go anywhere… it's that lack of understanding to me and being unable to see that person with a range of needs… you've either got the mental health label or not.'* (Senior Civil Servant 1)

The perspective conveyed here by the DOH professional of the governmentality approach of those working within the MOJ reflects the mad-bad binary view of offenders with mental health problems or learning disabilities; a dividing practice which

subsumes defendants with autism. This dividing practice was also reflected in the comment made by a Senior Police Officer working in Offender Health**:**

> '*Yes, there are issues because in terms of policy we like to put things in different cohorts and organisational buckets. It's not an on/off issue; either you are or you're not, it's a spectrum. The ideal approach would be if someone said to me: I am autistic… What I know now [I] would say [is] – what does that mean then in terms of how we need to interact to get the best out of you?*'

A Senior Crown Prosecutor, in discussing the particular challenges posed to prosecutorial decision-making, also raised the issue of the spectrum nature of autism and compared it to a 'learning difficulty or mental condition' where:

> '*…**[it] depend[s] on what you're dealing with: you may need to get into … [whether it's] a lower level issue, rather than if it is something very serious**, [you might ask]: is that an issue which could impact on proving essential elements of the offence because of the mens rea side of things? But again, I think it is challenging because you've got Aspergers at one end of the spectrum. I suppose what I would say [is] that it is very difficult for busy prosecutors who are dealing with a whole host of cases to fully understand and know the intricacies of this in cases'* (emphasis added).

Implicit here is the primacy given to the seriousness of the offence rather than the relevance of a condition such as autism, in determining whether the defendant has the mens rea for the offence, and the decision to prosecute. It also reflects misconceptions by criminal justice professionals of the autism spectrum as a scale of severity determined by IQ. The assumption is that the higher the person's IQ, the less severe a person's autism. This view is at odds with the NICE Guideline, which highlights that the 'potential discrepancy between intellectual functioning as measured by IQ and adaptive functioning as reflected, for example, by difficulties in planning and performing activities of daily living including education or employment' (2012: 11). It is also at odds with what the Autism Act 2009 and associated policy sought to achieve. By including autism as an umbrella term, drafters of the Act recognised that for too long, people with AS, having an IQ >70, had fallen between the gaps of mental health and learning disability provision (DOH, 2010a: 10; 35). Yet clinicians, who had acted

in an advisory capacity in the policymaking around the Autism Strategy, stated that despite concerns:

> '*policymakers [in the CJS could] work around the fact it is a spectrum condition. The limiting factor is the evidence base. This group all share core difficulties but policy teams can work around [the spectrum]; it is no excuse not to do it*' (Senior Psychiatrist).

A senior Member of Parliament with specialist knowledge in this area corroborated this view:

> *'[The spectrum nature of the condition is] always a problem; there's no typical case of someone with autism and therefore you can't make sort of glib assumptions about "oh he hasn't made eye contact or oh he's autistic so he takes a literal view of every word that's said to him or her". And of course, you cannot cater for the undiagnosed person of which there are many, in my sad experience, by the time you get to sentence, [you may realise] "there's something not right here; I want a medical report into this young man" and then you get the report and you see there's a diagnosis of ASD [Autism Spectrum Disorder] and you think "oh my god, if only that had been worked out years ago". That being said, where there has been a diagnosis then there has got to be a system whereby that has got to be flagged to the authorities*' (Research Interview).

However, there is also a tension between the egalitarian allocation of resources between defendants who are deemed to be vulnerable within the CJS and the availability of effective identification for specific conditions like autism:

> '*Well, it goes back to my earlier point on the quality and sensitivity of the assessment tools that are employed at different stages of identification and assessment and clearly that spectrum needs to be properly recognised. I wish we were at a point where such assessments [in the CJS] were that sophisticated... That sounds rather pessimistic but you have to start somewhere: getting an agreement for a common assessment tool and getting a multi-agency way and to have validity and consequences and that is the key first step. Then people with specific needs and people with expertise on specific needs can come in on the back of that and refine and develop that for those particular purposes*' (Member of the House of Lords).

This section of the chapter has sought to explicate the factors which have restricted the application of the Autism Act and related policy to the CJS. Progress in the establishment of Liaison and Diversion Services (see Chapter 4) over the next few

years will, therefore, have a crucial impact on the identification and assessment of adult defendants with autism.

2. No longer 'managed inappropriately'?

The DOH published a Local Self-Assessment Framework to help support local authorities, NHS organisations and their partners to implement the Statutory Guidance in their localities (2011). It identifies as Quality Outcome 5 that 'adults with autism are no longer managed inappropriately in the CJS' (DOH, 2011: 7), asking these organisations two specific questions to assess progress in their local area: 'are you engaging the CJS as a key partner in your planning for adults with autism'? 'Have you considered joint planning for community-based interventions?' (*ibid*) The 2012 NAO report, *Progress in implementing the 2010 Adult Autism Strategy,* reported that out of the 152 local authorities, only 135 authorities responded to the self-assessment exercise in March 2012. One of the main weaknesses found by this report was that very few local authorities had achieved Quality Outcome 5 and a large proportion of them were not planning in this area at present (*ibid*: 28). Under the RAG (Red/Amber/Green) rating system, only 4% of local authorities said they rated themselves as Green in achieving the outcome of adults with autism receiving support in the CJS. Thirty-six per cent of local authorities gave an Amber rating that they had a plan in place to achieve this outcome and 29% of local authorities said they had no such plan to achieve this outcome; 31% of local authorities did not answer (*ibid*). Thus, even on the measures for success the DOH set, there was inadequate support of adult offenders with autism. This is likely to have been the case, in part, because of the lack of statutory duty placed on the local authorities' criminal justice partners in this regard; slowing down partnership working in this area.

In a thesis which asks how adult defendants with autism are governed in the English CJS, it seemed crucial to catechise what was meant by Quality Outcome 5 that 'adults with autism are **no longer managed inappropriately** in the CJS' (DOH, 2011: 7; emphasis added). Interviewees were asked to elaborate on the meaning of Quality Outcome 5, and what managing defendants with autism *appropriately* might look like. Interviews were conducted before the publication of *Think Autism* (see below), but it was clear that the lack of a definition in the earlier Quality Outcome was deliberate:

> '*[It was] "[o]ne of those phrases", short-hand for adults with autism being recognised [identified in the CJS], where reasonable adjustments are made for them. [Being] treated appropriately means that they are recognised. They should potentially be diverted out into community mental health services. We pick people up in their 50's who have been revolving around prison because no-one picks them up. They have all been bullied. That equates to being treated inappropriately…*' (Senior Clinical Advisor).

In part, this phrase was kept as shorthand to reflect the shift towards localism (see Chapter 4), difficulties surrounding autism being a spectrum condition and because there was concern about the implementation of the Autism Strategy in the aftermath of the change of government (see above):

> '*I don't think that we are at that stage of the approach phase to get into detailed definitions of things. [We left it]… for people in the operational organisations... to define.*' (Senior Civil Servant 2)

> '*[It was agreed that] this is a cross government strategy rather than the pathways of care.*' (Senior Civil Servant 1)

This approach is reflected in the criminal justice related *Think Autism* Priority Actions for Challenge, critiqued below, which left 'no longer managed inappropriately' undefined.

Another objective of this research was to comprehend how offenders with autism *should* be governed (see Chapter 9). A number of themes emerged in interviewees' responses to the question of how defendants with autism should be managed appropriately. All interviewees acknowledged the need to improve

identification through better screening tools, training and to ensure '*assessment at any level [is] comprehensively employed and consistently and systematically used'* (Member of the House of Lords). In relation to screening tools, senior clinicians – who had worked in an advisory capacity in this policy area – believed that existing tools do not work well in the context of the CJS. For example, '*[e]ven ADOS (Autism Diagnostic Observation Schedule) needs to be adapted*' (Senior Clinical Advisor). Although it is one of the main tools of diagnostic assessment recommended by NICE (2012), ADOS was designed to assess children with autism and aspects of this schedule rely on interviews with the parents of the person with autism in order to chart their childhood development. However, '*[a] lot of people [with autism] are disinherited from an early age and therefore an adapted screening and diagnostic tool is needed*' for adults with autism (Senior Psychiatrist). In line with the offender pathways approach in Lord Bradley's 2009 Report, there was the view that managing offenders with autism appropriately should involve a cross-system model with apposite disposal pathways connecting individuals to access in health and social care systems:

> '*If they [defendants with autism] find themselves in the CJS, then it depends on the nature of the offence because it clearly depends on whether that disposal option is a community sentence or custodial sentence; then that condition has to be properly recognised and properly treated in either setting.*
>
> *So, in terms of prison healthcare, if that is the appropriate setting, then we have to do more to make sure that autism is recognised, supported and treated. If it is in the healthcare system then, clearly, that requirement should be axiomatic in those arrangements.*
>
> *If it is a community sentence, then community sentences are only effective if all the complex needs of the individual are recognised and are supported on the community sentence and that they are connected to services not only whilst they are on the community sentence but at the end of [it], because there is no point in cutting support for someone with health needs*' (Member of the House of Lords).

Early identification was seen as essential, both at the gateway to the CJS and at the interfaces with community-based services:

> ‘*It may be if the condition is recognised at the first point of contact – at police custody – and the nature of the offence does not necessarily require a court appearance, then it is again necessary to either connect or reconnect with services in the community. Because offenders are only a subset of the community whilst they have offended. There is a general need to improve services on a whole range of conditions, of which autism is one*’ (*ibid*).

Better identification was also commended as necessary in the courts. For example, at the Crown Court it was suggested that in the Plea and Case Management Hearing:

> ‘[it] is something which *can be done quite efficiently… you could ask an extra question [in] the questionnaire [at this stage]: does the defendant suffer from any disability, including hidden impairment? That can be flagged up straight away. If the box is filled with autism/ASD the judge can ask counsel: well thank you for telling me this. Is there any potential relevance to court sittings or the issues in the case that this condition gives rise to so that the judge is alerted? [T]he judge, with training, can [then] ask counsel how the disability relates to the management of the case or the issues in the case… [Y]ou could do that fairly easily with a revised practice direction. To a certain extent it’s done – if judges see someone with a hearing impairment or blindness they say well “how are we going to manage the case?” …[I]t does happen but the hidden (though I don’t like “hidden” as it implies some sort of intent), the invisible impairments, I really don’t think we’ve cracked that*’ (Member of Parliament).

Indeed, the Equal Treatment Benchbook (the ‘Benchbook’) states that judges should not only be able to ‘recognise the existence of a mental disability if not informed of it’ but they should also be able to ‘identify its implications in the court or tribunal setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties’ (Judicial College, 2013: 97). The Benchbook states that where a disability is ‘indicated on court or tribunal pro-formas both the administration and the judiciary should act on this information’ by ‘requesting further documentation or arranging a directions hearing to consider requirements arising out of special needs’ (*ibid*: 100). This documentation may then reveal that there is ‘a duty to make reasonable adjustments under the Equality Act 2010’ (*ibid*). Furthermore, a specific guide for solicitors, barristers, and judges on cross-examining defendants with autism is now available on The Advocate’s Gateway (2015). This guide also

emphasises that 'Courts are expected to make reasonable adjustments to remove barriers for people with disabilities' (*ibid*: 1). Yet, as Chapters 6–8 evince, there is often a paucity of good practice, despite being recommended in these materials, in individual cases in the lower courts.

In terms of training, interviewees gave examples of analogous professional practices which could be advanced for someone with autism:

> '*for people with personality disorders, we have got something called "psychologically enabled environments" where all the staff that are working with somebody have had training to handle and support somebody [with that disorder]. I wonder whether we could read across and have that sort of approach to someone with autism'* (Senior Psychiatrist).

Beyond improving professional awareness of autism across the offender pathway, interviewees expressed key principles that should imbue the concept of *managing defendants with autism appropriately*: '*The essence of the strategy needs to be applied. It's all about public services treating people fairly*' (*ibid*). As far as the *Revised Statutory Guidance* is concerned, interviewees stated that:

> '*I don't think we [will] get into that sort of definitional detail [about being managed inappropriately] because there are so many scenarios that you can imagine… [and types of] offences that people have committed… [I]t would be impossible for a strategic document to define all… [those] sort[s] of scenarios... I think the principle should be that people that are better cared for in a healthcare environment than in prison should be cared for in that healthcare environment. They should be looked after in those settings in a way in which… [enables them] as far as possible to be rehabilitated and recover, rather than stay there you know for a very long time without the support to address the behaviours that are of concern*' (Senior Civil Servant 2).

> '*...[Q]uite a lot of the prisons are concerned about the social care bit of the Care Bill because actually it opens up the fact that particularly around some older prisoners, there's some disability that they need to make the prisons a different environment, so I just wonder if there is something coming down the track [for autism]*' (Senior Civil Servant 1).

The relevance of social care provision, as incorporated in the Care Act 2014, is discussed in Chapters 8 and 9. The Policy Lead for Autism at the DOH worked towards

engaging with staff in the CJS to enable them to understand autism on the agenda of the July Programme Board (DOH, 2012a: 9). There followed over the next two years a process of 'refreshing' (Senior Civil Servant 2) the National Autism Strategy for England and *Think Autism* was published in April 2014 (DOH).

3. *Think Autism* and the *Revised Statutory Guidance* – what strategies and technologies of governance are included for defendants with autism?

Think Autism 'builds on rather than replaces' (2014: 5) the earlier Autism Strategy (DOH, 2010a). Norman Lamb MP, in his forward to the revised strategy, introduced the Priority Challenges for action as areas 'where we can all make a difference'. Described more as approaches for practitioners to internalise in their professional activities than practice requirements or quality standards, he states:

> 'Each of us should ask ourselves what we know about autism [and] what we could do in our work and in our communities to make them more accessible to people with autism.' (*ibid*: 3)

However, these approaches are supplemented by the actions that will be taken by the DOH, other cross-departmental leads and the Autism Partnership Boards in Appendix D to help the local implementation of the autism strategy 'refresh' (*ibid*: 53). These actions are tangible and, if implemented effectively, could certainly have an important impact on meta-level policy development. Although *Think Autism* does not develop the concept of 'managing' adult defendants with autism 'appropriately', it does set out a number of key strategy areas, which are augmented by the more detailed 'Priority Challenges for Action' (*ibid*: 8-7; 11-45). The 15 Priority Challenges were 'identified by people with autism, carers, professionals and others who work with people with autism' during the *Think Autism's* year-long consultation process. The key strategy

areas are enabling ‘people with autism to really be included as part of the community’; promoting ‘innovative local ideas, services or projects which can help people in their communities through new models of care, particularly for “lower level” support for those not meeting eligibility criteria for statutory support’; and the need to focus on ‘how advice and information on services can be joined-up better for people’ (*ibid*: 9). These strategic areas reflect broader approaches to individuals with disabilities elsewhere in public policy-making. In the first strategy ‘driver’, there are echoes of The Big Society as the strategy emphasises ‘looking beyond statutory services at how we **build communities that are more aware of and accessible to the needs of people with autism**, bringing together champions for change’ (DOH, 2014: 9; emphasis added). The second clearly incorporates the move towards localism; an idea that was central to the Coalition Government’s policymaking paradigm. The determination to have joined-up information about service provision is welcome and should entrench the move away from siloed practice as established by the Bradley Report in the criminal justice context. However, there is a risk that a cross-governmental focus on information provision for service users with disabilities, without effective resources allocated for advice services, symbolises a focus on ‘managerialism’ (Bottoms, 1995) rather than doing justice to difference and, furthermore, indicates a derogation from safeguarding duties and face-to-face advocacy.

Priority Challenges 5, 12 and 13 are particularly relevant to the governance of people with autism in the CJS. Priority Challenge 5 focuses on community safety and people with autism being ‘free from the risk of discrimination, hate crime and abuse’. This section sets out the enhanced service now available to ‘victims suffering from a mental disorder within the meaning of the Mental Health Act 1983, a physical disability or having a significant impairment of intelligence or social functioning’ as a ‘vulnerable

victim' under the new Code of Practice for Victims of Crime (CPS, 2013). In particular, it highlights the duty that the police have to provide an early assessment of these victims. The strategy provides no further detail with regards to victims with autism, other than identifying that 'it will be important' for Police and Crime Commissioners (PCCs) – now commissioning the majority of emotional and practical support services for victims of crime, rather than central government – 'to engage with local [Autism Partnership Boards (APBs)] or their equivalent' (DOH, 2014: 20). Chapter 8 outlines an innovative example of how a PCC intervened in the processing of a case of a defendant with autism. The role of PCCs in relation to these defendants is not explored in Priority Challenge 13 but it is recommended that they should also take this group into account when working strategically with APBs.

Priority Challenge 5 also signposts the work that has been done to include a case study of a victim with autism on the CPS's website to inform vulnerable victims about the court process and availability of Special Measures for Victims and Witnesses. An 'aide-memoire' will be produced to support prosecutors by 'highlighting key issues, implications for the prosecution process and sources of support for people with autism' (*ibid*: 20). The two further aspects of this Priority Challenge are 'preventing disability-related harassment on public transport' and reference to the national scheme to prevent cyber bullying by teaching pupils about e-safety (*ibid*). The Autism Partnership Board will ask the 'Department for Transport to provide a report on their review of disability awareness training, including autism and work to prevent disability related harassment'. Access to public transport is important in supporting the social inclusion of disabled people. The final focus on e-safety in Priority Challenge 5 is a theme which is not picked up by Priority Challenge 13 in relation to defendants with autism. As shown in Chapters 6 and 7, cybercrime was a feature of one of the case studies. Complex issues

arise out of the interaction between the symptomatology of autism and the nature of the offending. Therefore, it is unfortunate that there are no proposals to work with defendants with autism around understanding the boundaries of internet use and look at how to deal with this type of offending.

One would hope that the requirement for early assessment by the police, under the Victims Code of Practice, and through the 'aide-memoire' for Prosecutors, when read in conjunction with the relevant actions in Priority Challenge 13, would make the police and CPS more alert to the identification of defendants with autism at an early stage in their work with suspects who might be on the spectrum. However, as argued in Chapter 4, this is only likely to happen purposively if there is a move away from the asymmetrical approach to protecting vulnerable victims and witnesses and not defendants in criminal cases and the proper inclusion of defendants with disabilities in future CPS Business Plans (see Chapter 6).

The review of the 'psy' literature in Chapter 1 problematised the issue of the aetiology and legal classification of behaviour which is associated with the symptomatology of autism. Such behaviour – in certain contexts such as residential homes and supported living environments – may be deemed to be 'challenging' (Hayes, 2006) while, in other contexts, it may be prosecuted and the individual treated as a criminal offender. Priority Challenge 12 conveys the importance of professionals recognising an individual's autism and adapting the support they give to people on the spectrum if they have additional needs, such as a mental health problem, a learning disability, or if they 'sometimes communicate through behaviours which others may find challenging' (*ibid*: 36). In light of the terrible events at Winterbourne View, where a third of the residents had autism (DOH, 2014), *Think Autism* says that:

> 'Services and care planning for people with these needs should reflect their needs related specifically to their autism, as well as those related to learning disability or mental or physical health issues' (*ibid*:36)

It is encouraging that the refreshed Strategy acknowledges this issue and emphasises the 'aim for there to be a substantial reduction in reliance on in-patient care for this group of people' because it is 'possible for people with complex needs and autism to be supported appropriately to live in the community' (*ibid*: 36-37).

Priority Challenge 12 reiterates that many of the actions set out in *Transforming Care*, and the Accompanying DOH *Winterbourne View Review* 'specifically target the needs of people with autism and/or learning disabilities who also have mental health problems or sometimes behave in a way that is challenging to others' (DOH, 2013). Finally, this Priority Challenge restates that as part of its work around the review of the *Mental Health Act 1983 Code of Practice*, including the chapter on autism, the DOH 'will also launch a new programme designed to reduce the use of restrictive practice and promote safe, positive and therapeutic environments' (2014a: 36). However, it is disappointing that there is no reference to the use of Mental Health Act 1983 Sectioning orders for people with autism and the particularly delayed discharge from hospital they experience (see NAO, 2015). As one interviewee commented:

> *'Discharge is the biggest barrier, as there are no autism-specific community services to discharge people with autism to. There is a need for local specialist autism services but the opportunities for this are likely to be limited by the lack of expertise'* (Senior Clinical Advisor).

With regards to defendants with autism, in Priority Challenge 13 the language changes from 'no longer managed inappropriately' (DOH, 2011) to getting criminal justice professionals to 'think about autism and to know how to work well with other services where an individual with autism breaks the law' (ibid). It does set out a number of specific actions which offer optimism for a more coherent and dignified approach to the treatment of adult defendants with autism in the future. It emphasises, for example, that

where a person with autism is suspected of committing a crime, criminal justice agencies – the police, the CPS, probation and courts in particular – should 'ensure that they have access to expertise to support adults with autism and consider the most effective way of ensuring that autism awareness guidance/training is available to staff'. Recognising that this 'can change the way that police or courts view a situation', it states that these agencies 'at the very least need to be aware of the communication challenges experienced by people with autism in their interactions with other people' (*ibid*: 38). It is also pleasing to see that the MOJ are leading a cross-government group to consider issues to do with autism and the CJS and we await its publication.

Priority Challenge 13 states that the Home Office will consider the scope of using 'evidence-based advice for managing autism within justice settings' to go alongside training as well as 'whether the markers on local police force systems to indicate an individual with mental health or learning difficulties can be extended to autism' (*ibid*). Considering prevalence levels and the fact that autism presents as a hidden disability, '*a flagging system*' ought to be built in to proceedings at the '*earliest stage*' (Member of Parliament). Although it goes on to propose the use of such a flag by the Metropolitan Police's local intelligence database, which could be accompanied by a 'flow chart for staff guidance', this section is rather vague. Advocates of such a system saw this as pivotal to managing defendants with autism appropriately:

> '*…[where] the person is known to the police, there should be a system on the national computer that where it has been entered once there should be a system that makes a reference, so that when they look [up that individual] they shouldn't just see previous convictions but see "ah yes, there is autism oh ok, we're aware now". From there they should then be able to go to [a] person, if not more [than one person] who they can refer to… [Ideally] there should be such a person in every police station. It's not going to happen. The closest we get is with mental health and community nurses who get called out to accompany and support the person with mental health problems. But if we can get a system which is akin to that then the person with autism is going to get the right sort of support from the police station and from the outset of the*

> *investigation, there is an awareness of their condition which could affect the way in which the case is investigated*' (Member of Parliament).

In this context, interviewees were, again, keen to *'emphasise that autism is not always relevant to the allegations'* but early identification was important because *'[i]t could affect the fundamental progress of the case and it could then be a factor in the decision to charge…'* (*ibid*). The view here is that flagging and identification have an important role to play in improving the treatment of defendants with autism in the CJS, particularly because under the Equality Act 2010, no duty arises to provide 'reasonable adjustments' if the public authority 'does not know or could not reasonably be expected to know that a person has a disability' (E&HRC, 2010: 9). However, such measures must be supported with training and care should be taken so that early flagging and identification of people with autism does not to lead to the use of 'pre-crime technologies' (Zedner, 2007).

When we review the section of Priority Challenge 13 on the Courts, there appears to be a disjuncture between best practice and actual practice. This section notes, for example, that '[c]ases involving offenders with autism often involve an application for Special Measures' and that there is access training, delivered by the Judicial College, on the use of Special Measures. The court observation fieldwork (see Chapters 6-8) reveal, however, that in none of the cases observed were Special Measures given to the defendants who had autism. Some of the barristers and solicitors interviewed for the purposes of this research required an explanation of what I meant by 'Special Measures.' When participants did know about these measures, it was evident that they had not considered the use of these resources or did not know how to access them for their clients (see Chapter 6).

Interviews with elite decision-makers revealed disquiet about the use of Section 37, 41 or 47 of the Mental Health Act 1983 and policymakers were interested in '*any*

case studies, where [defendants with autism were] disposed under the Mental Health Act and where they have languished…' (Senior Civil Servant 1). A Member of Parliament from the All Party Parliamentary Group on Autism was particularly perturbed by the disposal of defendants with autism under such orders. Since there must be evidence from two qualified psychiatrists, under Section 12 of the Act, that the person either has a personality disorder or a mental health disorder that is capable of treatment, he argued that:

> '*…unless the person with autism has a co-morbid, diagnosable mental health condition that is capable of treatment then* ***I would hope that the vast majority of autistic people would never be made subject to Section 37 – or, God forbid – 41's. Because for me [this would be] a wholly inappropriate – not just for them – but a wholly inappropriate use of resources****. Because you are talking about beds which are very expensive. I would hope that the existing system is sufficiently tightly drafted… that people with autism aren't misdiagnosed'* (emphasis added).

He did not believe that consultant psychiatrists, considering the pressures on resources:

> '*…are in the culture of misdiagnosis or diagnosis for the sake of it, for the sake of filling up a bed. From my years of my experience, they don't glibly put people into that category. So the Mental Health Act side of things should be largely irrelevant when it comes to defendants with autism'* (Member of Parliament).

The research discussed in Chapters 6-7 shows that such orders *are* being given to defendants with autism, who do not have a dual diagnosis. This, it must be emphasised, is not attributed to psychiatrists being in a 'culture of misdiagnosis'. Rather, it is argued therein, that psychiatrists recommend and courts utilise such orders where prison is seen to be inappropriate or ineffective and community sentencing provisions either will not facilitate access to specialist support or are insufficient in expressing the court's cognisance of the risk management required for a particular offender.

Priority Challenge 13 also raises the need 'for the CJS to refer people with autism for appropriate health and care support [and] to divert them, where appropriate;

and prevent re-offending'. As discussed in Chapter 4, subject to the success of pilots, 'Liaison and Diversion services will be available in every police custody suite and criminal court in England by 2017/18'. A validated screening tool for autism which is 'acceptable to NHS England Area Team Health & Justice Commissioners' is required by the new Liaison and Diversion Standard Service Specification (NHS England, 2014). However, as Chapter 8 illustrates, the lack of available specialist services in the community means that defendants with autism are spending protracted periods in special hospitals under Sectioning Orders issued by the court (see Samuel's case).

Much of the section on prisons covered by Priority Challenge 13 summarises existing schemes and initiatives. The National Offender Management Service (NOMS) has produced autism awareness pocket guides and a web-based toolkit following 2013-14 funding it gave to support Prison Officer training to raise staff awareness about hidden disabilities or difficulties. Designed to 'improve outcomes for offenders with learning disabilities', NOMS will share good practice in prisons (*ibid*: 13.5). From August 2014, 'mandatory assessment of function skills will take place for all prisoners' and 'NOMS will report back to the Autism Programme Board on what effect this has had on identifying prisoners with autism' (*ibid*: 38, para 13.5; [Action 29]). However, there is no cogent message about the use of imprisonment for this group more broadly nor are there any supplementary guidelines on reasonable adjustments which could be made in this context.

The MOJ's *Transforming Rehabilitation* strategy of reform to England's Probation Service means those sentenced to less than 12 months in custody – an estimated 50,000 offenders – represent an increase of 22% offenders managed on the 2012/13 figures. While this signifies an extended service, the MOJ 'could not tell' the Public Accounts Committee how these additional individuals 'would be managed'

(2013). In conducting the present research, cynicism was expressed about the Institute of Probation being a '*sop*' (Forensic Psychologist) to soak up the concerns about the abolition of the 35 former Probation Trusts for the creation of the new National Probation Service. There is a sense that the Independent Institute of Probation represents a compromise – a symbolic representation of a resource to sustain cohesion and professionalism – for a service which has been split by apportioning certain levels of risk between public services on the one hand and private services on the other. *Transforming Rehabilitation: A Strategy for Reform* (MOJ, 2013) states that key functions will remain within the ambit of the public sector, 'including the direct management of offenders who pose the highest risk of serious harm', while low risk cases will be contracted out to the private Community Rehabilitation Companies (see also the Offender Rehabilitation Act 2014).

In conjunction with these developments, the MOJ will work with the new Independent Institute of Probation to see whether autism awareness training can be built into their work. Where appropriate, the Institute will look to place relevant information into the information repository, established for potential bidders for new probation contracts, called the Transforming Rehabilitation Data (*ibid*: 39).

Direct consequences for adult defendants with autism will no doubt arise from the restructuring of the Probation Service outlined above. *Transforming Rehabilitation* states that its strategy offers the benefits of 'a new mix of providers equipped with the flexibility and the right incentives to reduce reoffending' and 'important systemic changes to provide effective rehabilitation to those who need it most' (*ibid*: 4). Thus the new structure of probation provision offers the opportunity for charities to work more closely with Community Rehabilitation Companies (*ibid*: 7), providing specialist practitioners who work with offenders with autism and tailored psychosocial

programmes. However, to split a service on the basis of risk presents serious concerns. Although the MOJ 'recognises the dynamic nature of risk, by ensuring that the public sector has the right to review cases where risk is more volatile or circumstances have changed' (2013: 4), it may be that those deemed to be 'lower risk' will miss out on the expertise of the National Probation Service. For example, former Probation Service practitioners, such as senior forensic psychologists, will now come under the remit of the National Probation Service and thus will only work on the high risk caseload. As the original Autism Strategy, *Fulfilling and rewarding lives,* noted, adults on the autism spectrum often only come into contact with the CJS 'when they reach crisis point', however, when their needs are recognised earlier, 'crisis can be prevented' (DOH, 2010a: 37). It may be that without access to such professionals, practitioners working in Community Rehabilitation Companies will not have the same support available to deal with individuals who have complex needs but present with 'low risk' offending. This is not to say that defendants with autism should be characterised as high risk; more that the restructuring may lead to fragmentation that will act as a barrier to effective identification and improved support of adult defendants with autism. Dividing defendants between service providers on the basis of risk rather than need reasserts this rationality as the dominant paradigm.

With respect to implementing these priority actions, the *Revised Statutory Guidance* sets out the role of local authorities and NHS bodies with respect to how they should work with the CJS (DOH, 2015: 55). However, given the asymmetrical application of the statutory guidance, this may leave an imbalance in implementation without bodies within the CJS being compelled to reciprocity in working jointly with local authorities and NHS bodies. There are two specific sections which reflect the Priority Actions in Think Autism which relate to issues that may affect adults with

autism coming into contact with the CJS. These are section 7 'Supporting people with complex needs, whose behaviour may challenge or who may lack capacity' and section 9 'Working with the CJS'. Section 7 does not explicate approaches to supporting people with 'challenging behaviour'; instead, it builds on the recommendations which came out of the *Winterbourne View Review*. The focus is de-institutionalising people with autism to 'ensure there is a substantial reduction in reliance on inpatient care for people with autism' (2015: 47). The *Revised Statutory Guidance* emphasises that action for local authorities and health bodies, under the Concordat, includes putting 'in place a locally agreed joint plan to ensure high-quality care and support services for all people with challenging behaviour' and this applies both to 'people currently within inpatient settings' and 'ensuring support for those who may be at risk of going into them in future' (*ibid*). It does not properly problematise situations where individuals, already living in community settings, are criminalised for such challenging behaviour, nor does it reflect on the movement of people with autism from inadequate community support through the criminal court system to inpatient mental health services by Section 37 and 41 Orders of the Mental Health Act 1983. This is unsatisfactory, but progress may be achieved through the NAO's recent recommendation that the government must 'improve data quality and coverage, by including the numbers and flows of patients through the health, social care and criminal justice systems (using the Mental Health and Learning Disability Data set)' (2015: 13).

Following complaints about the draft version (see NAS, 2014), the language of mandate in the *Revised Statutory Guidance* has been strengthened in its application to local authorities and health bodies, who:

> 'must not only take account of this guidance, but also follow the relevant sections or provide a good reason why they are not doing so… If they do not follow the guidance and cannot provide a good reason, they may be liable to judicial review or action by the Secretary of State' (DOH, 2015: 6).

This language of mandate has also been strengthened for NHS bodies and local authorities in Section 9 of the guidance on working with the CJS, compared with earlier drafts, but still uses ‘should’ rather than the imperative ‘must’. The focus of this section is largely on how local authorities and NHS bodies should work with local Liaison and Diversion Services, as these bodies are told it ‘would be good practice’, as this approach is rolled out, ‘to connect’ these services with ‘the local authority autism lead, relevant community care assessment team(s), and local preventative services’ (*ibid*: 36). Also, under this section, NHS bodies and NHS Foundation Trusts are told they ‘should’:

> ‘Ensure that Liaison and Diversion services have in place a clear process to communicate the needs of an offender with autism to the relevant prison or probation provider;
> Ensure that, in commissioning health services for persons in prison and other forms of detention, prisoners are able to access autism diagnosis in a timely way and healthcare, including mental health support, that takes account of the needs of people with autism’ (*ibid*: 57).

In addition to this, local authorities, NHS bodies and NHS Foundation Trusts ‘should’:

> • ‘Seek to engage with local police forces, criminal justice agencies and prisons in the training on autism that is available in the local area;
> • Consider undertaking some joint training with police forces and criminal justice services working with people with autism’ (*ibid*).

The language of ‘should seek to’ and ‘consider’ are so weak that they are likely to perpetuate the low rate of local planning to support adults with autism in the CJS reported by Local Authority Self Assessments and recorded in the NAO report discussed above (2012; see also DOH, 2016). The role of health bodies with respect to identification at earlier stages of the criminal justice process is explicated (*ibid*: 55, para 9.7-8), along with the ‘need for the CJS to refer people with autism for appropriate health and care support to divert them from offending, where appropriate, and prevent re-offending’ (*ibid*). Finally, Section 9 emphasises that ‘local authorities must’, under

the Care Act, from April 2015, 'assess the care and support needs of adults (including those with autism) who may have such needs in prisons or other forms of detention in their local area, and meet those needs in those who are eligible' (*ibid*: 56). This is an important statement in light of the difficulties that the cohort of defendants, discussed in Chapters 6-8, had in accessing social care. However, it is unfortunate that Sections 7 and 9 do not relate to the earlier sections of the guidance, which import aspects of the Equality Act 2010 on the need for public sector organisations 'to make reasonable adjustments to services to ensure they are accessible to disabled people' (DOH, 2014: 33).

Conclusion

The present chapter has sought to explicate the limits of the Autism Act 2009 and related policy and explain why the lack of statutory application to the CJS sustains the sort of siloed working that the Liaison and Diversion agenda has sought to avoid. We have seen an improved substantive focus on adults with autism coming into contact with the CJS in *Think Autism* and the *Revised Statutory Guidance*. However, there remains a lack of coherence in properly connecting the interfaces of the CJS, through statutory requirements, with social care and health services.

Chapter 1 described the analysis of the incidence of adult defendants as acting like a barium test on the CJS; revealing problems in the way it operates for defendants with disabilities in general. Expanding the statutory parameters of the operation of the Autism Act 2009 and subsequent policy via mechanisms within the Equality Act 2010 may provide a helpful schema for entrenching the Liaison and Diversion agenda in a legislative framework for defendants with disabilities. Such a programme of legislative reform may enable a shift away from the rationality of the vulnerable defendant discussed in Chapter 4. Following on from the arguments developed in Chapters 4 and

5, there is descriptive value in proactively categorising these groups as ‘disabled’ under the ‘social model’ of ‘disability’ in order to move discussion away from the rationality of ‘vulnerability’. Circumscribing the focus of statutory guidance to local authorities and health bodies – and not extending it to criminal justice – actually risks further sustaining the mad-bad binary for this group in criminal justice practice while also ensuring the predominance of the medical model of disability.

In the wake of the publication of the Bradley Report, Baroness Stern commented that the ‘high number of people with mental health problems and learning disabilities in prison is a clear sign that something is going wrong’. She strongly criticised the use of our ‘punishment system to deal with failures in the health and welfare system[s]’ (Westminster Policy Forum, 2009). As Hayes points out in discussing offenders with learning disabilities, the fact that these individuals are ‘missing out on support and services which might reduce or prevent offending behaviour does not only have consequences for the individual’ (2007a: 152). The impact extends to families, service providers, and society more generally because the ‘community as a whole suffers, socially, ethically and economically’ (*ibid*). It is such failures in these systems for people with autism which led to the enactment of the Autism Act 2009. However, as described in Chapters 6-8, adult defendants with autism are still ‘missing out’ on such support and this is having a grave impact on them and their families.

Part 2 – The governance of adult defendants with autism in the Crown and Magistrates' Courts

Chapter 6 – Court observation case studies: pre-trial shaping

Introduction

'I make no apologies when I say that the CJS is seriously letting people like myself, who are on the Autistic Spectrum, down badly' **(Samuel, Letter Correspondence).**

Part 2 (Chapters 6-8) of this thesis moves from an analysis of the broader strategies of governance and the data collected in Phases 1 and 3 of the research to incorporate 'the real' into the governmentality approach (Lippert and Stenson, 2010), through eight case studies of adult defendants with autism as they were processed through the Crown and Magistrates' Courts. It aims to analyse the moral language and practices of decision-makers in this context. The data collected while observing the court cases of these eight individuals became a rich but intricate array of source materials: field notes when the court was in session and in meetings outside the courtroom, interview transcripts, notes of telephone calls and expert reports. The use of longitudinal case studies 'provides the ability to capture and explain change, conceiving of legitimacy views as part of a developing process rather than a stable state of thinking or acting' (Pennington, 2015). Section 1(i) provides an overview of the cohort of eight individuals. Section 1(ii) of this chapter triangulates these data to set out, in italics, a composite summary case study for each of the eight individuals followed through the criminal court process.

Chapter 1 summarised some of the 'psy' literature, which has looked at the 'symptomatology' of Autism and the difficulties it presents for individuals negotiating the CJS. This literature has highlighted the potential of autism to impact upon most

aspects of criminal responsibility owing to its pervasive developmental nature (Freckleton and List, 2009: 30) and made clear that any 'elevated prevalence of [AS] within offender populations... may be better explained in terms of certain inter-connecting variables' (Browning and Caulfield, 2011: 175). Such variables include an 'inadequate level of recognition and understanding within the police service, the CPS, the Judiciary and the various criminal justice agencies, along with current justice policy', rather than an 'innate predilection towards offending behaviour' (*ibid*).

The present chapter aims to answer the thesis' sub-questions: to what ends are adult defendants with autism governed and who governs what aspects of the process? Chapter 1 explained that this line of enquiry leads us to understand more clearly how the governed are 'juridical subjects whose conduct is to be limited by law, individuals to be disciplined, or, indeed, people to be freed' (Rose *et al,* 2006: 84). It 'recognises that a whole variety of authorities govern in different sites, in relation to different objectives' instead of 'seeing a single body – such as the state – as responsible for managing the conduct of citizens' (*ibid*). The utility of Foucault's 'dividing practices' as a contextual tool is to bring together three interconnected areas for analysis: the modes of objectifying, categorising and distinguishing human subjects; the social and human sciences which provide the language and discursive resources for these modes of 'knowing' human beings and making them subjects; and the modes of controlling, containing and regulating the subjects thus classified (Seddon, 2007: 14). Chapters 4 and 5 explored the rationalities of governance of adult defendants with autism as they come within the ambit of 'vulnerability' and the approach taken towards this group through autism-specific policy-making. This inadequacy of recognition and understanding of defendants with autism by criminal justice decision-makers is borne

out in this chapter and the next in the 'prescriptions, plans or schema for acting' used by the police and the courts to control some aspects of the conduct of this group.

Case preparation in the earlier stages of the criminal process 'will be carried out in the light of the possibility that the case may go to court' (Ashworth and Redmayne, 2014: 321). A distinction can be drawn between three types of decision at the pre-trial stage (*ibid*: 416). Firstly, 'processual decisions' are 'concerned with the progress of the case from arrest through to court' or up to the point that the case moves through the criminal process. Secondly, 'dispositive decisions' involve diverting 'a case from the process of prosecution and trial'; they may also dispose of the case 'through some kind of undertaking or penalty' (*ibid*). Thirdly, the 'temporising decision' of remand 'determines whether or not the defendant should be at liberty between first court appearance and trial' (Ashworth and Redmayne, 2014: 416). As Ashworth and Redmayne note, such decisions should not be regarded as 'discrete rational determinations': each decision-maker is subject to rules and guidelines and, importantly, 'may be influenced as much by the power relations between the parties as by the law'. Indeed, they may also be 'influenced by an occupational culture and the expectations of others both within and outside the system' (*ibid*). None of the cases observed in the present cohort were diverted from the process of prosecution in the sense described above. The present chapter focusses on the processual decisions, the application of 'dividing practices' and the treatment of adult defendants with autism by decision-makers in the pre-trial criminal process. Section 2 examines what logics are applied to defendants with autism in decision-making: i) by the police, and ii) by the CPS's decision to prosecute. Chapter 7 moves to the courtroom observations and considers the 'temporising decision' of remand (*ibid*), followed by discussion of the influence of occupational culture on plea. It is argued that there is a lack of

preparedness to examine the relevance of the defendant's autism by the prosecution at these earlier stages of processual decisions. Instead, the 'guilty plea culture' has shifted emphasis to examine the relevance of autism in dispositive decisions: essentially, in mitigation at sentencing, discussed in detail in Chapter 8.

1. The cohort

i) Background features of the eight case studies

Of the eight individuals that I followed through the court system, seven are male and one is female. Seven of the cohort were aged between 18 and 25 and one was aged between 35 to 41 at the time of the final follow-up. The process of retrieving participants for this cohort is discussed at length in Chapter 3; for the purposes of the present chapter, participants were identified as follows: two were identified by their solicitor, one by a police officer, one by their social worker, three by an autism charity and one by the researcher while observing another case at court. The crimes for which the group were charged were as follows: two cases involved possession of a knife ('Claire' and 'Joseph'), one possession of class B drugs ('Ollie'), one the downloading of illicit images of children ('Mark'), one sexual assault ('Samuel'), one racially aggravated assault and theft ('Patrick') and one of domestic violence ('Robert'). These are the crimes which were on the indictments for the cohort when fieldwork observation began. As described above, apart from Harry, seven individuals in the cohort had an antecedent history and Mark reoffended during the period of time in which his case was followed.[6]

[6] Despite numerous attempts to get in touch, contact was lost with Patrick and his family after the sentencing for racially aggravated assault.

One of this thesis' subsidiary research questions was to explore 'who or what is to be governed?' This was posed to find out how the categories of defendants with mental health problems and learning disabilities were applied to defendants with autism (see Chapter 1). For example, do decision-makers differentiate the category of autism and the categories of 'Aspergers' or 'high-functioning autism'? Where the latter categories dominate, what implications do they have for the outcomes for the defendant? That there is 'wide variation in rates of identification and referral for diagnostic assessment, waiting times for diagnosis, models of multi-professional working, assessment criteria and diagnostic practice for adults with features of autism' (NICE, 2012: 4) was discussed in Chapter 1.

The nature of an individual's diagnosis and the stage at which it was discovered by, or disclosed to, decision-makers in the criminal justice process had implications for decision-making about and disposal of their case. The terms of reference for this thesis (see Chapter 1) meant that all defendants in this cohort had been given a diagnosis of autism prior to their Plea and Case Management Hearing and their diagnosis was disclosed to the court. Unsurprisingly, the nature of their 'autism' was differentially diagnosed and some had co-occurring conditions. Mark's diagnosis was one of high functioning AS; Robert had a diagnosis of AS along with Semantic Pragmatic Disorder and Obsessive Compulsive Disorder. Harry and Patrick also had a diagnosis of ADHD. Ollie had AS. Samuel and Joseph were both recorded as having a co-occurring learning disability and low IQ (<70 and <100, respectively). Indeed, Chapter 1 noted that the disparate 'factors [in identification] contribute to delays in reaching a diagnosis [of autism] and subsequent access to appropriate services' (*ibid*) and in turn may become one of the 'interconnecting variables' (Browning and Caulfield, 2011) that lead individuals with autism to come into contact with the CJS. The change in the diagnosis

given to Claire, from AS to autism, as her IQ was later assessed as being lower than previously thought, had a direct impact on her access to local authority support and how her case was processed through the CJS (see below).

ii) The eight case studies

Case 1, 'Harry'

'Harry' and a friend were walking home together one evening. They were looking down at Harry's mobile phone when two youths ran towards them and punched Harry in the face. Harry fell over onto a wall, and then one of the youths jumped 'a metre in the air' and landed on Harry's head; then kicked him in the head numerous times. This youth then took Harry's wallet and Autism Alert card from his pocket. A woman, who witnessed this scene from her lounge window, banged on the window to get the youths to disperse.

Harry remained on the ground unconscious and the witness thought he was dead. The police and ambulance services were called. When the police arrived, they asked Harry whether he wanted to press charges. He replied, 'I just want to go home'. The police asked Harry what had happened and he said '"I fell on the wall" which is literally what had happened' (Father, interview). He was asked about whether he wanted to press charges and 'he'd said, "No, I just want to go home"' (ibid). The paramedics subsequently spoke to him but, rather than asking him what he wanted to do, told him to get in their ambulance because of his injuries. The witness asked the police at the scene whether they were going to press charges and the Police Officer said 'no, he doesn't want to' (Father, Interview). The witness protested and said, 'but I saw it all, I'll be witness to it' (Autism Expert, Interview) and went on to tell them that

they could still have caught the 'two lads that have beaten him up, one went to top of the road and the other is hiding in the graveyard' (ibid).

When Harry arrived at hospital, he repeatedly told staff that he had autism but this 'factor was not fully acknowledged' (Father, Interview). At no point during his trip to hospital was he assisted to call home. While sitting in Accident and Emergency (A&E), Harry continued to ask medical staff about going home. There happened to be a separate pair of Police Officers in the waiting room. He asked these two officers if they could take him home. After they kept refusing to do so and told him to stop asking them, 'he got very agitated and started swearing' (Solicitor). One officer told him that he could not swear in A&E and asked him to leave. Harry stood up and the Officer pushed him from behind towards the door. Harry got more agitated and turned around, and the Officer then took him by the arm toward the exit. Harry then had a 'meltdown' (Father, Interview) and there was a scuffle. Harry was accused of pulling the Officer's ear. The Officers then bound Harry's ankles and hands and he, allegedly, bit one of the officers. They 'threw him head first' (Father, Interview) into the police van and threatened to taser him. Harry was arrested and charged with assault on two police officers. He was held at the police station for sixteen-and-a-half hours.

Harry pleaded not guilty at the Plea and Case Management Hearing. The case went to trial in the Magistrates' Court in front of a district Judge. In the intervening period, Harry's defence solicitor had instructed a psychiatrist to produce an expert witness report. The CPS had approved the psychiatric report commissioned by the defence. The consultant psychiatrist said that Harry was not fit to stand trial. At court, the district judge opened proceedings by asking whether the prosecution was going to 'proceed with a view to conviction or on fact finding basis under Section 37(3).' (District Judge, Court Observation). The District Judge told the 'claimants' (the police

officers) that he 'didn't want them to confuse fact finding where they seek to put matters forward to make a Hospital Order, with a public interest test to bring a conviction' (ibid). Further, the District Judge said that the prosecution:

> *'[c]ould not, under a reading of S37(3) [of the Mental Health Act 1983] proceed with both trying to get a conviction and, if there was an acquittal, seek a Hospital Order. It was in the public interest that it was one or the other' (District Judge, Court Observation).*

The Judge then requested 'that the claimants' solicitor (CPS) show the claimants (the police officers) the psychiatrist's report'. The CPS Solicitor said that he had shown one claimant the report but they wanted to proceed. The other claimant had not seen it and the CPS Solicitor said that he would have to show it to his superior. The District Judge asked whether it was 'in the public interest to proceed with the prosecution of assault in the knowledge of [the defendant's] autism.' The District Judge said that if it was the guidance of the CPS solicitor's superior 'to proceed then there would be an abuse of process application' and reiterated that if they 'proceeded with fact finding then the Magistrates' Court would not make a finding to lead to a Hospital Order' (ibid). The District Judge told the CPS that 'no doctor would say that [Harry] needs a Hospital Order and [they] already decided they did not want to get a second expert opinion'. The case was adjourned while the solicitor saw the claimants' superintendent. When he returned, he had been instructed to offer a bind over; this was rejected by the defence. After a further adjournment, the CPS solicitor informed the court that they 'had no evidence to proceed with the case'. The district judge agreed that this was 'the right decision'. The case was dismissed.

Case 2, 'Ollie'

During the process of Ollie's diagnostic assessment for autism with a psychologist at a Mental Health Service, his psychologist repeatedly asked the same question framed in a

certain way. Gradually, Ollie proceeded to get more and more agitated. Eventually, he had 'an outburst of frustration and smashed the laptop in half' (Autism Social Worker, interview). *This led to Ollie being convicted for common assault and criminal damage. For these offences, he was given a community order and fine. The latter was paid out of the disability benefits he received: Disability Living Allowance and Employment Support Allowance.*

Six months later, Ollie went to a house which was being watched by the police drug squad. He had gone there to pick up some 'wraps' of cannabis for his friend 'Barney' who owed him money. Barney had told Ollie that he would give these cannabis wraps to his other friend, 'Gerard' who owed Barney money. Barney had promised Ollie that his friend, in return, would give Ollie petrol to fill up his motorbike.

Ollie was found by a police officer shouting over the fence of a house that was being watched by him and appeared agitated. The police officer asked: 'what's in the bag?' Ollie answered: 'a book and a drink'. Ollie's bag was searched and inside there was a book which had contained within it a compartment which had 2 wraps of herbal cannabis. He was then asked whether the bag was his. 'Yes, it is mine' he replied. In Court, the solicitor clarified that 'it was not his cannabis but it was his bag'.

When the police interviewed the defendant, there was an appropriate adult present but not a solicitor. He was charged with possession of two wraps of cannabis and one resin, and pleaded guilty. The Magistrate Court gave him a £75 fine and made him pay £40 for costs along with a £20 victim surcharge. They allowed the conditional discharge to continue. The fine was added to his existing fine for the previous assault and criminal damage; these funds were to be subtracted from his benefits.

Case 3, 'Joseph'

Joseph lived with his parents. Between the ages of eight to eleven, he went to a special school near his home for people with moderate learning disabilities. At this school, he was taught by a teacher, 'Mrs Wood', 'who had seemed to bully' (Father, Interview) Joseph. After she married a male teacher, Mr Wood, she would bring him into her classroom and verbally humiliate Joseph (ibid). These incidents emerged only years later. Joseph would 'see [the teachers] when out in town and wanted to know why they did not acknowledge him when he walked past them down the street' (ibid). Joseph wrote to them years later saying that 'that he wanted to be able to say 'hello' when he saw them... [but] got no response' (ibid). Joseph 'harboured all of this until on the day of the incident' (ibid) when, while his parents were out of the house, Joseph watched a moderately violent film. He had been 'very stable for days' so his parents 'did not think twice about leaving him and therefore [this day] was not unusual'. After watching the video 'he got angry and wound up with adrenalin… and grabbed... a butter knife and went to his teacher's house' (ibid). When his parents arrived home to find Joseph was not there, they 'knew where he [must have] gone' and his father drove to the teachers' home.

When Joseph arrived at the teacher's house he had kicked at the door. This was a glass door 'so they would have been able to see who it was and seen him carrying a knife but then [Joseph] saw that they were not opening the door… And so he went to [their] cars and scratched the door of one of them' (Father, Interview). At this point, his father arrived, saw him do this and started calling him to get into the car. Then the male teacher 'came out of the house and was shouting at [Joseph] and then lost it and pushed him to the floor and punched him up; his wife, the other teacher, then called the police' (ibid). The father managed to get Joseph to sit in the car and they waited at the

scene until the police arrived. Because the police were responding to an incident 'where someone was [described as] wielding a knife… three police cars turned up'. Joseph and his father went home with one of the officers and told them that Joseph had a learning disability and autism.

At the incident, 'the police said "oh this will never ever go to court; he has got autism" and they kept on reassuring us that it would not go to court' (ibid). However, Joseph's father 'was very worried because [he] knew that Joseph had been carrying a knife and [we] needed to demonstrate that we had taken it very seriously' (ibid). Therefore, his father 'took him to A&E to see if he needed to be admitted to hospital' because he thought 'a stay in hospital might demonstrate a) that we had taken it seriously and also because b) psychiatric services might need to do something to put resources into [Joseph's case] at this stage'. Joseph was admitted as a voluntary patient but requested to go home. Therefore, it was decided to section him under section 2 of the Mental Health Act for 28 days. After a week, the doctors and nursing staff wanted to discharge him 'but the police said, "No, we don't want him discharged until we have taken his statement"' (ibid). The police took the statement while he was still on the Section 2 Order.

Joseph appeared before the Magistrates' Court in 2011 'for criminal damage, assault and possession of an offensive weapon', represented by the duty solicitor who had accompanied him at the police interview. Prior to this Plea and Case Management Hearing, his parents had obtained an expert witness statement from a consultant psychiatrist. That 'report made it abundantly clear that [Joseph] was not capable of understanding the proceedings or responding to questions from… lawyers… wouldn't follow the proceedings at all [and] wasn't capable of giving instructions or making decisions' [Solicitor]. However, at the first appearance at the Magistrates' Court

'nothing happened: [the duty solicitor] had the report but it didn't lead to any application for [Joseph] to be deemed not fit to plead' (Solicitor, Interview). Instead, as Solicitor Geller, who later replaced the duty solicitor, explained, 'he rang the local prosecutor and said: "we have got this young man, he is autistic, he has appeared before the court for criminal damage, assault and possession of an offensive weapon, if I then persuade him to admit the offensive weapon and the criminal damages, will you drop the assault [charge]?"' (ibid). This charge was dropped and the duty solicitor explained the 'good news' that Joseph's assault charge had been dropped and 'if [Joseph] pleads guilty to the remainder of the offences because [he] was guilty of those offences, [then] I can then get the case dealt with for you today' (ibid). Joseph and his father agreed because 'most importantly, [they thought it would] get the stress away from Joseph and get the case dealt with [that day]'. However, instead, he was then committed for sentence to the Crown Court, and 'shock horror, best laid plans and all this has gone to tatters' (ibid).

So concerned were Joseph's parents with the prospect that Joseph might go to prison, they sought a second opinion from Solicitor Geller, who took over his case. Solicitor Geller then took proceedings to make an application to vacate the plea, this was 'done reasonably quickly and the courts were moderately good in getting it listed… for September 2011'. However, the first appearance at the Crown Court did not take place until the summer of 2012 and the case was not finally listed for trial until July 2013, over two years after the original incident. At these proceedings, the Judge made an order that Joseph was unfit to plead. There followed proceedings for a jury to determine whether Joseph 'did the act or made the omission charged against him as the offence' (S4A(2) of the Criminal Procedure (Insanity) Act 1964). The jury were 'agreed that the defendant did the acts alleged' and that left the judge to decide whether to give

'a Hospital Order, a supervision order [or] an absolute discharge' (Judge, Court Observation). Following the advice of the defence barrister (see below) who explained that Joseph had now been given 'an increase from 35 hours' social service support to 67 hours from social services to keep him in as much as possible', the judge gave Joseph a two-year Supervision Order.

Case 4, 'Samuel'

'Samuel' had previously been convicted for two separate offences of sexual assault. The first offence occurred on a bus where he struck up a conversation with a woman he did not know and subsequently slid his hand up her leg on top of her clothing without her consent. The second offence occurred at a railway station, where he began a conversation with a woman as he was exiting the station on an escalator and then touched the woman on her bottom. For the latter offence, Samuel was given a Supervision Order and a Sexual Offences Prevention Order (SOPO) in 2011. The SOPO prohibited Samuel from 'travelling on any form of public transport including train, bus, tram and metro or being present at any location where public transport is accessed or exited, including railway and coach stations, bus, tram, metro or underground stops, unless accompanied by an appropriate adult who was over 18 years old and who had knowledge of his previous convictions' (Court Observation).

The third offence occurred in August 2013. Samuel was waiting outside the job centre where he met a young woman, 'Judy', who had gone outside for a cigarette, and was standing at the doors. They had a short conversation and he stood right next to her. He stared at her breasts and did not look at her face. She was 'wearing a strappy top' and Samuel asked if her breasts were 'natural'. He attempted to start talking about breast implants and asked her where her bras were from. Judy began talking about her boyfriend as Samuel kept asking her 'increasingly personal questions' (Defence

Barrister). Daniel stroked her arm down to her hand and she pulled her hand away; and he continued to stare at her breasts. He spoke about her freckles and asked her age; he said he thought she was 'only 17 or 18'. Judy began to move away, trying to distract him, and walked back into the job centre but felt Samuel's 'hand on her bra strap and then felt his finger around to the side of the breast, he did not squeeze but left his hand lingering there' (ibid). He was still staring at her and she became frightened and told an official in the job centre and told them what had happened and the police were called. Samuel was charged with sexual assault in August 2013.

Samuel lived with his mother, Angela, who was in her seventies. At the bail hearing in September 2013, she refused to have him back living with her because it had become 'too much' and she wanted him to 'get proper help'. His application for bail was unsuccessful and he was remanded in prison. He pleaded guilty at his Plea and Case Management hearing, in October 2013, and his sentencing in the Crown Court was listed for February 2014. His legal team sought a Section 37 Order for him but his solicitor had only arranged one medical report by the time of those proceedings. The case was adjourned until the end of April 2014. At sentencing, Samuel was given a Section 37 Order and was placed immediately in a forensic hospital, when he had already been placed on remand for eight months. A SOPO was also put in place for seven years. The judge also changed the terms of this order to prevent the 'draconian' (Judge, Court Observation) impact of the original terms on Samuel's mother. As of April 2016, Samuel remains on the Section 37 Order. Discharge under Section 117 'may be considered when he has completed another course with his psychologist' in summer 2016 (Mother, Interview).

Case 5, 'Robert'

'Robert' lived on his own in a housing association flat, two miles away from his mother 'Nicola'. He had been housed there since the age of 16 as his prior aggressive and violent behaviour had been viewed by social services as a risk to his younger sister, 'Christina'. He had one previous conviction for violence against his mother. He also had one previous conviction for growing cannabis in this flat, along with three other suspects, for which he had been given a four-month suspended sentence.

On the afternoon of the third offence, he had been at the pub with his school friend, 'Tyler', and Tyler's girlfriend, 'Lauren'. At 11.25pm, he came around to his mother's house, knocking on her window saying 'Alright mum, they're taking the piss [out of me] and Tyler's girlfriend came over and said she doesn't "like me" and [Tyler] said: "you don't understand that people have homes to go to"'. Nicola let Robert in because he was threatening to break the window, which 'he had done before'. They sat talking in Nicola's living room, and she told him that she had to be honest that 'you demand a lot and you cling on [to people]' (Mother, Interview). Then Robert 'got a bit aggressive' and started saying 'oh Mum, you don't understand', and she suggested that he 'go up to bed and calm down' (ibid). He said 'I've got nobody, I've got no friends, you kicked me out when I was 16'. Nicola 'left it then as [she] did not want an argument'. Robert threw a telephone at her, followed by a stool, then he walked over to her and 'kept punching [Nicola] and [she] got up and then he threw the lamp at [her]'. She managed to call the police but it got 'worse and [he] called [her] everything under the sun'. Nicola reported that 'he got at me so much with fear that [she] wet [herself] all down [her] trousers. [Her] right breast was black and blue and he kept punching [her] at the back of the head' (ibid).

When Nicola called the police they 'could hear him being abusive' (ibid). They arrested Robert when they arrived and, because Nicola was so frightened and her blood pressure was so high, she was taken to hospital in an ambulance. Nicola made a statement but retracted it two weeks after his arrest 'because of [Robert's] autism'. As she was his main carer, she did 'not want him to get locked up' (ibid). Robert pleaded not guilty at the Plea and Case Management Hearing but, on the day of the trial, a guilty plea was entered. Rather than activating a breach on the suspended sentence for the second offence, the Magistrates' court extended Robert's suspended sentence to eighteen months and gave him a community order.

Case 6, 'Patrick'

Patrick had been arrested a total of 16 times and, in 2011, was convicted for affray. In April 2013, charges were brought against him for criminal damage to three vehicles and possession of cannabis. He was charged with theft of copper piping and cylinders in June 2016 when he was 18 years old. He denied all charges except those relating to the theft. Patrick was found guilty by a District Judge in the Magistrates' Court for all charges and was to be sentenced in early August 2013. At those sentencing proceedings, District Judge Simon 'had concerns with sentencing [Patrick]' on that day (Court Observation). This was because in the intervening period, Patrick was also charged with common assault and racially aggravated assault in May 2013, before his 18th birthday. He pleaded guilty to the charge of common assault and not guilty to racially aggravated assault. The proceedings for those charges had been listed for trial in the Youth Court for mid-August 2013. District Judge Simon thought that it was 'important that the court [had] all the information… and therefore it would [have been] wrong for the court to deal with [that] matter [on that day]…' and decided to adjourn until 'his trial [was] over'. The District Judge requested that the sentencing for the

property offences was listed for the afternoon after Patrick's trial in the youth court (Court Observation).

At the trial in the youth court, the facts of the racially aggravated assault were set out as follows. Patrick, then aged 17, attempted to gain entry to a nightclub at a Pride event in his local city centre. A female bouncer denied the defendant entry to the nightclub, raising 'concern[s] about his ID and age' (Prosecution Witness, Court Observation). Patrick was, according to the claimant, the male head bouncer, 'subsequently rude and abusive' (CPS Solicitor). The head bouncer intervened, asking Patrick's 'friends to take him away… [and] pointed towards the police officers' at the exit (Prosecution Witness, Court Observation). Patrick struggled as his friends tried to take him away. The head bouncer put his arms up 'in a welcoming gesture' and 'asked again if they could take him home… [and] put [his] arm out again… and Patrick pushed the bouncer'. The Bouncer then 'felt something on [his] face [spit] then said "what did you do?"' (ibid). The bouncer alleged that Patrick 'then said: "fuck off nigger" and ran off from the police' (ibid). Patrick admitted to 'jumping up and spitting' at the head bouncer 'because he had been pushing [him] and [he] had had a little to drink'. Patrick ran off because he 'saw a copper looking straight into [his] face' (Court Observation). Patrick denied saying 'anything after spitting [at the bouncer and] never said the "N" word… at all' because '[i]t's racist innit? I've got black friends and my sister has got mixed race kids and I've got mixed race friends.'

Patrick was found guilty of the racially aggravated assault. After some deliberation and confusion as to why the proceedings were being tried in the youth court, District Judge Howdle decided to sentence Patrick for all the charges alleged against him. For the racially aggravated assault, he was given a 12-week community order with supervision and a 11pm to 6am curfew requirement for this period under

Section 177(1)(e) of the Criminal Justice Act (CJA) 2003. He was also ordered to pay £150 and a £250 contribution towards prosecution costs. For the remaining offences, she gave him a 12-month community order and ordered him to pay £60.

Case 7, 'Mark'

In 2009, Mark's father discovered pornographic images of children on Mark's computer and encouraged him to report these to the police. Mark admitted these offences. He was given a Community Order for 3 years with supervision and intervention requirements. He was also subject to a Sexual Offences Prevention Order and put on the Sex Offenders' Register for 5 years. Mark reoffended between November 2011 and May 2012 by accessing hundreds of indecent images of children and indecent movies. He received specific help for sexual offending and counselling from an AS Specialist before going to court for these offences. His solicitor advised him 'not to enter a plea at the Magistrates' court' to allow the defence 'more opportunity to investigate his condition and circumstances surrounding his offending before the matter was finally sentenced in the Crown Court' (Solicitor). The case was 'adjourned… three times in the Crown Court for various reports to be finalised in conjunction with the probation service, so it was a lengthy process' (ibid). The case went before the Crown Court for sentencing in April 2013 and Mark was given an extension to his Sexual Offences Prevention Order and a Community Order with a requirement for him to undergo psychiatric support from a specialist, 'Dr Teale', in the town where he was studying at university.

He returned to university and a local Offender Manager was assigned to check his internet usage. As his university accommodation was not his primary domiciliary residence, Mark had to go back to Primary Care in his university town in order to be referred to Dr Teale. However, Mark 'failed to organise the appointments and wasn't

given the support to do so' (Mother). During this intervening period, his Offender Manager discovered that Mark had begun to download images again. Mark's 'mental ill-health deteriorated' (ibid) and he was sectioned under Section 3 of the Mental Health Act 1983. In June 2013, against his and his parents' wishes, Mark was moved from the hospital placement in his university town back to a mental hospital placement in the local authority where his family reside because his local authority would not pay for his out of area placement. Five months later, he was moved to a specialist Asperger hospital placement. In January 2014, the Mental Health Review Tribunal decided to take Mark off the Section 3 Order but 'the [Local] Mental Commissioner said there was no place for him' and wanted to 'turf him back into the community' (Mother). Six months later, Mark was discharged from hospital on a Section 117 procedure. At this stage, he was 'guaranteed support by [the Local] Community Psychiatric Nurse and Mental Health Trust' (ibid). However, Mark was 'never given psychiatric help and the Mental Health Trust said that it was not their job now' (ibid). Mark's parents 'made it clear to them that if there was no support he would reoffend' (ibid). His parents complained because, although he had been given 'the right kind of probation support, he had not had adequate psychiatric support after [being] discharge[d]'.

In September 2014, Mark reoffended. Triage software was attached to his computer by his Probation Officer and they discovered that two types of software had been downloaded by Mark: a 'memory eraser' and a 'CCleaner' to erase internet history. Forensic analysis using Iris software 'revealed that he had used open source peer-to-peer sharing apps to retrieve data artefacts' (prosecution solicitor, Court Observation). He had 'viewed six videos with sexually suggestive titles regarding sexual exploitation of children and toddlers' (ibid). Mark pleaded guilty to the charges in the indictment and to breaching his SOPO by erasing his web history and

downloads. He was sentenced in the Crown Court to a 12-month sentence which, 'with understandable hesitation' (Judge, Court Observation), was suspended for 2 years with 200 hours of unpaid work as an additional requirement. The judge modified Mark's SOPO, making it indefinite and added a further prohibition not to use any device capable of accessing the internet including but not limited to a personal computer, laptop, unless internet capability is disabled and unless you make the device available to the police when requested. Under this Order, Mark was prohibited until further notice from:

> *1) using any device capable of accessing the internet unless internet capability has been disabled;*
>
> *2) from deleting any internet history;*
>
> *3) from possessing any device capable of accessing the internet unless you disable that device;*
>
> *4) prohibited from any contact with children under the age of 18, whether inadvertent or unavoidable, without the consent of the child's parent or guardian who [themselves] know about [his] offending history.*

Case 8, 'Claire'

'Claire' became known to the police in 2008 when she started to 'attend' local police stations. She would turn up and 'just wait around the public areas of the station' until an officer began an interaction with her (Offender Manager, Interview). Gradually, this behaviour 'escalated with her entering the "private" areas of the station, such as the staff car park, and causing criminal damage to officers' vehicles and being found in possession of a bladed article'(ibid). Claire was diagnosed with AS in 2010 but was

later found to have an IQ of <70 and so the consultant psychologist 'changed her diagnosis to autism, because of the low IQ' (ibid).

When Claire 'attended' the police station, she would sometimes produce a Stanley knife which she would hold in her hand and refuse to let go. Afterwards, she would describe hearing 'voices in her head telling her to go the police station; she can't hear anything else over those voices and therefore is compelled to be at the police station' (crown prosecutor, Court Observation). Afterwards, she would not remember being at the police station and describe not being able to 'let [the knife] go' as if 'she had no control' (ibid). The police were told by an expert psychologist that this was dissociative behaviour – 'trauma symptoms [related to] being touched [inappropriately]' caused by earlier incidents of sexual abuse and that 'when she is anxious, she feels safe at the police station' (offender manager, Interview).

By 2013, Claire had been 'arrested 68 times' (CPS solicitor, Court Observation) prior to being charged with two counts of possession of a bladed article: the incidents which led to the court proceedings observed for this research. Prior to being charged for these offences, Claire had been given 'short prison sentences' for possession of a bladed article and public disorder offences 'but nothing [has] worked so she keeps coming back' and the 'local CPS said they [were] not interested in prosecuting her' (offender manager, Interview). She had also been '[d]etained under the Mental Health Act but Mental Health Services said [Claire did] not suffer from any 'treatable mental illness' and was 'not in crisis so they [did] not section her' (ibid). Despite Claire's low assessed IQ, the 'learning disability services just didn't want to know' and she failed 'various tests and assessments social services [did]... of her needs' (ibid) and, therefore, the 'local social worker found her not to meet their eligibility criteria' (ibid).

When her case came to court, the police had recorded that Claire had taken up over '1,000 hours of police time' and sought advice from a consultant forensic psychologist, 'Dr Wilkie'. Dr Wilkie recommended Cognitive Behaviour Therapy along with a supported living package but they 'found it impossible for the local authority and mental health services to give [Claire] support' (Offender Manager, Interview). Further, as a result of her high rating on their Independent Offender Management scores and the 'intense level of resources' needed to support her, the Detective Constable worked with the CPS to pursue 'prosecution rather than diversion in this case because they were concerned that if the court [did] not require her to attend the psychological sessions then she [would] not attend [them]' (ibid).

Claire pleaded guilty to both counts of possession at the Magistrates' Court Plea and Case Management hearing. During the period before sentencing, Claire's Offender Manager, 'DC Kim', contacted their local Police and Crime Commissioner asking for their support and to 'speed up and push counterparts at other agencies' (ibid) in order to secure funding from social services to work with them. Kim had told the Commissioner that it costs £2,500 'every time [Claire] is arrested' (Offender Manager, Interview). Thus, at sentencing proceedings, the CPS, as instructed by the police, and Claire's defence solicitor obtained a four-week adjournment in order for DC Kim to seek funding for cognitive behaviour therapy and 'residential care through the Police and Crime Commissioner' (Defence Solicitor, Court Observation).

When Claire was sentenced a month later, at the request of both legal teams, the presiding judge sentenced her to a twelve-month Community Order along with a twelve-month Supervision Order; a six-month Mental Health Treatment Requirement to engage with the named psychologist to undergo Cognitive Behaviour Therapy, and a

six-month residency requirement for her to be domiciled at the supported living placement that would be paid for out of the Police and Crime Commissioner's budget.

2. Pre-trial shaping: to what ends are they governed and who governs what?

i) Police

Difficulties surrounding early identification of autism for those charged with a criminal offence were discussed in Chapters 1 and 3. Very often, the police are the first point of contact with the CJS for defendants with autism and thus 'there is an early opportunity through police intervention and liaison to engage services and potentially avoid future problems' for anyone who may appear to have a mental health problem (Bradley, 2009). As Lord Bradley pointed out in his original report, 'the legal responsibility for identifying mental health needs in police custody rests solely with the custody officer' (*ibid*: 39). Chapter 4 elucidated the current Service Specification requirements for Liaison and Diversion Services and Chapter 5 explicated what is expected of the police when coming into contact with someone with autism who is thought to have committed an offence or is displaying challenging behaviour under the Autism Act 2009 and accompanying policy. Yet, in a number of cases in the cohort documented here, the police and health services, which were involved before the case was referred to the CPS, did not base their decision-making on logics surrounding the categorisation of the defendant being a vulnerable adult nor an adult with autism.

Although the autism of all defendants in this cohort had been diagnosed prior to arrest and disclosed to police on arrest, this is unusual. Methodological difficulties in systematic identification were discussed in Chapter 3, undeniably impacting upon the

size of the cohort observed for the present research. According to the defendants' solicitors, it is 'rare' for the person's autism '*to be diagnosed or diagnosed correctly.'* Indeed, autism is not usually identified expediently or appropriately because if they see '*a client, who… is not behaving "normally"… [t]hey are often diagnosed with ADHD, or learning difficulties…'* (Solicitor McKinnery, Interview). It is only when 'you ar*e using your experience… as a defence advocate… you appreciate it is more than ADHD'* (*ibid*). Such an identification then had an impact on how solicitors built their defence case:

> *'…it is important that you don't write them off; it is very easy to accept a "diagnosis" e.g. I am ADHD or [whatever]…particularly the time constraints we have at the moment [and] financial constraints'* (*ibid*).

Other defence solicitors raised the need to systematise identification where *'there is a specific unequivocal diagnosis'* as there are no '*reasons why it wouldn't help everybody'* if there was '*a mark so everybody in court knows how to react and approach individuals… in court'* where the case involved *'a vulnerable defendant'* (Solicitor Griffiths). They drew the analogy to the early identification of a *'domestic violence case'*, although they acknowledged that an unequivocal diagnosis *'in itself might cause a problem because in many cases you can be… [defending] people who haven't had a diagnosis'* (*ibid*). The new L&D Service Specifications now requires their services and other agencies to use the most relevant 'screening tool' at a specific 'screening appointment' to assess the defendant for 'a wide range of health issues and vulnerabilities' (NHS England, 2014: 7). However, solicitors raised concerns about police attitudes towards defendants who self-disclosed that they had autism using autism alert cards, as one solicitor said:

> '*…it has been useful, if you can get the officer to look at it [and] if the officers are aware of them. But again [the officers are saying to themselves] "you're not behaving how… I would expect you to behave normally… therefore I take hold of you" [for example but the person with autism thinks] "I don't like being*

touched, I feel threatened", it escalates. [Therefore], if the client says, "I have a card that I can show you", I'm not sure the officers will take any notice… So, I am told they are useful, it's a question of how the officer reacts; I wouldn't say they are the panacea' (Solicitor McKinnery, Interview).

Harry's pathway into the CJS began with him being the victim of an assault, not the offender, and this illustrates the problems which arise from the failure of the police and other agencies to properly identify the defendant's autism prior to arrest and charge. Harry's literal interpretation of the language used by the police when they first asked him if he wanted to press charges influenced how his case was processed. As his father, 'Andy', explained, when the police were called they asked Harry:

> *'whether [he] wanted to press charges. [He replied] "no, I just want to go home" [and when] they asked Harry what happened and he said "I fell on the wall" – which is literally what had happened!'*

Andy related how Harry '*wanted to go home because we have drilled it in to him that this is where he must go if he has been scared and in danger*' (*ibid*). Although the '*woman who had witnessed the incident from her downstairs window had informed the police'* that she '"*saw it all, [and would] be witness to it*"', the police told her that they were not going to press charges because '"*[Harry] doesn't want to*"' (*ibid*). Conversely, when the paramedics spoke to Harry, '*rather than asking him what he wanted to do, [they] told him to get in the ambulance because of his injuries*' (*ibid*). Harry got into the ambulance and was then taken to A&E, because, as his father related, he '*was taking instructions rather than being asked*' (*ibid*).

Consequently, Harry was taken to hospital and when he and his friend were in A&E, both patients and medical staff witnessed the incident with the police complainants (who were not the officers at the original incident). Harry's solicitor said that at A&E, the witnesses '*were given the impression that [Harry] was behaving in a very violent way towards the police officers*' (Solicitor McKinnery, Interview). However, what had actually happened was that Harry and his friend '*had been*

assaulted which is why they had gone to the hospital in the first place.' His solicitor explicated:

> '*[Harry's] shirt had been covered in blood, so [he] had taken the shirt off... Of course, just the appearance would suggest aggression, a young man stripped to the waist being noisy in a hospital was bound to attract attention… it started off by [Harry] going up to the police officer, stripped to the waist, saying: "take me home". Just a demand, which again would seem aggressive in ordinary circumstances but [his] Dad [Andy] explained to me: "no, that's what we have told him. If he gets lost, ask a policeman, look for a policeman, tell him you're lost and then ask him, can he take you home". So everything that [Harry] did could have been explained by Dad…*' (Solicitor McKinnery, Interview).

Neither Harry's father nor any other relative was called by the hospital and the defence solicitor said: '*so I think they charged him on the basis that there was an awful lot of evidence against him; they were satisfied that they could prove the case*' [*ibid*]. Harry's solicitor recalled that had the case gone to trial, they would have drawn on the psychiatric report and called Harry's father to explain *'the sorts of things that cause stress and anger, asking why he might have reacted when he was taken hold of by a stranger'*. Harry was held under arrest at the police station for sixteen-and-a-half hours and *'they did not induct him properly as a vulnerable adult'* (Andy, Interview).

Thus the failure of the police and the medical staff to properly identify Harry's autism led to the escalation of the incident at A&E and his arrest. Harry's autism alert card was taken when his wallet had been stolen in the attack. Nevertheless, when this incident occurred, the Autism Statutory Guidance was already in force and its provisions would have applied to the NHS staff involved. Autism awareness training should have already been carried out in all NHS bodies and NHS Foundation Trusts for all staff working in health and social care (see DOH, 2010d). This training had the express aim of enabling staff 'to identify potential signs of autism and understand how to make reasonable adjustments in their behaviour, communication and services for people who have a diagnosis of autism or who display these characteristics' (DOH,

2010: 13). Therefore, the onus would not have been upon Harry to disclose his autism; the absence of his alert card was no excuse for non-identification. There is no duty to disclose placed upon an individual who has a disability such as autism. Sadly, Harry's case also reflects the findings of the Adebowale Report, that the 'police on the street lacked understanding of mental health issues, including vulnerability and adults at risk [and] …also failed to grasp the significance of information from family or bystanders, and from their own observations in order to assess the situation and decide on an appropriate response' (2013: 18). The *Mental Health Crisis Care Concordat* recognises that '[w]here there are problems, they are often as a result of what happens at the points where these services meet, about the support that different professionals give one another, particularly at those moments when people need to transfer from one service to another' (2014: 6). The *Concordat* states that 'people needing help should be treated with respect, compassion and dignity by the professionals they turn to' (*ibid*: 18). The police response was the antithesis of this approach. Harry was not at the A&E because of a mental health crisis; he was there because of injuries suffered by the earlier assault. Nevertheless, the response of the police failed to properly identify that he was a vulnerable adult. There was also a failure to follow guidance on restraint (See NPIA, 2009) and Section 8 of Code C of the PACE Code of Practice on conditions of detention for 'mentally disordered' or 'mentally vulnerable' defendants (Home Office, 2014).

Analogies can be drawn between Harry's treatment by the police and *ZH v Commissioner of Police for the Metropolis* (2013, EWCA Civ 69). In that case, during a school trip, a nineteen-year-old man with autism and epilepsy became fixated with the glistening surface of the water and jumped back in the water fully clothed after the police officer touched him on the shoulder. The police had to forcibly take him out of

the pool and the attending officers physically restrained him before using handcuffs and leg restraints. ZH was then taken out of the pool building via an emergency exit and was then placed alone in a cage in the rear of a police van, still in handcuffs, leg restraints, and soaking wet. The court found that the police had breached the duty to make reasonable adjustments under the Disability Discrimination Act 1995 to normal practice, policy or procedure and their defence of justification. They also found that the way ZH was restrained and placed in the police van amounted to inhuman or degrading treatment, and was in breach of Article 3 of the ECHR. Despite the arguments levied by the police in that case about necessity to prevent ZH from drowning, the court held that even if the purpose and intention of such actions were taken into account, there was a breach of Article 5 (2013, EWCA Civ). When the police arrested Harry they bound his ankles and hands and he, allegedly, bit one of the officers (Court Observation). His father then described how they *'threw him head first into the police van and threatened to taser him'* (Andy, Interview). He was then held at the police station for sixteen-and-a-half hours. The positive association with autism and over-responsivity to touch experienced by people with autism (see Chapter 7 below), and the fact that Harry had been at A&E because of a serious physical assault against him, indicate that no reasonable adjustments were made by the officers and their actions in restraining him amounted to inhuman or degrading treatment. Their failure to recognise his 'mental vulnerability' (*sic* Home Office, 2014) meant that their interventions escalated the situation; shifting his status from victim to offender.

Studies have shown that the experience of victimisation may precipitate offending (Reid and Sullivan, 2012; Ford *et al*, 2010; Manasse and Ganem, 2009). There is, however, a lack of robust research on the police's interpretation of a person with autism's behaviour and their impact on the escalation of that behaviour – whether

at the scene of the crime or over a longer period of engagement with the individual – and whether such interpretation influences their categorisation of that individual as a victim or offender. In Claire's case, her shifting status as victim to being dealt with by the police as an offender, unlike Harry, took place over a longer period of time. As her Offender Manager, DC Kim, recalled:

> *'…there are many PC's who don't believe she's suffering from anything; there are some that are understanding but there are officers who don't believe her and muck her [about]. That might have changed now because [I bring her]… in [the] custody block here. Don't get me wrong… [their lack of understanding] is because of a complete lack of knowledge… [A] lot of them don't have a clue.'*

The Offender Manager explained that she had someone in her family with autism but *'[o]ther than that we'd be in the same boat because officers just don't know how to treat her'* (*ibid*). DC Kim described how Claire had shifted from being a victim to being categorised as an offender by the police:

> '*…if she was not suffering from autism, I don't think we would see her here. There are some trauma issues. My personal opinion is [that the reason it was the] police that she started coming to [was because when she first came to them]… about serious sexual offences [committed on her], [it was the police who] tried to trip her up… [The] [p]olice messed up and [her relationship with the police] became unhealthy because [her case was] not dealt with properly when [she was] asking for help. [This] led to her hating us*' (Interview).

The issue of dividing practices in the processing of Claire's case was manifest in the internal disagreement the police had about whether she should be dealt with as a vulnerable adult or by the Offender Management team. The latter team:

> '*kept her because the boss asked me to…sort [out her case] once and for all. We are not equipped in here to be able to deal with her properly; we are going to be here in five years' time. She should go to the vulnerable adult team…not [labelled] as [an] offender but [a] victim*' (*ibid*).

When asked whether they had considered diversion, Claire's Offender Manager responded that the Integrated Offender Management team '*would employ simple tactics*' because they are *'not trained'* and are '*[n]othing more than a bunch of cops having a go at it*'. Towards the end of working with Claire, '*the only diversionary*

practice was the buses' and if they '*were lucky*' her '*favourite driver would be on the bus*' (*ibid*). She emphasised that they were '*not experts in autism*', '*we're cops, we're supposed to be out catching thieves*' but expressed the view that they have '*to do something*' for her. The police officers working with Claire were frustrated that the health and social care systems were not supporting her. This aspect of her case is considered in Chapter 8 but, clearly, a better understanding of her condition, when she first tried to report her sexual abuse could have prevented her shift in status from that of victim to offender. The police's difficulty in unravelling Claire's victim-offender status at this pre-trial stage, because of her complex needs, clearly directly influenced the schema for acting upon her conduct, from arrival at the police station to the processual and dispositive decisions about her. This, in turn, impacted on the treatment of Claire as a juridical subject whose conduct was to be limited by law and an individual to be disciplined through the disposal of her case and increasingly invasive governance of her actions (see Chapter 8).

Like Harry's case, Ollie's literal interpretation of language impacted on the processing of his case, and this was compounded by the failure of the police to ensure that he exercised his right to legal advice during police interview. These issues are revealed in an exchange between Ollie and his defence solicitor after his Magistrates' court proceedings:

> '***Solicitor***: *Now there are two lessons to be learned today aren't there?*
> ***Ollie***: *Yes.*
> ***Solicitor***: *First never carry anything [illegal] because even if it is not yours, you will still be in possession [of it]. [She demonstrates with a pen] If I give you my pen, it is still my pen but it is in* **your** *possession. The other lesson is: always ask for a solicitor!*
> ***Ollie***: *But the [Police Officer] said I could [have a solicitor] but didn't say I* ***had to*** *and because he was so nice, I asked him what he thought. He said "well it's only possession isn't it?" And I had an appropriate adult so I didn't think I needed [one].*
> ***Defence Solicitor:*** *The police do a different job [to me] and this is why we had three versions of events – I had to be quite careful because otherwise it can look*

> *like you were lying. Remember, you should always ask for [a duty solicitor]. We have to turn up within 45 minutes of being called if you are going to have… [a police] interview. Our job is to be there for you; that's different to the police's job*' (Court Observation; emphasis added).

It is deeply concerning that Ollie was not better supported to exercise this right as required by the Police and Criminal Evidence Act 1984. The right to legal advice applies to all detainees, who 'must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available' (see Home Office, 2014: 12). Indeed, the PACE Code of Practice explicates that '[n]o police officer should, at any time, do or say anything with the intention of dissuading any person who is entitled to legal advice in accordance with this Code… from obtaining legal advice' (*ibid*: 22). The Code makes it absolutely clear that in the case of a person who is 'mentally disordered or otherwise mentally vulnerable, an appropriate adult should consider whether legal advice from a solicitor is required'. Further, and pertinently in Ollie's case, 'if the person indicates that they do not want legal advice, the appropriate adult has the right to ask for a solicitor to attend if this would be in the best interests of the person' (*ibid*).

In Joseph's case, at the scene of the incident, his father explained that *'the police said "oh this will never ever go to court; he has got autism" and they kept on reassuring us that it would not go to court'* (Peter, Interview). However, Joseph's father, '*was very worried*' and took Joseph to A&E '*to see if he needed to be admitted to hospital*' because he '*knew that Joseph had been carrying a knife and [he] needed to demonstrate that [they] had taken it very seriously*' (Interview). Peter thought '*that psychiatric services might need to do something*' in response and Joseph was admitted as a voluntary patient. In the subsequent days, Joseph requested to go home but he was

sectioned, under Section 2 of the Mental Health Act 1983, for 28 days. After being there for a week, the doctors and nursing staff wanted to discharge him '*but the police said: "no, we don't want him discharged until we have taken his statement"'* (*ibid*).

It is understandable, though not desirable, that Joseph's father felt that a placement in hospital was necessary in the circumstances. However, that such action was taken by the police to block discharge is problematic, especially as the police had previously given assurances that the case would not go to court. Further, at the scene of the incident, the police could have decided to remove Joseph to a place of safety if he had been deemed by a constable to be suffering from a 'mental disorder and to be in immediate need of care or control' (Section 136, Mental Health Act 1983). If, at this stage, they had thought it 'necessary to do so in the interests of that person or for the protection of other persons' they could have done so for a period 'not exceeding 72 hours for the purpose of enabling him to be examined by a registered medical practitioner and to be interviewed by an approved mental health professional and of making any necessary arrangements for his treatment or care' (*ibid*). This did not happen. The decision of medical professionals to section Joseph was the result of him no longer being willing to remain as a voluntary patient and the police expressly telling the medical staff that they did not want him to be discharged until they had taken his statement. Section 2 of the Mental Health Act 1983 is an Order for the admission for assessment for up to 28 days. It is ultimately a clinical decision to be made by two registered medical practitioners on the grounds that the individual is:

> '(a) …suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and
> (b) he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons.'

The police have no power in making recommendations for the application of such an order or for discharge from this order, in order to facilitate their investigations; requesting the detention of someone for such purposes is not part of the criteria of either of these grounds. Further, it is certainly not clear that Joseph needed to be detained for assessment or treatment and thus ought to have been discharged. His compulsory hospitalisation under these circumstances also appears to have circumvented the proper process that the police should have followed in deciding to arrest him and determining whether or not to deny bail under their 1976 Bail Act powers (see also section 2(iii) below).

PACE does not give specific guidance about interviews undertaken while a suspect is on a Section 2 Hospital Order. However, it does give guidance with respect to interviewing detainees under Section 136 of the Mental Health Act 1983 under Code of Practice C and states that:

> 'Whenever the appropriate healthcare professional is called in accordance with this section to examine or treat a detainee, the custody officer shall ask for their opinion about:
>
> - any risks or problems which police need to take into account when making decisions about the detainee's continued detention;
> - when to carry out an interview if applicable; and
> - the need for safeguards' (Home Office, 2014: 31; para 9.13).

By analogy, and especially because of the higher threshold for detention under a Section 2 Hospital Order leading to 28 days rather than 72 hours of detention, one would have expected that the police would have had regard to this guidance in requesting Joseph's continued detention under that Order and considered the timing of the interview more carefully. At the very least, it is an example of bad practice carried out for the sole purpose of securing Joseph's prosecution, in turn, frustrating the expectations engendered for Joseph's parents at the scene of the incident. Utilising a

Mental Health Act Hospital Order in this way subverts the objectives of a Section 2 Order and re-purposes them to achieve goals of the criminal law.

The issue of the police failing to conceptualise these defendants as 'disabled' and properly apply PACE was also evident in Samuel's case. When Samuel '*showed the Custody Officer [his] autism alert card*' at the police station, the officer asked him '*what it was [and] took one look at [it] and gave it back to me, but… didn't look all that interested*' (Letter Correspondence).[7] The police officer's actions are contrary to PACE which states that if:

> 'an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable, in the absence of clear evidence to dispel that suspicion, the person shall be treated as such for the purposes of this Code' (Home Office, 2014: 5).

Samuel was detained for 16 hours and his case was not dealt with as expeditiously as it should have been under PACE which provides that any person in custody should be 'released as soon as the need for detention no longer applies' (*ibid*). In disclosing his autism alert card, Samuel had told the officers in good faith about his autism but the custody officer did not expeditiously inform the appropriate adult nor ask them to 'come to the police station to see' him. Instead, when Samuel was first detained, a male police officer searched him *'from the neck down to my waist by rubbing down both shoulders and both my arms [and legs]'* (Letter Correspondence). Samuel described this as '*very uncomfortable'* especially *'the way that [his] groin was searched'* and '*the [manner] that [his body] was searched… wasn't a gentle rub down …[but] can only be described as ruthless and painful'* (*ibid*).

Given the over-responsivity to touch positively associated with autism, such actions seem to breach PACE's guidance and the requirements to make reasonable

[7] Samuel wrote letters to me recording his experiences documenting his arrest through to his time on a Section 37.

adjustments under the Equality Act 2010. The conditions of Samuel's stay in the police cell were also startling:

> *'...I was only allowed out of my cell once [and] I wasn't allowed to wash my hands once I had been to the toilet which I think is completely unhygienic… On many occasions I did ask if I could have a wash and a shave but this is something else I was denied; I was told that the shower at the police station was broken… All the while I was locked up at [the Police Station] I was extremely hot and there was no ventilation'* (*ibid*).

PACE explicitly states that the conditions of detention must be 'adequately heated, cleaned and ventilated…' and '[a]ccess to toilet and washing facilities must be provided' (Home Office, 2014: 29).

Thus in the cases of Harry, Claire, Ollie, Samuel and Joseph, there is evidence of a proliferation of bad practice by the police in relation to their treatment of defendants with autism. Some of this practice amounts to breaches of both PACE and their Section 149 duties under the Equality Act 2010 to ensure that 'the powers and procedures in [the PACE Code of Practice] must be used fairly, responsibly, with respect for the people to whom they apply and without unlawful discrimination' (*ibid*: 5). Specifically, PACE states that when officers are carrying out their functions under this Act, 'they also have a duty to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, to advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it, and to take steps to foster good relations between those persons' (*ibid*). The conduct of the police appears to be flagrant disregard of the guidance provided therein in relation to persons who are 'mentally vulnerable'; this includes defendants with autism. Most worryingly, it amounts to discriminatory governance.

ii) The CPS and the decision to prosecute

Chapter 3 explicated the problems of systematic identification, flagging and differentiating disability on the electronic Case Management System (CMS). Following the Bradley Report, the CPS's own research on the prosecution of offenders with mental health problems or learning disabilities set out seven recommendations for further action by this agency. One of these recommendations was that the 'CPS should continue to take forward work with the police to improve the completeness of monitoring data on the disability of offenders' (Magill and Rivers/CPS, 2012). This research found that there was:

> 'little need for further training of prosecutors to assist them in making charging/initial review decisions in cases involving mentally disordered offenders… and in the large majority of cases reviewed, the decisions taken at charging/initial review were in accordance with the evidential and public interest stages' (*ibid*).

Yet there is no mention whatsoever of defendants, suspects or offenders with disabilities in the CPS Business Plans of 2012-13, 2014-15 or 2015-16, whether or not they are defendants with mental health problems or learning disabilities. In fact, there is no mention of defendants, offenders or suspects at all in these documents. Conversely, making their 'Service to victims and witnesses central to everything [they] do' is one of the CPS' four strategic objectives in their most recent plan (2015: 4). The category of vulnerability is only used by reference to their achievement goals to increase the uptake of 'Special Measures in all appropriate hearings involving vulnerable witnesses' (*ibid*: 7).

Central to achieving this goal is ensuring that the way the CPS explain their 'decisions and interact with victims and witnesses takes account of their needs, is more open and direct, and shows empathy' (*ibid*). Here, the CPS strategic approach represents the 'rebalancing' towards the victim. We must remember, however, that the

'availability of sufficient evidence should not automatically result in prosecution' (Sprack, 2012:80). Further, CPS Guidance states that:

> 'there should be no presumption either in favour of or against the prosecution of a mentally disordered offender; that each case must be considered on its merits, taking into account all available information about any disorder and its relevance to the offence, in addition to the principles set out in the Code' (CPS, 2010).

The process for determining the interest to prosecute is set out in two lists in the Code for Crown Prosecutors; one setting out the factors in favour of the commencement for prosecution (4.16) and another which tends against a prosecution (4.17). The case studies are illustrative of how the rationality of re-balancing in favour of the vulnerable victim and witness created 'oblique amnesia' (see Chapter 4) about the factors relevant to the interest to prosecute where the defendant had autism.

In Harry's case, we already saw how the failure to properly identify his autism by the A&E staff and on duty Police Officers led to an escalation in events and his shift in status from a victim in the earlier incidents to an alleged defendant. On the day that Harry's case was listed for trial, the District Judge questioned whether it was '*in the public interest to proceed with the prosecution of assault*' on the two police officers (Court Observation). He opened proceedings by asking whether '*the claimants were going to proceed with a view to conviction or on a fact finding basis under Section 37(3)*' of the Mental Health Act 1983. The judge said that they:

> *'could not, under a reading of S37(3) proceed for both: to try to get a conviction and if there was an acquittal seek a Hospital Order. It [was] in the public interest that it was one or the other'* (*ibid*).

The Judge continued to address the CPS solicitor in front of the court, telling them that he did not '*want [them] to confuse fact finding, where they seek to put matters forward to make a Hospital Order, with the public interest test to bring a conviction'*. He was very clear that if they chose *'to proceed with S37(3) fact finding'* then there was *'no*

way that the court would make a Hospital Order because [Harry] does not need to be in hospital' and that he agreed *'with the consultant psychiatrist that [Harry] does not need this'* (*ibid*). *R (on the application of Singh) v Stratford Magistrates' Court* explains that Section 37(3) of the Mental Health Act, taken with Section 11 of the Powers of Criminal Courts (Sentencing) Act 2000, only apply to a defendant who is mentally ill *when he appears before the court* ([2007] EWHC 1582 (Admin), para 23; emphasis in original). In view of these provisions, the District Judge informed the CPS Solicitor that:

> '*If the court agrees with the psychiatrist not to make a Hospital Order, then you are going to have to carry on with the prosecution but the consultant psychiatrist has said that he is not fit to stand trial. Therefore, it would be an abuse of process to carry on with the trial*' (Court Observation).

The CPS Solicitor had already seen the psychiatric report that Harry's defence team had ordered and had approved it, deciding not to get a second expert opinion for the prosecution. Subsequently, the judge instructed the CPS Solicitor to show the claimants, the two police officers, the psychiatrist's report. Their exchange continued:

> '***CPS Solicitor:*** *I have shown one claimant the report but he wanted to proceed. The other claimant has not seen it and I will have to show it to his* [the police officers'] *superior.*
> ***District Judge:*** *[Is] it in the public interest to proceed with the prosecution of assault in the knowledge of [Harry's] autism? If it [is the] guidance to proceed then there would be an abuse of process application and… if they proceeded with fact finding, then the [Magistrates' Court] would not make a finding to lead to [a] hospital [order]'* (Court Observation).

The court adjourned whilst the CPS solicitor spoke to the police officers' superior. When they returned, the CPS solicitor informed the District Judge that he had been instructed to offer a bind over. This was not accepted by Harry's solicitor and the case was adjourned again. When they returned, the prosecution said that they *'had no evidence to proceed with the case'* (*ibid*). The District Judge said that this '*was the right decision*', and whilst there:

> '*was no criticism in bringing a case of public disorder, the [CPS] should have taken the decision not to proceed as, in light [of the psychiatric report]... it was not in the public interest... [and] the Police should take on board [the court's decision]... in these circumstances*' (Court Observation).

The Code for Crown Prosecutors, para 4.17(g), lists the factors which tend against a prosecution being in the public interest: 'a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence and the views of the victim about the effect of a prosecution on his or her mental health' (2013). However, *'despite having approved the defence's psychiatric report'*, the CPS *'were having none of it'* (Solicitor McKinnery, Interview) and they certainly did not appear to consider such factors tending against prosecuting Harry. This implies that there may be a culture of attaining successful prosecutions over achieving equitable outcomes in cases like Harry's which meet factors tending against prosecution in the Code of Practice and where the impact on the offender is such that it is 'far greater than is warranted by the offence' (Ashworth and Redmayne, 2014: 206).

In Claire's case, the Detective Constable, (DC Kim), who worked with her at the Integrated Offender Management Service, had been told by the psychologist that they had been instructed to assess Claire because she '*needed treatment*' (Interview). DC Kim recalled why, on this occasion, they sought prosecution:

> '*The Crown is not interested in prosecuting [but] we're trying to make the most of this situation to get help for her from services. We've taken it upon ourselves to sort it out*' (*ibid*).

The IOM Team, therefore, had worked with the CPS and '*pursued prosecution rather than diversion in this case because they [were] concerned that if the court [did] not require her to attend the psychological sessions then she will not atten*d' (*ibid*). DC Kim stressed that she did not want Claire to go to prison because of her '*vulnerability'* but that they '*have to use "bad" [i.e. sentencing] to do some "good", [i.e.] to secure psychological support"'* (*ibid*).

Taking together, the absence of any consideration of defendants, suspects or offenders in the CPS Business Plans for the last four years, in conjunction with the determination to continue prosecutions where it may not be in the public interest to do so, or under the view that this is the only means to obtain any kind of support from public services, it appears that there is a culture of pursuing a crude re-balancing of the CJS towards victims which obfuscates the rights of defendants with disabilities. Thus, it is a matter of great urgency that the CJS divides the public interest test into two and considers particular 'harms of prosecution' to mental health and other consequential losses separately (see Rogers, 2006: 775). Much more also needs to be done to raise awareness of the adult social care support which is available in the community to Crown Prosecutors, the police and defence solicitors. This would assist in dismissing the misguided belief that access to these services can only be achieved through court-ordered requirements.

Conclusion

One of the most poignant aspects of observing these cases was being aware that the adult defendants with autism and their families did not have access to knowledge about all the legal options and protections which were available to them at each stage of the legal process and nor, rather frustratingly, did many of the decision-makers in the process. We can see this in the failure by the police to ensure Ollie had an on-duty solicitor for his interview and in the arrest and prosecution of Harry, for example. Despite the entrenchment of the social model of disability in the Equality Act 2010 and the UNCRPD, ratified by the Government in 2009, the research discussed in this chapter demonstrates that the medical model of disability is still dominant in the pre-trial stages of the court process. Thus, the defendants in this cohort were governed according to logics of this model, logics which situate 'the problematic aspects of

disability firmly within the individual, and perpetuates the illusion that the state or society has no role in this' (Clough, 2014: 2). However, even more worryingly, there are extensive examples of the police's policies for vulnerable defendants and the CPS guidance on prosecution as being in the public interest. The defendants were, therefore, unable to even garner the protection from being categorised as 'vulnerable'. As a consequence, the evidence in this chapter compounds the 'oblique amnesia', described in Chapter 4, about the duties of the police and the CPS to identify and respond to disability, here, the person's autism, under the requirements of the Equality Act 2010.

Chapter 2 cited the value of the work of the late criminologist Professor Barbara Hudson, who looked at the nature of justice in modern democratic societies, societies which are 'divided by gender, race, ethnicity, socio-economic status, lifestyle, religion and so on' (2008: 276). Because 'citizens of modernity' do not live in homogeneous societies, she argued, our CJS must respond to *difference* and *diversity*. Hudson differentiated these terms (2007: 158-9): 'difference' has negative connotations, implying 'not only dichotomy, but also hierarchy'; while 'diversity' has neutral or positive connotations, suggesting 'a range of options from which to choose, a spectrum of lifestyles and attributes to enjoy and appreciate' (*ibid*). She argued, therefore, that it is imperative for criminology 'to expose and critique the politics and policies of criminalisation and crime control which are grounded on an ideology of difference, rather than on an acknowledgement of diversity' (*ibid*). As a modern democracy, we must work to achieve justice in ways which reflect the heterogeneity of our humanity and move disability away from a 'diagnostic attribute' to a 'central location in the conceptualisation of the individual who presents to the CJS' (see above, Baldry *et al*, 2008: 42). Part Two of this thesis makes this conceptual shift. The following chapter moves from this pre-trial shaping to examine governance through the court process.

Chapter 7 – Court observation case studies: to what ends are they governed?

Introduction

***'I don't see being in court as any different as being in this room [interview room in Courthouse]. Well, except when I walk into the courtroom it all comes together in one place and at one time'* ('Mark', adult defendant with autism).**

This quote reflects the imperative that led me to undertake court case observation of the Magistrates' and Crown Courts: the language and argumentation used by legal counsel, the judge or magistrate, the defendant(s) and witnesses reveal much about the 'wider structures' of 'states, economies and legal orders, and the like' (Burawoy *et al*, 1991: 282). Mark's perception that, in the courtroom, 'it all comes together in one place and at one time' indicates how criminal courts are sites which make the intersection of multiple issues and criminal justice pathways (of both the defendant(s) and victim(s)) visible and observable.

The courts are spaces where justice is administered and where the symbolic nature of their 'transparency and ease of access resonates deeply with many groups who have been marginalised in society, including people with disabilities' (Flynn, 2015: 83). The way the justice system responds to people with disabilities, therefore, is represented in both a substantive and symbolic way by the existence of barriers in the physical space of the courtroom. These physical barriers amount to technologies of governance, representing material means that impact upon the modes of controlling, containing and regulating defendants with autism as juridical subjects. Section 1 situates the case studies in the place and space of the courtrooms in which their cases were heard and illustrates the issues which arose around the defendants' access to – and participation in – their court cases.

The chapter then examines to what ends defendants with autism are governed through expert witness evidence (Section 1.iii). It goes on to consider the dominant skew towards guilty plea in Section 2 and decisions about remand in Section 3. The latter section is illustrative of the governance which occurs through adjournment, remand in custody, delayed decision-making and expert witness statements. The process recorded in court observations here was not a linear pathway through court procedure: there were long interruptions to obtain expert evidence and get the case listed in court, and this led to delays in processing the defendants' cases. The result left the defendants and their families in a confusing melee of unmade or delayed decisions about their future and caused a great deal of anxiety and frustration, exacerbating the collateral impact of the criminal justice process on the defendants and their families (see Chapter 8).

1. The context: the courts and access to justice

i) Difficulties negotiating the courtroom

Following her two-year observation of the Metropolitan magistrates' courts, Pat Carlen argued that the social relations between Magistrates, the police and court personnel along with the physical layout of the courtroom, behaviour of the bench and arduous waiting times combine to produce 'staged' Magistrates' justice which 'atrophies the defendants' ability to participate' in these proceedings (1976a; b). Accordingly, 'judicial rhetoric of an adversary justice' is rendered 'absurd'. Carlen's visceral account encourages a researcher's critical eye to attend to the impact that the material reality of the courtroom and the social relations between its actors has on the defendant's experience of justice and the extent to which justice can be done in these circumstances. Predating many of the studies on measures for vulnerable witnesses and defendants by

twenty years (see Chapters 1 and 4), Carlen's work remains an important reminder for researchers to be alert to this 'material reality.' It is especially relevant here in examining the subtle technologies involved in governing defendants with autism in the courtroom. Indeed, Foucault suggested that ensuring a particular allocation of people in space is fundamental to any exercise of power (1984). Feminist scholars have written about the symbolism of the physical space in which justice is administered and the ways in which the 'architectural design might impact and influence the way in which the law is interpreted, applied and upheld in court' (Flynn, 2015: 88). Mulcahy is one such scholar, who argues that 'the shape of a courtroom, the configuration of walls and barriers, the height of partitions within it, the positioning of tables, and even the choice of materials are crucial to a broader and more nuanced understanding of judgecraft' (2007: 385). She recognises that the design of courtroom architecture – transmitted by, for example, the high gothic architecture of the Royal Courts of Justice in the Strand or the Victoria Law Courts in Birmingham – is deliberately imposing, imbued with symbols of the state that encourages participants 'to reflect on the gravity of law and legal proceedings' (*ibid*: 387). This is not to say 'that surveillance and discipline in the courtroom are inappropriate *per se'* but that we must consider that the courtroom is not the depoliticised space it is sometimes assumed to be. Instead, we must appreciate 'how spatial dynamics can influence what evidence is forthcoming, the basis on which judgments are made and the confidence that the public have in the process of adjudication' (*ibid*: 384).

Flynn nuances this discussion by considering the impact of courtroom design on people with disabilities and their access to and participation in justice; sending implicit and, sometimes, explicit signals of whether people with disabilities are fully welcomed or excluded (2015: 88). Difficulties surrounding access to justice in the courts and

participation in the court process, which disproportionately affect people with disabilities, 'can be considered, broadly, in terms of the physical accessibility to court buildings and infrastructure, access to court procedures and evidentiary barriers' (*ibid*: 83). The cases observed for the present research took place in both modern and 'historic' courts of the HMCTS estate.

The issue of physical accessibility and reasonable adjustments is particularly apposite in relation to the hyper-sensitivity or over-responsivity of adult defendants with autism whose sensory responses to the material environment of the courtroom could impact on their participation in proceedings. 'Over-responsivity' refers to hyper and hypo-sensitivities across visual, auditory, tactile, olfactory, gustatory and proprioceptive sensory domains which amount to exaggerated responses to one or more types of sensory stimuli (Schoen *et al*, 2008) to the extent that 'daily life experiences' such as labels in clothing (tactile domain) or clocks ticking (the auditory domain) are 'endorsed as uncomfortable or distressing' by individuals with autism (Tavassoli *et al*, 2014: 429). A recent study found that that a positive relationship exists between sensory over-responsivity and autistic traits. Adults with autism experience sensory over-responsivity to daily sensory stimuli in their physical environment across *all* of these sensory domains to a high degree and experienced this over-responsivity more than control group (*ibid*). Understanding the relationship between autism and over-responsivity is important as previous research has found that the discomfort and distress it causes is such that it compromises the person's quality of life (Kinnealey *et al*, 2011) and is linked to high rates of depression and anxiety (Kinnealey *et al*, 2011; Kinnealey and Fuiek, 1999).

Currently, there is no research available on the impact of over-responsivity in the courtroom environment or on the ability of adult defendants or witnesses with

autism to participate effectively in such circumstances but it is possible to deduce from the existing research that it would. While this thesis does not seek to explore the environmental stimuli of the courtroom on this cohort, difficulties in navigating this space and its corresponding impact on their participation in proceedings emerged as an important theme in fieldwork observations. In one of the historic courts, where two of the cases were sentenced (that of Robert and Patrick), a wooden trellis encased the dock. This obscured visibility for the defendant of the Magistrates' Bench, the positions of the defence and prosecution solicitors in the court and those in the public gallery. The trellis also obscured visibility for the family members in the public gallery. Shadows were cast across the austere Victorian courtrooms; further reducing visibility for those with visual hypo-sensitivity. In the modern Crown and Magistrates' Courts – which were used in the cases of Claire, Ollie, Harry and Samuel – the multiple bright lights would likely bleach out the faces and detail for those with hyper-sensitivity to light.

In the high-ceilinged Victorian courtroom, the acoustics were poor and there was no microphone or electronic sound system. As the Magistrates' and solicitors' pronouncements did not project well into the space, parents commented that it was difficult to follow what was going on. My field notes from Robert's case record him becoming restless in the dock and his mother, Nicola, commenting that her son '*was not listening*' to the proceedings. In the busy modern courtroom, clocks tick, fluorescent lights burr, barristers shuffle their briefs, the keyboard of the Crown Court note-taker clacks, members of the public whisper and doors slam as ushers and witnesses move in and out of the courtroom, and such stimuli might well amount to over-responsivity for autistic defendants with hyper-aurality. This could be compounded by hyper-tactility experienced in wearing a suit or tie for the first time or other unfamiliar clothes, lent to

the defendant by prison or hospital stores. Expressing his anxiety about wearing borrowed attire while remanded in custody, Samuel remarked:

> '*[F]rom… December 2013, as a prisoner, I will no longer be able to have my own clothes sent in on visits; I can only wear prison clothes, these clothes have holes in them, prison clothes are not suitable for wearing as far as I am concerned*' (Letter Correspondence).

In the two modern Crown Courts where the cases of Mark and Joseph were heard, the public gallery was high above the court with a glass window separating the gallery and the main courtroom. This meant that the defendants' family and supporters were not visible to the defendants.

The *Revised Statutory Guidance* acknowledges the sensory differences that can affect people with autism as well as the impact of over-responsivity on communication, socialising and independent living for people with autism (DOH, 2015: 42). It also states that all public sector organisations, under the Equality Act 2010, including providers of services such as Her Majesty's Courts and Tribunal Service, are 'required to make reasonable adjustments to services with the aim of ensuring they are accessible to disabled people, including people with autism' (DOH, 2015: 42). Yet, in the cases observed here, in both the modern and 'historic' courts of the HMCTS estate, reasonable adjustments for the over-responsivity of defendants with autism had not been considered at all.

Amplified over-responsivity to stimuli in the court environment risks augmenting problems of comprehension about proceedings. Field notes of Claire, Robert and Samuel's cases record how the defendants and their families struggled to follow proceedings and establish what had been decided by the court. The impact of this physical environment on the defendant's participation in court was commented upon by Samuel's barrister, 'Mr Minelli':

> ‘*When you represent anyone, you need eyes not just in the back of your head, but all [a]round… [you]. Your main focus is inevitably the judge, or if it’s a trial, the judge and the jury. You’re also trying to make sure the prosecution… don’t surprise you with anything that hasn’t previously been disclosed... I dislike courtrooms… [where] the defendant is walled off by glass because it does create a barrier. The defendant is always, inevitably, behind you. So, unless someone attracts your attention… you don’t have the opportunity to observe the defendant all the time*’ (Interview).

Where the defendant had been remanded in custody, they were not always brought to the court for the entirety of the proceedings. This occurred at one of the sessions at Crown Court for Samuel’s case and for one of Robert’s later bail hearings. Instead, the proceedings were conducted via video link from the prison. This clearly created tension and signalled, inappropriately, to the defendant that the outcome of their bail and Plea and Case Management Hearings were a forgone conclusion: they would remain in custody on remand until sentence and this would likely involve incarceration. Indeed, Samuel had to instruct Mr Minelli from a video link room prior to the hearing and described this experience:

> ‘*…as you walk into the room itself... to the right… was a curtain and to the left… was a large television with a camera on top… I sat facing the television, the Officer that took me over to video link sat with me while my court case took place. I wasn’t told why this was… the Clerk introduced me to who everybody was by using the web-cam*’ (Letter Correspondence).

The camera was directed at counsel, and so he could not see his mother sitting in the public gallery. It is standard practice around the world for bail applications and remand renewal applications to be performed remotely to save costs (Diamond *et al*, 2010) and they may be specifically requested by defendants as a Special Measure (Plotnikoff and Wilson, 2004). However, researching its use in Australia, McKay found that such video links framed ‘the prisoner in the context of their detention, intruding on legal process, and affecting prisoners’ comprehension and participation’ (2016). For Samuel and Robert, neither of whom had an intermediary or appropriate adult present, the process

had the effect of atrophying their ability to participate. Robert's mother commented, while we were physically present in court: '*look at him, he's not listening. I know he doesn't know what's going on*' (Court Observation). In Samuel's case, he recounted that:

> '*After being introduced to everybody the Clerk of the Court then read out my offence and asked me how I… [wished]… to plead… I told the Clerk… I wished to plead guilty… the judge apologised that I had to remain in custody so that the Probation Service and this Doctor… [could] see me [and]… said that when… [they do he]… wanted me to co-operate with both... I told the Judge that I would. My court hearing lasted at the very most ten minutes, I have to say… [it] was a lot shorter than I thought [it would be]*'.

Many commentators have argued that the trial (and all pre-trial stages) should be viewed as a 'communicative process, whereby the State tries to let the convicted defendant know, in terms which he can understand, why he is to be subjected to censure of the criminal sanction' (Ashworth and Redmayne, 2014: 25-26; Duff *et al*, 2007; Redmayne, 2009). In doing so, however, 'the state must also establish the legitimacy of its own claim to hold the defendant to account' (Ashworth and Redmayne, 2014: 25-6). This must be done by observing 'norms that require the defendant to be treated as a citizen of a liberal polity' (Duff *et al*, 2007: 288). The use of a video link for such important stages in the pre-trial process disconnects the defendant from the communicative *space* of the courtroom; undermining their ability to relate to the expressive effect of the communicative *process*. For defendants with autism, this experience is likely to be exacerbated by specific aspects of their condition. Research on theory of mind demonstrates how difficult it is for this group to transfer experience and knowledge from one context to another and to predict the behaviour of others and determine the most appropriate behaviour in response (Baron-Cohen, 1997). Although more research is needed, remote court appearances via video link likely create additional barriers to the defendant with autism being able to relate the alleged

wrongdoing of their criminal actions and to the administration of justice in the processing of their case. Importantly, this is also likely to reduce the expressive effect of the sanctioning of the wrongful conduct. Such physical barriers lead defendants with a disability to be excluded from the participative aspects of the pre-trial stages of the criminal process; with the state failing to treat such defendants as 'citizens of a liberal polity' (Duff *et al*, 2007: 288) and reducing the state's legitimacy in their claim to hold the defendant to account.

ii) Negotiating information and communication

This inaccessibility of the courtroom space is exacerbated by barriers to understanding information and materials used in court. Research has found that 'compared to 14.9% of the general population, 50% of prisoners' have a literacy level below L1 – the level 'considered the appropriate skill level for succeeding in most types of employment' (Crease, 2015: 5). There are no similar literacy figures for those who attend court but similar patterns of low literacy could be expected. Parsons and Sherwood note 'that for any offender who may have difficulties with reading and/or writing, navigating and understanding the systems of the [CJS] can be a significant challenge' (2015: 5). In Patrick's trial for racially aggravated assault in the youth court, he was unable to read the oath and so repeated it after the usher. While a number of charities (Betts, 2011) have worked closely with criminal justice professionals to produce Easy Read versions of documentation such as the police's 'Notice of Rights and Entitlements' document (PCC Bedfordshire *et al*, 2016), such materials were not used for any of the defendants in this cohort. More should be done to disseminate accessible materials and train staff to use them when working with defendants in practice.

Special Measures and intermediaries were not used in any of the cases observed. Six of the eight defendants with autism ultimately entered a guilty plea (see below). The perception was that Special Measures were not relevant where the defendant was '*always going to plead guilty to the charge; it would have been interesting actually if he had denied the case looking at the role of intermediaries there*' (Solicitor Griffiths, Interview). There was also an assumption that a diagnosis of AS made these measures irrelevant: '*I'm not sure that [intermediaries] would have been necessary for [the defendant] because, quite clearly, he does have Asperger's, he is very bright…*' (*ibid*). There was also a differentiation between the need for intermediaries and Special Measures between the Magistrates' and Crown Court where '*Crown Court people appreciate [such conditions] more*' (*ibid*). There was also a surprising lack of knowledge about the role and purpose of intermediaries amongst solicitors. I was asked if I could '*expand on what [I meant by] intermediaries*' and whether they would '*try to get one appointed by the court.*' When the role was explained, they responded that whilst they '*certainly involved outside experts [they hadn't] used an intermediary*' (Solicitor Arkwright). Indeed, other solicitors admitted that, before acting for the particular client in the cohort they '*didn't know… the first thing about autism*' until a solicitor colleague '*brought [them] up to speed with it*' (Solicitor O'Malley).

This is somewhat surprising given how long a number of autism-specific materials have been available on the *Advocate's Gateway*, in practice directions and online training for solicitors (ATC, 2013). Such a paucity of awareness indicates that further training is required on access to these resources. However, there was evidence of solicitors operationalising professional empathy in their practice to rectify their lack of knowledge about the defendant's condition, for example, by visiting the defendant's parents' home so that they could '*fill [them] in on the sort of different things autistic*

people face… and how they get into trouble like this' (Solicitor O'Malley). Rather than using Special Measures, solicitors asked for other '*more simplistic things to be done'* such as Joseph's father being allowed to sit *'with his father'* and not '*in the dock'* (Solicitor Geller). Both '*of these things were acceded to*' by the judge (*ibid*). It is interesting that instead of describing these solutions as reasonable adjustments and relating them to their defendant's legal status accorded by the Equality Act 2010, solicitors described such measures as common-sense problem-solving techniques. These empathetic strategies also involved the solicitor going in to court and explaining to the clerk '*any specific behaviour*' or '*difficulties and why they may occur, for instance, the inability to look at the clerk, or look at the court*' (Solicitor Arkwright). Talking about why sitting outside the dock was an important adjustment for Joseph, his Solicitor said:

> '*…this lad clearly found the court process difficult… to deal with and he was very anxious during the court case and after. His dad would tell me that after each court case they had had a terrible few days, so clearly all of these appearances had an impact on him*' (Solicitor Geller).

Harry was also allowed to sit next to his parents, behind his legal representative, rather than standing in the dock and his solicitor '*had seen the District Judge beforehand*' and '*explained*' Harry's autism (Solicitor O'Malley).

Although Claire was allowed to sit near her Offender Manager in the public gallery for her Plea and Case Management Hearing, the Usher had not arranged this at her sentencing proceedings. Instead, they followed procedure and placed Claire in the dock at this court appearance. The shock of being placed in the dock meant that Claire was unable to concentrate on what was said to her because she did not *'like going in there'* as she '*struggle[s] with [her] hearing… [and] freaked*' (Interview). Claire '*couldn't make eye contact with [her] solicitor or anyone that [she] knew in the court*' and she '*didn't know what was going on*' which meant that she thought she '*was going*

to jail… [and] was very scared' (*ibid*). Thus, despite the judge explaining her sentence to her, Claire perceived the symbolism of being placed in the glass-panelled, segregated dock as signifying that she would be given a prison sentence and not the community order her offender manager and solicitor had indicated. This meant that she was confused about the outcome of her case and burst into tears as we left the courtroom. Conversely, Claire described being allowed to sit in the main courtroom as being '*alright*' because '*…you can hear a lot better than when you are in the box; [where she]… sometimes just agree[d]*' with what people said to her (*ibid*). This had implications for her participation in the case against her. Claire said that '*to put your case properly*' it would be better for people with autism if there were not '*too many people in there*' as she found that '*easier to cope with… when the court was not full… because she didn't like to hear their arguments*'.

Solicitors also highlighted the impact of delays in court listings on the anxiety of their clients. In Mark's case, his solicitor '*stressed to the usher and… the court clerk that this was a young man who would become increasingly frustrated, increasingly anxious the longer he had to wait*' (Solicitor Griffiths). While '*there was a degree of sympathy for the situation… it became secondary to the normal court business*' (*ibid*). Other solicitors also commented on the significance of their seniority and the type of court on the expediency of court administration: '*they will tend to listen to me… [rather] than [a] younger advocate*' (Solicitor Jason). However, there was a frustration amongst other defence solicitors that the perception was that '*they didn't believe [the defendant] had a diagnosis of Asperger's syndrome*' (Solicitor Geller). What was concerning was the attitude towards the person with autism which this solicitor recounted: '*[there] was a reluctance to accept… like he was trying it on… they didn't really try to put his case on any earlier, or deal with him any differently than any other*

defendant' (*ibid*). The disbelief of the existence of a disability as well as differential treatment on the basis of the seniority of the advocate is contrary to the *Equal Treatment Benchbook* which says that judges 'should be able to identify situations in which a person may be at a disadvantage owing to some personal attribute' and 'take steps to remedy the disadvantage without prejudicing another party' (2013: 14). Indeed, the *Benchbook* emphasises that the 'sooner the disadvantage is identified, the easier it is to remedy it' and 'where possible, ensure that information is obtained in advance of a hearing about any disability or medical or other circumstance affecting a person so that individual needs can be accommodated' (*ibid*). There is an endemic problem of early and effective identification of the defendant's autism and a failure of the court in exercising their duty to provide reasonable adjustments to persons with a disability under Section 20 of the Equality Act 2010.

However, obstructive attitudes towards the solicitors' requests in court were not universal. Another solicitor commented that if the defendant is '*feeling a little uncomfortable and wants someone with him*' then it '*wasn't a problem*' because the district judge was '*perfectly happy to allow that*' in order to '*try and achieve fairness for the defendant*' (Solicitor O'Malley). However, what did emerge was the '*distinct difference between the Magistrates' Court*' in dealing with people with autism and '*the Crown Court*' (Solicitor Griffiths). As the solicitor in Mark's case explained:

> '*The magistrates' court is very much "let's get on and deal with this case as quickly as possible", allowing no real opportunity to get further details such as a psychiatrist's assessment, yet in the Crown Court there is a far greater willingness to appreciate the background to offending*' (*ibid*).

Mr *Griffiths* went on to explain the impact that this has on the processing of the case and the engagement of his client in the process:

> '*The Crown Courts proceed pretty well, they are far more formal; there is less business in each court. It's just a calmer environment… [so] it was easier for [Mark] to concentrate on the matter in hand. [In contrast]… the Magistrates'*

> *court has lots of papers listed, solicitors going to and fro, in and out of court*' (Solicitor Griffiths).

These interviews and court observations reveal that much more needs to be done to entrench the 'concept of barrier-free spaces for the administration of justice' especially given the 'paternalistic history and legacy of the medical model of disability which has dominated the legal system' (Flynn, 2015) amongst those who administer justice – ushers, court clerks, magistrates, judges, the CPS and defence solicitors – and to the infrastructure of the courtroom where justice is administered. This should be done not only because of its important symbolism but because of its substantive impact on access to justice for people with autism.

2. Who governs what? Remand and adjournment for expert witness evidence

i) Remand

The decision about whether to remand a defendant on bail or in custody arises at five different stages of the court process (see Redmayne and Ashworth, 2010: 228-9). The power of the arresting officer to release an arrestee on bail, 'street bail', to report to a police station, at a specified time, is the first of such stages. The second is the bail decision by the police at the police station while the defendant awaits their first appearance in court. Whether to remand the defendant between the first and last appearance in court is the third stage – a decision determined by the court, rather than the police. At the fourth stage, remand is considered post-conviction and prior to sentence while, for example, expert witness evidence reports are prepared. Finally, the question of remand is determined whilst awaiting an appeal against the verdict or sentence (*ibid*). According to MOJ figures, 1.53 million defendants were directed by the

police to appear at Magistrates' courts in the 14 months ending June 2015 and 11% were remanded in custody by the police (2015: 13). In 2015, 48,330 defendants were remanded in custody to await trial, spending an average of nine weeks there, with 15% of those people subsequently receiving a non-custodial sentence (MOJ, 2015b). However, these figures do not accurately portray the differential rates of remands in custody by different courts. Studies argue that this is influenced by court culture; differential recommendations are made by the CPS and defence lawyers in different courts, with the latter sometimes 'placing their credibility and status with the court above the interests of their clients' (Hucklesby, 1997: 276) rather than being 'full and fearless' in their defence (Ashworth and Redmayne, 2014: 255).

With regards to the cases in the present cohort, Samuel and Robert were remanded in custody. Ollie's case was concluded in the Magistrates' court and he was not remanded. Patrick and Mark were given conditional bail, and Patrick was also electronically tagged. Joseph and Claire were given unconditional bail. This section will focus specifically on decision-making by the courts about remand at the third and fourth stages of the court process in Samuel's case. Applicable to each of the decision-making stages where remand can be ordered, Article 5(1) of the European Convention on Human Rights (ECHR) sets out the general presumption of liberty and the circumstances in which it can be deprived in accordance with the law (see Art. 5(1)(a-f)). Article 5(1)(c) deems it lawful to arrest a person for the purpose of bringing them before 'the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so'. Article 5(1)(a) provides that the general right can also be deprived for the lawful detention of a person after conviction by a competent court. Deprivation of liberty requires a strong justification given its

'profound implications for the human rights of defendants' (Player, 2007: 245). Although the ECHR was incorporated into domestic legislation in the Human Rights Act 1998, the general right to bail of accused persons is covered by Section 4 of the Bail Act 1976 as amended. As shown later in this section, the statutory compatibility of this domestic legislation and the right to liberty under Article 5 is a vexed question and its application, in decisions made by the courts, is especially problematic for defendants with disabilities where it risks disproportionately negative effects on their rights and liberties.

Under the 1976 Act, the courts have four options at their disposal: unconditional bail; conditional bail; bail subject to surety or security or, alternatively, they can remand the accused in custody (see Section 3(2),(4),(6) and Schedule 1, Part 1 (paragraph 2) respectively). The general presumption in favour of granting bail in Section 4 is qualified by the exceptions provided in Schedule 1 of the 1976 Act (Section 4(1)). Paragraph 2 of this Schedule sets out three exceptions that may justify the court's refusal to grant bail if they are satisfied that there are *substantial grounds* for believing that the defendant, if released on bail, would fail to surrender to custody and therefore present a risk of absconding; commit an offence while on bail prior to sentencing or 'interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person'. The Strasbourg Court has recognised a fourth ground, whereby the nature of the crime is such that the granting of bail may lead to a probable reaction of public disorder to the defendant's release (Ashworth and Redmayne, 2014: 234). Ashworth and Redmayne note that these grounds broadly correspond to those 'approved by the European Court of Human Rights in its development of Article 5(3)' (*ibid*: 236). The latter subsection of Article 5 states that everyone arrested or detained in accordance with the provisions of Article 5(1)(c) 'shall be brought promptly before a

judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial'.

A further four statutory considerations, to which the court should have regard for decisions under Paragraph 2 to deny the right to bail, are given in Paragraph 9 of Schedule 1 of the Bail Act. These are the defendant's fulfilment of their prior bail obligations; the 'nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it)'; the 'character, antecedents, associations and community ties of the defendant' and 'the strength of the evidence of his having committed the offence or having defaulted' except, interestingly, 'in the case of a defendant whose case is adjourned for inquiries or a report'. The thinking is that so-called 'community ties' are relevant to the defendant's attendance at court and those with temporary or unstable domiciliary arrangements are more likely to abscond. Paragraph 7 of the Schedule provides a further exception to the right to grant bail, applicable only to defendants whose case is adjourned for inquiries or a report. It provides that if the case is adjourned for such inquiries, 'the defendant need not be granted bail if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody' (*ibid*). The Mental Health Act 1983 introduced the power to remand defendants to psychiatric hospital for reports to be prepared, but this has not been widely used and such defendants are given custodial demands in large numbers (Ashworth and Redmayne, 2014: 252). However, giving the example of an early Home Office Circular (*sic* 155/1975), Ashworth and Redmayne point out that it has long been urged that 'homelessness should not lead to a custodial remand without thorough exploration of other alternatives' (*ibid*: 237).

In Samuel's case, the court had initially been willing to grant him unconditional bail but his mother, Angela, did not feel that she could *'have him at home with her again'* (Interview). Angela made this decision because she could no longer deal with the restrictive requirements of his SOPO which required him to travel on public transport accompanied by an adult who had full knowledge of his previous convictions. Samuel's shame about his previous convictions meant that he did not want anybody else to know about them and, consequently, Angela was the only person with whom he could travel. No attempt was made by his defence solicitor or the court to make alternative community arrangements for Samuel so that he could be bailed to a different address, such as a hostel or independent living placement. This provides another example of the criminal law operating in a silo, without cognisance of guidance on defendants with disabilities under adult social care law. If Samuel's needs had been assessed properly in these circumstances – where his mother was no longer able to care for him – his needs may have met the threshold for a support package from his local authority and bail may have been granted, preventing the nine months he spent remanded in custody.

Ashworth and Redmayne argue persuasively that the fallibility of predictions of dangerousness means that there are no persuasive reasons for the state to take power over defendants in the pre-trial period, especially for non-serious offences for which they argue 'custodial remands should simply be ruled out' (2014). They describe the 'bail/custody decision… [as raising] some of the most acute conflicts in the whole criminal process': with the suspect/defendant's right to liberty, protected by Article 5 of the ECHR, on the one hand and the public interest in security and protection from crime on the other (*ibid*). The concept of 'balancing' is 'manifestly inadequate' in this context where more cogent appreciation of the rights of the defendant at each of these stages,

the legitimacy of the claimed public interest and the evidential basis for the calculations of risk must be given (*ibid*). Imprisonment on remand can be 'immensely stressful and upsetting', particularly given the 'inherent uncertainty of the situation… for many prisoners it can be as damaging to their social, domestic, and financial circumstances as a period of imprisonment under sentence' (Player *et al*, 2010: 231-2). Research has long documented the higher proportion of defendants from certain racial backgrounds remanded in custody pending trial (Hood, 1992) and the higher proportion of female than male defendants held on remand (Player *et al*, 2010).

As long ago as 1992, a Home Office Bulletin found that remand in custody was used for mentally disordered offenders who had committed minor offences and had no fixed address; stating that such use was 'inhumane' and an 'ineffective way of securing help and care for disturbed people' (Robertson *et al*, 1992). There is, however, limited research on the 'pains of imprisonment' (Sykes, 1958; Crewe, 2011) and the failure to make reasonable adjustments for defendants with disabilities who are held on remand. A joint report of the Prison and Probation Inspectorate on the treatment of defendants with Learning Disabilities, including 'people with an autism spectrum disorder' serving a sentence in prison or on remand, was only able to identify one prisoner on remand out of a cohort of 26 in the prisons where they were carrying out their enquiry (2015). The inspectors found that 'many prisons and probation trusts were either unaware or unwilling to implement National Offender Management Service instructions and the Equality Act 2010'. Indeed, the 'main factor' that 'prison leaders, both nationally and locally, appear to miss is that they have a statutory duty to make reasonable adjustments to the services they provide to make them accessible to all offenders with disabilities, including those with a learning disability' (*ibid*: 11). Inspectors were emphatic that the failure to accurately identify the population numbers of prisoners with learning

disabilities was because of the prisons' failure to screen their populations properly but that did 'not remove [the prison and probation service's] obligation under the Equality Act 2010' (*ibid*).

This failure was certainly evident in Samuel's case and was exacerbated by factors related to his autism. This meant that the pains of his imprisonment were severely felt. He was remanded in custody in July 2013 for approximately 270 days, more than four-times the 63-day average (MOJ, 2014). When Samuel was first moved to prison on remand, he was placed in a holding wing, and was then moved to the high security wing. He described being on this wing as not *'easy by any means'*. He recorded the conditions of his cell as '*awful'*. There were *'two beds one either side of the cell'* and the *'bed was extremely uncomfortable',* near *'the door, there was a toilet which was not private by any means… the sink was on the verge of coming off the wall'* and he *'even had cockroaches in [his] cell which is just about as disgusting as it comes'* (Letter Correspondence). In addition to these conditions, Samuel had to '*share the cell with someone who self-harm[ed]'* and Samuel *'felt [he] was responsible for this individual'* (*ibid*). Samuel's letters frequently mentioned the pains he experienced in his back and ankles, which were caused by a small curvature of his spine and early onset arthritis which were diagnosed by prison healthcare staff. This was made worse by the prison beds, one of which he described as being *'made up of two hospital beds'* on top of each other, with *'an exercise mat'* as a mattress (*ibid*). When his cell door was closed, some of the inmates came up to the door of his cell *'and started to shout abuse'* at him (*ibid*). After over two weeks, he was moved to a wing for vulnerable persons, which he described as *'an absolute blessing'* until the same *'self-harmer'* was moved into his cell with him. Following another court adjournment in late December 2013, Samuel had to return to the prison to await the psychiatrist's expert witness report.

When he arrived '*spaces were so limited, the only space that there was available'* for him was back on the high security wing and *'even the Senior Officer said he didn't want to put me back [there]'* (*ibid*). Instead, he was put into a suicide cell. This made Samuel '*feel that [he was being] punished for something that [he hadn't done]'* and that this was '*disability discrimination'*.

In March 2014, Samuel was still on remand but was transferred to a prison further away from his home, after another adjournment for the second medical report. The use of remand in the period from arrest before sentencing is such an intrusion on liberty that a resounding justification must be given. This is especially true for defendants such as Samuel. It is troubling that a case such as his should have led to his incarceration for nine months before the court meted out a non-custodial sentence in the form of detention in a psychiatric hospital. The seriousness of his offence and low risk of absconding and re-offending should have inclined the court to give him unconditional bail. That the decision fell on the absence of alternative accommodation for him in the community, without any alternatives being made available by the probation service, is troubling. Even more perturbing was that the court did not issue an order for his remand in hospital under the Mental Health Act 1983. Samuel's case provides a further example of invasive governance, which did not properly consider his protected characteristic under the Equality Act 2010.

Ashworth and Redmayne provide a powerful and principled call to action to overhaul the decision on the form of remand that should be given and argue that these decisions should be 'governed by a statutory framework or by guidelines similar to those for sentencing' (2014: 255). Their starting point is unconditional bail as a preferred level of disposal, with the next being conditional bail, followed by progressive levels of departure, and each level with clear reasons required for departure. Remand in

custody should only be used where the strength of the case is such that conviction is likely and 'where the court is satisfied that the charge, if proven at the trial, would be likely to result in the imposition of a custodial sentence, and where the evidence for the chosen ground for refusing bail is clear and convincing' (*ibid*: 245; 255). The probable penalty, as included in the second part of this formulation, is of particular import for defendants with disabilities, especially for those likely to be given a community sentence or a court-ordered Sectioning Order under the Mental Health Act 1983. They also distil a further set of principles. Remand in custody should not be used 'unless there is a substantial risk of *serious* offences being committed if the defendant were left at liberty' with legislative guidance on such offences and robust formulations of the 'degree of risk and the basis for inferring it' (*ibid*: 245). If a court does 'decide that custodial remand is unavoidable, it must be for the shortest period possible'; ensuring that the existing time limits are circumscribed. In addition to their recommendations, it is necessary to build in better checks for sequential and repeat renewal and a flagging system which alerts the prosecution and defence, along with the bench who presides over the case at each court stage, when consecutive renewals have passed a three-month period. There are clearly decency issues documented in Samuel's account of his time on remand and his 'pains of imprisonment' during this period are blatant (see Crewe, 2011). For Ashworth and Redmayne, however, 'remand is not a prisons issue, it is a justice issue… and efforts to develop non-custodial facilities for holding defendants in the community must be redoubled' (*ibid*: 256).

ii) Expert witness evidence

In the present research, the quality and utility of expert evidence and the availability and expediency of the process of expert evidence was a theme throughout the cases

observed. In five of the eight cases, medical reports were sought either prior to the entry of the plea, when the defendant was remanded on bail or in custody or before the sentencing hearing. Procedural rules dictate that a magistrates' court may exercise its power to adjourn the case for the 'purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case… after convicting the accused and before sentencing him or otherwise dealing with him' (Section 10 (3)A of the Magistrates' Courts Act 1980). The court has the power to remand the defendant in custody or on bail for medical examination and the preparation of medical reports if they are satisfied that the defendant (a) 'did the act or made the omission charged' and are (b) 'of the opinion that an inquiry ought to be made into his physical or mental condition before the method of dealing with him is determined' (Powers of Criminal Courts (Sentencing) Act 2000, Section 11 (1). However, there was some evidence of reluctance to use this power of adjournment. Describing changes in access to obtaining expert witnesses over the period 2009–2013, one solicitor noted that there had been changes in '*the Magistrates' court, without question*':

> '*There is far less willingness to allow adjournment for reports to be prepared. It's seen as delaying tactics… [they say]: "oh the probation service can deal with this issue; you don't need a psychiatric report". Or… you're given unrealistic timetables [for]... psychiatrists to produce a report… and if you haven't got the report in that timeline… they [won't give]… any more time*' (Solicitor Griffiths).

The solicitor accepted that *'years ago, cases used to last… months unnecessarily'* in the Magistrates' court and there had to be '*more intense case supervision'* but that the '*pendulum had swung too far to the fact that cases are driven more by cost rather than by justice*' (*ibid*). His view was that this was '*particularly*' the case '*when you've got… vulnerable offenders*' but that '*was less likely in Crown Court*' where there is '*a greater willingness to allow adjournments for reports*' (*ibid*). This was corroborated by another solicitor who also described the difficulty of getting an adjournment:

'*…certainly nowadays speed is of the essence… but… when [there is a good reason for solicitors to ask] for an expert's report, the courts will accommodate that*' (Solicitor McKinnery).

The quality of such reports was also raised, with Samuel's barrister commenting that you need to be '*fairly careful about who you choose to give the report; there is the good, bad and the ugly in any profession*' so he would '*make a recommendation based on previous experience*' but acknowledged that it was '*difficult to assess somebody's clinical judgement if you are not a clinician*' (Mr Manson). Article 25 of the UNCRPD proscribes that 'States Parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability'. Article 25(a) states that, in particular, States Parties shall provide 'persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons' and subsection (b) requires that States Parties provide 'those health services needed by persons with disabilities specifically because of their disabilities, including… intervention as appropriate, and services designed to minimize and prevent further disabilities'. The ordering of reports on the defendant's mental health by the courts is such an intervention and expert witness statements, it is submitted, amount to 'services designed to minimize and prevent further disabilities'. However, court observations and interviews with the defendants' solicitors revealed a number of difficulties in the quality of expert evidence and factors which led to delay:

'*the difficulty was identifying the expert, once I'd got the expert it was a relatively simple process in getting that final authority [from the Crown Court]*' (Solicitor Griffiths).

There is no directory of professionals with specific expertise that can be accessed by defence solicitors. In Robert's case, no medical report was requested. He was not registered with a GP and as his mother, Nicola, pointed out, the onus was *'on him to*

make the appointment… but he does not want to go to the doctors on his own' (Mother, Interview). Nicola said that he was *'hard to deal with and should have a specialist worker'* but she had been told by social services that *'because he has Aspergers they won't deal with him… and probation [kept] passing the buck'*. Unsurprisingly, the cost of obtaining a report was also an important consideration, as was the social capital of the defendant and their support network. This impacted on their ability to request and scrutinise the expert report, along with the expediency with which they could obtain a second opinion. Written reports from two registered medical practitioners are necessary for a defendant to be sectioned by the court (Samuel's case); new reports may also be necessary to update the case file of an individual whose case has taken a long time to be listed, as was the situation for Joseph, or to counteract reports made by experts with vested interests in recommending the sort of clinical placement their own service provided. This raises clear issues around health inequality for defendants with autism from certain socio-economic groups; augmenting structural barriers facing such individuals' access to justice.

3. The context of plea: the dominant skew towards 'guilty'

The statutory, judicial and prosecutorial policy legitimation of the professional pressures on defendants to plead guilty generates a 'guilty plea culture' which, in turn, drives the practices of defence lawyers who trail 'the prosecution in adopting a strategy of case disposals through guilty pleas' (McConville, 1998). This culture and resultant trial avoidance emerged as an important theme underpinning the rationalities and strategies of governance which influenced the prosecution and defence professional practices in relation to what plea was entered by the cohort of adults with autism. Particular strategies and rationalities also arose in relation to the defendant's autism, impacting on the working practices and occupational cultures of professionals in their

influences on how the defendant pleaded. Over two-thirds of cases in the Crown Court, and 90% of cases in the Magistrates' Courts, proceed on a plea of guilty 'which means that no trial of guilt ever takes place' (Ashworth and Redmayne, 2014: 418). Far from being inevitable, this outcome results because 'the system is structured to produce it' with 'incentives that do not exist in some other legal systems' (*ibid*). For the defendant, the incentives are expediency and, more compellingly, sentence discounts for a guilty plea of up to one third. Bridges identifies that the most important step in 'formalising and systematising the sentence discount for guilty pleas' was the Sentencing Guidelines Council's *Guideline on Reduction in Sentence for a Guilty Plea* (2006; 2004; c.f. 2007). Along with other changes introduced by the Blair government, this guideline led to the further subordination of the principle of the presumption of innocence in pursuit of 'other political and administrative priorities' (*ibid*). It was borne out of the Blairite 're-balancing' of the CJS in favour of the victim, which was not, according to Blair, designed to dispense with 'human rights… [but in] deciding whose [rights] come first' (2005).[8] It marked an abandonment 'of the classical justification in English jurisprudence for the reduction in sentence being based on the defendant's remorse, as shown through the fact of guilty plea, and instead gives precedence to various administrative rationales around expeditious disposal, cost effectiveness and saving 'victims and witnesses from the concern about having to give evidence' (Bridges, 2006: 84).

For the CPS, policy pressures on achieving this outcome can be seen, for example, in the CPS' Business Plan, where one of their 'high-weighted measures' for their fourth achievement goal of 'Efficiency' is to 'increase guilty pleas at Magistrates' 1st hearing' and at the 'Crown Court 1st/2nd/3rd hearing before PCMH [Plea and Case

[8] Full transcript of Tony Blair's speech available at: <http://news.bbc.co.uk/1/hi/uk_politics/4287370.stm>. Accessed 9th November 2016.

Management Hearing]' (2014-15). Advice by defence lawyers to defendants to enter a guilty plea becomes an 'achieved outcome' in their intervention 'and the way they handle clients'; contributing to a culture in which 'the views of clients are given little weight and their accounts [are] not investigated' and the 'case proceeds on the basis that the lawyer knows best' incentivising the guilty plea (McConville, 1998: 572). This leads Ashworth and Redmayne to state that what 'ought to be different ethical orientations may thus become submerged beneath the working practices and occupational cultures of the local groups of professionals' (2014: 418).

In the present research, the 'guilty plea culture' – affecting the working practices of the prosecution, defence and wider circle of court actors – had an important but often inappropriate influence on the plea which was ultimately entered by the defendants in the cohort. One interesting theme was around the use of a guilty plea to 'get help' for the defendant with autism (Samuel, Robert and Claire). There was a sense that determining culpability for the offence – even whether the defendant could form the requisite *mens rea* – would delay the inevitable. Instead, it was seen as expeditious to plead guilty, by both the prosecution and defence, not just to maximise the opportunity for sentence reduction but also to ensure the 'right' outcome was secured for the defendant by pleading guilty. The pressures on prosecutors to achieve early guilty pleas and for the courts to improve efficiency created a context in which defence lawyers did not always focus on determining whether their client was fit to plead or to allow the court to establish that they were not guilty. There was also a protective dimension to this approach: an early guilty plea would reduce the distress caused to the person with autism and their family. Instead, trailing the pressures of the prosecution to enter an early guilty plea, there was evidence that some defence solicitors shifted their professional energies from the processual decision about plea to working with the

individual, family and probation to secure the most appropriate dispositive decision for their client.

Five of the eight defendants with autism ultimately entered a guilty plea (Claire, Robert, Ollie, Samuel, Mark). Harry was the only participant in the cohort to plead not guilty at any stage for the offences alleged against him. Robert entered a late guilty plea, after his mother Nicola had been encouraged to be a witness for the prosecution. Mark elected not to enter a plea at the Magistrates' court and instead chose to enter a guilty plea at the Crown Court Plea and Case Management Hearing. Patrick entered not guilty on the first count of racially aggravated assault but guilty on the other counts with which he was charged. Joseph initially pleaded guilty at the Magistrates' Court but then vacated his plea at the Crown Court. This was followed by a trial of the facts after the judge found he was unfit to plead. Whether through the negligence of solicitors to recognise the proper need to enter a plea of unfitness to plead (Joseph) or as a result of more competent defence solicitors adopting the strategy of entering a late plea so as to obtain better expert evidence (Mark and Harry), the timing and decision on plea were utilised to achieve 'better' outcomes for the defendant with autism. This had an important consequential impact on their governance in relation to the dispositive decisions made by the court in regards to their sentence.

Harry pleaded not guilty at the Plea and Case Management Hearing. The case went to trial in the Magistrates' Court in front of a district Judge. In the intervening period, Harry's defence solicitor had instructed a psychiatrist to produce an expert witness report. The CPS had approved the psychiatric report commissioned by the defence. The consultant psychiatrist said that Harry was not fit to stand trial. As described in the previous chapter, the CPS did not '*seem terribly satisfied about his autism [even] up until the very end in court';* even though they had been sent

psychiatric reports which confirmed that he was unfit to plead (Solicitor O'Malley). Nevertheless, the CPS pursued the early entry of a guilty plea, saying: 'no, he can plead guilty and we'll even put his autism in his litigation' (*ibid*); implying that the strategies of governance, embedded in the CPS Business Plan, were driving the prosecutorial culture.

The dominance of the prosecutorial culture towards pleading guilty can also be seen in Joseph's case, where the first solicitor, Mr Adam, entered a guilty plea at the first appearance at the Magistrates' Court. This was *in spite of* the joint expert witness report between his consultant psychiatrist and lead psychologist, which said:

> '*…[Joseph] does not have the capacity to understand the nature of the forthcoming proceedings. He will not be able to fully understand the information given to him about the hearing and therefore would not be able to retain information to be able to make the decision [about plea]. …[H]e will [not]be able to weigh up the information or communicate any meaningful information to his solicitor. There is no guarantee that what [Joseph] does communicate is in reality his own thoughts or beliefs and is not a response designed to appease others*' (Psychiatrist, Expert Witness Report).

The second solicitor, Mr Geller, who later acted for Joseph, recalled that there was '*only one conclusion that you can come to [after reading the report] because that screams out to you "not fit to plead"*' (Solicitor Geller, Interview). However, when represented by his first solicitor, Mr Adam told Joseph's father, Peter, that he was going to do '*a deal with the prosecution*' to '*drop the assault [and] we'll plead guilty for the primary offence and to criminal damage*' (Interview). Peter recalled thinking: '*well that's fine… if they drop the assault… [which] was really worrying me and [my wife]*' because it made Joseph '*sound extremely dangerous*' and '*like it's a five-year prison sentence*' (*ibid*). The advice of the first defence solicitor and his 'deal' with the CPS is contrary to *The Code for Crown Prosecutors*:

> 'Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should

> never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one' (2013: 13).

Joseph's parents did not know about this Code. Instead, they agreed with Mr Adam's plea bargain because '*most importantly*' they thought it would '*get the case dealt with*' that day (Solicitor Geller, Interview). That is not what happened. Joseph pleaded guilty to possession of a knife, the Magistrates' Court '*committed [his case] for sentence to the Crown Court. Shock horror! Best laid plans and all this has gone to tatters!*' (*ibid*). Peter described the stark realisation of what had happened in the Magistrates' Court when Mr Adams entered the plea:

> '*...the prosecution... were making quite clear the use of the knife... [was dangerous and Joseph's behaviour] was very threatening. ...[A]fter this occurred, I couldn't believe it... [our solicitor was] saying: "yes I've listened to the [interview] tape and [Joseph] did say he'd raised a knife above his head and threatened to kill Mr [Coyle]" ...So, I'm thinking: "you're meant to be our guide, what are you doing?" And he didn't raise anything about the psychiatric report. ...I'm listening to our own solicitor agreeing with the prosecution... [and] he's not defending him properly...*' (Interview).

Consequently, Joseph's father intervened in the proceedings and spoke directly to the Chair of the Magistrates:

> '*I said: "if you read the psychiatric report... you will see that it says [Joseph] is not fit to plead, and I think that's really important".*
> *[T]hen the [court clerk] said: "excuse me Mr [Herbert], you are raising a legal issue here".*
> *I don't know if it's a legal issue or not but I think "it's something you need to know about here!"*
> *The Clerk then says to the Magistrates: "you might want to take some time to consider this, as this is a legal point to be made"*' (*ibid*).

After an adjournment to read the psychiatric report, the Magistrates informed Joseph's father that they agreed with him but that they were '*not able to deal with the case*' and it would have to be transferred to the Crown Court. As Peter recalled, '*it has now become a legal mess*' because Joseph had already been '*prompted*' to plead guilty '*but the psychiatric report is saying [he's] not fit to plead*' (*ibid*).

The decision of Joseph's first solicitor to enter a plea in this way had a massive impact on the processual decisions about his case and caused great distress for him and his family. So concerned were Joseph's parents with the prospect that Joseph might go to prison, they sought a second opinion from defence solicitor, Mr Geller, who took over his case. Legal Aid was not transmutable from the first solicitor, so Joseph's parents had to pay for him privately. Mr Geller applied to vacate the plea. This was '*done reasonably quickly and… [the case was] listed… for September 2011*' (Interview). However, the first appearance at the Crown Court did not happen until August 2012 and the case was not listed for trial until July 2013, over two years after the alleged offences occurred. Mr Geller believed that Mr Adams had '*dealt with this case dreadfully simplistically*' given that the medical report '*made it abundantly clear that [Joseph] was not capable of understanding the proceedings or… capable of giving instructions*' which '*are the tests for any lawyer that's taken a degree in the last 120 years for fitness to plead*' (*ibid*). Mr Geller went further than criticising the duty solicitor, however, and emphasised the point that the legal question of fitness to plead may be raised by '*the [court] clerk who is a qualified solicitor sitting in front of the magistrate*' the prosecution, defence, or Judge (see CPS, 2015). He spelled out that '*the Magistrates' Court got this wrong*' but all '*three [solicitors] are officers of the court and under criminal procedure rules they are required to assist the courts*'. The magistrates, therefore, are '*entitled to rely upon [them]*' (Mr Geller, Interview). The failure of the Crown Prosecutor to raise the question of unfitness to plead is also contrary to the principle set out in the *Prosecution Policy and Guidance* which states that if during proceedings 'the CPS is provided with a medical report which states that the strain of criminal proceedings may lead to a considerable worsening of the defendant's mental health, the implications of the report should be considered very

carefully' (2013). Such consideration was not made. Joseph's case instead reflects subversion of the 'ethics of client representation' (Bridges, 2006) by the first solicitor. Indeed, so immersed were Mr Adams, the duty solicitor, the prosecution and the Court Clerk in the occupational culture towards early guilty plea, that it obfuscated the need to even consider Joseph's fitness to plead.

Once the question of unfitness to plead was raised before the Crown Court and Mr Geller '*notified both the prosecution and the defence [barristers] that Joseph was not fit to plead, [things] changed completely*' because the '*prosecution took a completely neutral stance in relation to [first] our application [to vacate] the guilty plea*' which '*they didn't oppose'* and, secondly, the '*CPS lawyers had agreed… that they would not oppose [our other requests]*' (*ibid*). The barrister, who the CPS had instructed for the Crown Court proceedings, took a very different approach to the CPS solicitor in the Magistrates' Court because this barrister viewed the psychiatrists' expert witness evidence as '*so simple, straightforward and forceful*' that they would '*not instruct [their] own psychiatrist*'. Theas they accepted Joseph was '*not fit to go through proceedings*' (*ibid*). They went further and worked collaboratively with the defence counsel and said: '*let's look at what we can do to make these proceedings as simple and as short as possible*' (*ibid*). Consequently, they *agreed* '*that they wouldn't call any factual testimony*' and agreed in advance that the '*facts that the prosecution read out*' in court were an attempt '*to try and shortcut the case as much as possible*' (*ibid*).

This change in the decision-making approach, from the CPS solicitors at the Magistrates' Court to the barristers at the Crown Court, also indicates how different working practices amongst prosecutorial professionals can impact on the programmes of governance which are applied to a defendant's case. When the Crown Court heard the case, the Judge made an order that Joseph was unfit to plead. There followed

proceedings for a jury to determine whether Joseph committed the act or made the omission charged against him for the offence under S4A(2) of the Criminal Procedure (Insanity) Act 1964. The proceedings were simplified: the judge agreed that the counts of possession of a knife and damage to the two vehicles could be heard together on a summary indictment in three counts. He also determined that '*the summary of the evidence [should be given by the prosecution] instead of extracts of the witness statements*' (Court Observation). Further, the defence barrister advised the judge '*to direct the jury to make an appropriate special verdict that doing the act [was his] use of a knife*' and recommended that there was no '*need for the jury to retire*'. When the jury entered the court the judge instructed them accordingly that the defendant:

> '*…suffers from such disability that he is not able to take part in the trial and therefore is not fit to plead. That's the decision I have made*' (Court Observation).

The jury examined the photographs of the knife and car damage and the judge directed them as follows:

> '*…there is no controversy of the evidence [in this case], the defendant has admitted to it and this is not challenged in effect. What you have to say is whether he did the act, not that he was guilty of the offences just that he did the act: he had a knife for an offensive purpose and damaged the car. …Foreman, there is no necessity to adjourn this case for you to make your findings*' (*ibid*).

This approach is highly unusual, but streamlining proceedings in this way minimised Joseph's distress. The jury conferred quietly in the courtroom and the foreman told the judge that he committed all the acts on the indictment and remained in court whilst the judge determined whether to dispose of the case through a Hospital Order, a supervision order or an absolute discharge. This shift in the processual decision about plea, therefore, directly impacted upon the disposal of Joseph's case and the strategies of governance that were applied to him.

In Robert's case, the victim of his assault was his mother, Nicola, and the CPS, together with his defence solicitor, treated his case straightforwardly as one of domestic violence. Prior to his case being heard in the Magistrates' Court, Nicola had told the police and the CPS that she wished to retract the witness statement which had been taken in hospital immediately after the incident: '*but the CPS would not accept my retraction*' (Interview). A summons was ordered for her to attend court as a witness for the prosecution and she was told that '*she would get arrested if not because the police wanted to pursue the case, because [Robert] was aggressive and abusive towards the police when they had arrested him at the scene*' (Interview). Robert's solicitor told her that he was not able to '*speak to [her] until after the case*' (*ibid*). Nicola, therefore, described the difficult position she was in: she did not want Robert '*to be locked up*' and thought retracting her statement would be enough for them to drop the case '*but now [the police] are bringing things in that [happened after the assault and were] nothing to do with [her]*'. In these circumstances, Nicola was both victim and primary carer, and so this required a more nuanced understanding than a straightforward domestic violence case. Before Robert's trial at the Magistrates' Court, Nicola had a number of meetings with the CPS and Victim Support, along with other MAPPA agencies. These professionals placed pressure on her to testify against Robert in order to persuade him to make an early guilty plea. In the exchange between Nicola and the Senior Prosecutor, which took place at court just before Roberts's trial, she emphasised that she did not '*want [her] son locked up'* but the Senior Prosecutor was steadfast in persuading her to testify:

> '***Prosecutor**: Aspergers, OCD and semantic pragmatic literal understanding, that's a heady cocktail. I know that he is a nuisance to you. [The violence], [i]t's frequent isn't it?*
> ***Nicola**: I just want [him] settled in his own flat and to get outside agencies involved [such as support to live independently] ...He's not got the mentality of a 22-year-old; I don't think he can cope with his flat without support. ...*

Prosecutor: *It's not easy to give evidence against any family member but we don't want you to keep getting assaulted; he needs to understand that.*
Nicola: *As his main carer, I do his washing, taking him to appointments, supporting him in his house and if he wants to go to the doctor or the dentist.*' (Court Observation).

This dialogue reveals much about the responsibility Nicola felt towards Robert as his main carer. On the one hand, Nicola's response reflects the technique of an 'appeal to higher loyalties' (Sykes and Matza, 1957) in justifying a continuing relationship with someone who has committed a serious offence by 'holding up family bonds… to counter real or perceived criticism of their support' (Condry, 2007). On the other hand, this interpretation overlooks the pragmatic need for Nicola to be Robert's main carer because other services had failed to help support him. The Senior Prosecutor continued to persuade her to testify:

> '*… if you [say you will] give evidence, [his] defence will collapse and he will get an easy bonus for his guilty plea. [He's in front of a] reasonable district judge who is not known to be too harsh. Probably because this is a different type of offence [to what Robert had previously been convicted for] it would be unlikely to activate his suspended sentence because of [his] mitigating factors*' (Pre-Court Meeting Observation).

In that context, the Senior Prosecutor gave Nicola a choice:

> '*[But the] [o]nly way to guarantee that he won't do this again is to [threaten] prison. Which is better? Not going to prison or getting treatment? …I'm not sure what probation would do in this situation. Do you want to give evidence or not? ...If you say at this stage that you are happy to testify, I can go to speak to the defence solicitor…*' (*ibid*).

Nicola nodded her head in consent, saying: *'this is the most difficult decision I've ever made*'. The Senior Prosecutor returned and informed Nicola that Robert was going to *'change his plea to admit that he is guilty'* and '*is going to get a probation order and an alcohol awareness course'*. The Senior Prosecutor reassured Nicola that he would put: '*his views across forcefully to the court that [she] did not want him to be sentenced [to prison]*'.

These passages demonstrate the determination to obtain an early guilty plea; deferring consideration of Robert's autism until it could be included as a mitigating factor at sentencing. According to guidelines issued by the Sentencing Guidelines Council, the justification for the reduction for a guilty plea 'derives from the need for effective administration of justice and not as an aspect of mitigation' (2007: 4). However, such a fine distinction is not so clear in reality. The Senior Prosecutor reassured Nicola that *'he will get an easy bonus for his guilty plea'* and his *'heady mix'* of Aspergers, OCD and semantic pragmatic disorders could be used as mitigating factors to prevent the suspended sentence from being triggered. This echoes the approach of the police and the CPS in Harry's case (above). The guarantee of reduction for a guilty plea is used to persuade her to testify because this will create the opportunity for his disability to be properly considered later in the process at mitigation. A guilty plea becomes an aspect of mitigation by creating the conditions of possibility for this to be considered.

In Claire's case, the CPS worked closely with her Offender Manager who, in turn, worked with her defence solicitor. In relation to plea, her Offender Manager said:

> *'She always pleads guilty to bladed article but nothing else; at the advice of her solicitor, they feel, quite rightly, very strongly about her trying to get help'* (Interview).

As we have seen, these cases showed that part of the 'guilty plea culture' – as it emerged here – is to use the guilty plea to obtain 'help' for defendants with autism. Justiciable issues are examined by the defence, prosecution and Magistrates' or Crown Court judges from the perspective of wrongdoing from the criminal justice paradigm, rather than perceiving the parallel legal rights which arise in relation to the person's disability in the context of the social care system. Bridges regards the reality of the current sentence discount to be that a 'guilty plea (whether honest or dishonest) is to be

treated *per se* as a mitigating factor and rewarded by a lesser sentence' (2006: 89). These cases also show that there is a tendency for the culture towards the guilty plea to shift material consideration of the person's autism from fitness to plead to its relevance to mitigation at sentencing. These aspects of the 'guilty plea culture' represent the kind of 'politics and policies of criminalisation and crime control which are grounded on an ideology of difference, rather than on an acknowledgement of diversity' (Hudson, 2007).

Conclusion

Chapters 7 and 8 contribute to an understanding of the 'disablement' (see Chapters 1 and 2) faced by the cohort of eight defendants. Chapter 7 has demonstrated that the inequitable experiences of autistic offenders arise out of the failure of decision-makers to conceptualise them as 'disabled' at the processual and temporising decision-making stages. We have seen that in the organisational culture of attaining an early guilty plea for administrative expediency and re-balancing the system towards the victim, consideration of the defendant's autism is shifted further down the criminal justice pathway, becoming relevant in the context of mitigation at sentencing. This is not an argument in favour of increased use of fitness to plead proceedings. Others have already set out the difficulties around current legislation and the Law Commission's proposed reforms to this legislation in relation to compatibility with the UNCRPD (see Gooding and O'Mahony, 2015). Gooding and O'Mahony give the example of those who are deemed unfit to plead, and who routinely face extended periods of detention in secure settings, for longer periods of time than if they received the maximum sentence for the alleged crime (*ibid*: 2; see ALRC, 2014). Rather, the aim is to highlight that the specific impact of the guilty plea culture on defendants with autism means that this strategy of government fails to ensure that these defendants receive access to justice.

Chapter 8 – Dividing practices in case disposal

Introduction

The disparate actions and siloed working practices of criminal justice decision-makers in arriving at 'processual' and 'temporising' decisions (see Chapter 7 above) become evident when these actors come together in the courtroom and are brought under the scrutiny of the court. Section 1 examines how the defendants' autism was used by their defence solicitor or barrister as a mitigating factor and the extent to which sentencers took this into account in adjusting the level and type of sentence. It also highlights where consideration of mitigating factors was diminished because overriding weight was given to the need to protect the public following a calculation about risk. Thus, Section 1 is alert to whether the person's autism was associated with rationalities such as dangerousness, increasing the prospect of and length of incapacitation (see Manson, 2011).

Section 2 looks at the technologies and programmes of governance (see Chapter 1; Lippert and Stenson, 2010) which were applied to defendants with autism at sentencing. It examines the court observation and other qualitative data to ascertain what logics were applied by the courts in determining the sentence for the defendants in the cohort through the use of: i) actual or suspended sentence; ii) Hospital Orders under the Mental Health Act 1983, and iii) community orders. The cases of Claire, Samuel and Joseph in particular are illustrative of the ways in which 'civil and administrative processes are increasingly being repurposed so as to accommodate the goals of criminal law' (Spivakovsky, 2014: 3). In the absence of 'disabled justice' there may be principled reasons for using measures within health and social care, however, there is some evidence of invasive governance of adult defendants with autism as these

measures are re-purposed and integrated into SOPOs, Community Orders and Supervision Orders.

In seven out of the eight cases, the adult defendant with autism was supported by one or more family members. The role and experiences of these family members became an important theme in understanding the governance of the defendants. Indeed, there was evidence of 'governing through the family' (Donzelot, 1979). Consequently, Section 3 examines the difficulties encountered by the defendant with autism when negotiating the CJS and how this type of governance had a collateral impact on the defendant's family.

1. Aggravating and mitigating factors and the pursuit of equality policies in sentencing

In six of the eight case studies, the defendant with autism was convicted for the offences alleged against them and Joseph was found by the jury to have committed the acts in his unfitness to plead proceedings. Harry was the only defendant to be acquitted unreservedly. Research shows that judicial recognition of personal mitigation still plays the largest role in tipping the balance away from a custodial term (Hough *et al*, 2003); changing what otherwise would have been a period in custody to a community-based sentence in one third of cases (see Hough and Jacobson, 2007). The present section examines the relevance of the defendant's autism in personal mitigation. The legislature creates statutory sentencing factors which allow for judicial discretion to consider mitigation at sentencing (Roberts, 2011). Five such factors have been placed on a statutory footing in England and Wales by Section 142 (1) of the CJA 2003, which sets out the purposes of sentencing to which the court must have regard in respect of the defendant's offence:

'(a) the punishment of offenders,

(b) the reduction of crime (including its reduction by deterrence),
(c) the reform and rehabilitation of offenders,
(d) the protection of the public, and
(e) the making of reparation by offenders to persons affected by their offences.’

However, this Act ‘provides no indication regarding the relative weight of the factors, their potential to move a case over the custody threshold, or whether they are more important than other sentencing factors emerging from the case law (Roberts, 2011: 7). The Coroners and Justice Act 2009 created a single Sentencing Council, replacing the former Sentencing Guidelines Council and Sentencing Advisory Panel. Unless it would be contrary to the interests of justice, Guidelines issued by the Council (or the former Sentencing Guidelines Council) ‘must’ be followed by the court. The sentencing guidelines, issued by the Sentencing Council, supplement the details in statute and its interpretation by the judiciary (*ibid*) and assist judges and magistrates in deciding ‘the appropriate sentence for a criminal offence’ (Sentencing Council, 2009). The definitive guideline, *Overarching Principles,* explains that the ‘seriousness of an offence is determined by two main parameters; the culpability of the offender and the harm caused or risked being caused by the offence’ (2004). Interestingly, Ashworth notes that the *Overarching Principles,* which list the aggravating and mitigating factors, divide the former into ‘factors indicating higher culpability’ such as ‘previous convictions’ and ‘factors indicating more than [a] usually serious degree of harm’ such as vulnerability of the victim (2011; c.f. Sentencing Guidelines Council, 2004: 10).

Roberts has criticised the *Overarching Principles: Seriousness* guideline in England and Wales for providing only a ‘limited rationale for the invocation of any specific factor’ and for making ‘no distinctions among the thirty-one aggravating circumstances related to harm and culpability’ (2011: 11; 14). Conversely, the shorter list of mitigating factors only indicates a lower level of culpability, and not harm (*ibid*). ‘Mental illness or disability’ is one of the four mitigating factors set out in the

Overarching Principles which indicates that an offender's culpability is 'significantly lower'. However, '[m]itigating factors that lower culpability may be assigned much less weight if they do not diminish the estimated need for public protection from the offender' (Ashworth, 2011: 25). On the other hand, 'reduced culpability and matters of personal mitigation may be highly important if the purpose of sentencing is reform or rehabilitation' (*ibid*). Whilst Section 116(1) of the 2003 CJA makes 'provision for a sentencer to take account of any matters that "in the opinion of the court, are relevant in mitigation of sentence"' (Sentencing Guidelines Council, 2004: 7), it does not add further guidance on 'whether there is a strong case for taking account of the impact of a given sentence on a particular offender' (Ashworth, 2011: 25).

The impact of the sentence on the individual offender is a factor identified by Ashworth as one of a group of mitigating factors which are extraneous to harm and culpability and have no bearing on proportionality. As Ashworth explains, once the judge has set the 'appropriate provisional punishment', it should then be adjusted 'to reflect the degree of "sensibility" of the individual offender', such as health, bodily imperfection and pecuniary circumstances (2011: 26). The underlying principle is that of equality of impact: 'sentences should be adjusted downwards or upwards where that is necessary to ensure the delivery of the same amount of punishment' to the individual before the court (*ibid*). These 'circumstances influencing sensibility' (Bentham, 1948 [1789]) should, Ashworth argues, be taken into account in proportionality theory in relation to the principle of 'equal impact' (2011). Ashworth describes the incorporation of 'wider social policies' into sentencing law and practice such as the 'statutory requirement to aggravate sentence where an offence has been motivated by… discrimination on grounds of disability or sexual orientation' (Ashworth, 2011: 29) in Section 146 of the CJA 2003. English and Welsh guidelines adopt a 'sensibilities'

approach by progressively lowering the sentencing starting point where the age ‘of the young offender is lower’ (Sentencing Guidelines Council, 2009: 24; c.f. Ashworth, 2011: 27) and in recommendations by the Sentencing Advisory Panel on women, because of ‘the multiple harms that are likely to result from incarceration’ (2010: 75). Citing the example of the ‘demonstrably greater negative impact on women’ of imprisonment because of the harms they are likely to experience as a result of incarceration, Ashworth argues that ‘mitigation of sentence must be the correct approach until the negative impacts are removed’ (*ibid*: 30). This equality of impact approach is not meted out in relation to the impact of sentence on defendants with mental illness or disability in the *Overarching Principles*. This factor only goes to the assessment of culpability.

However, sentencers are ‘required to hear any speech in mitigation that the offender or his legal representative wishes to make’ when sentencing an offender in England and Wales (Shapland, 1981; 2011). Section 166 of the CJA 2003 gives powers to judges to mitigate sentences and deal appropriately with mentally disordered offenders. It states that nothing in previous sections relating to imposing custodial and community sentences ‘prevents a court from mitigating an offender’s sentence by taking into account any such matters as, in the opinion of the court, are relevant in mitigation of sentence’ (Shapland, 2011: 66-7). In the court observation of the cohort of defendants with autism, although the defence solicitor or barrister would make a speech in mitigation, this was not quite the standalone, all-encompassing monologue that one might assume. Instead, the defence solicitor or counsel presented the mitigating factors to the court as part of a disparate and fragmented process of providing the sentencer with information about offence mitigation. In her work on personal mitigation, Shapland contends that this process of providing information to sentencers on personal

mitigation is not well-developed and can be unreliable. For example, although the probation service's pre-sentence reports are a source of information on personal mitigation, they are not always requested (*ibid*).

The *Overarching Principles* do not include mental ill-health or disability as a potential aggravating factor. However, the research has been alert to the question of whether other aggravating factors are linked to the symptomatology of a person's autism. For example, whether sentencers connected certain behaviour linked to the person's autism to factors such as a defendant's 'failure to respond to warnings or concerns expressed by others about the offender's behaviour', or 'failure to respond to previous sentences' (Sentencing Guidelines Council, 2004: 6). In the interviews with the cohort's defence solicitors and barristers, some were adamant that autism would not be treated as an aggravating factor in the sentencing of a defendant with this condition '*[u]nless someone was seen to be extremely dangerous*'. Whilst sentencers '*may take steps to protect others from*' the defendant or give '*some sort of sentence which… wouldn't be deserved*', Harry's solicitor did not '*think it [would] ever been seen as an aggravating feature*' (*ibid*). Samuel's barrister echoed this, because even though judges had disregarded autism as a mitigating factor and '*poo-pooed the suggestion [that the] behaviour is rooted in autism*' even the most '*cynical judges*' have never '*suggested that the autism is an aggravating feature*' (Mr Manson, Interview). Mark's original solicitor, Mr Arkwright, also reflected on the cynicism of sentencers in discounting defendants' autism as a mitigating factor in relation to disability or mental ill-health:

> '*You have to explain [the autism] to the magistrates [in mitigation] …how this [criminal] behaviour is predicated by the autism…[S]ome magistrates are ready to listen and be sympathetic. Others…have no great interest in this…[and they say]: you've done it…[even though you have a probation] report to that effect. And of course the more previous convictions you have got…it undermines your position, and [the judges] just say: "well yes, he is just a n'ere do well, isn't he?!"*'

The description of this solicitor's approach to deploying a defendant's autism as a mitigating factor, '*clothing*' the criminal behaviour, reveals a focus on its relevance to the culpability of the defendant. However, the attitudes of the District Judges recalled here show that, despite the guidance in the *Overarching Principles*, there is not always consistency or preparedness by sentencers to give proper consideration to the defendant's disability or mental ill-health as mitigating culpability nor in taking probation reports into account. Harry's solicitor corroborated this view, claiming that where '*the probation report*' is presented to give evidence of '*a mitigating factor where someone has pleaded guilty*', and it states that the defendant with autism is '*"not a person who views the world in the same way as we do", they [the magistrates] will have judged them by our standards but you know his view of the world is completely different*' (Mr O'Malley, Interview). Here, the defence solicitor's account moves beyond the relevance of a condition like autism to culpability, and acknowledges different norms of behaviour which highlight the 'sensibilities' of the defendant.

However, other defence solicitors acknowledged that they were not so convinced about a bright line shielding conditions like autism from being considered as an aggravating factor at sentencing. Despite refuting its role as an aggravating factor (see above), Samuel's defence barrister conceded that it could become a sentencing problem '*if the medical opinion was that because of the autism the defendant would be unlikely to change his behaviour, then you have a problem in dealing with future risk*' (Mr Manson, Interview). In Mark's case, his defence solicitor, Mr Griffiths, believed that '*...even without any previous convictions… he was looking at a custodial sentence according to the Guidelines*' because there were significant aggravating features (Interview). Mark had previous convictions for offences of downloading indecent images of children and was subject at the time to both a community order and a SOPO.

Although the latter had been '*removed because the police felt that [Mark] was no longer a risk*', his defence solicitor knew that '*there were significant aggravating features*' and he was:

> '*…anxious not to just jump in and say plead guilty and get in and get your credit for an early guilty plea because… unless the court had the fullest possible information about his disability and how it impacted on the case and, more importantly, how he could be treated in the future, as part of a community order then he would inevitably receive a custodial sentence*' (Mr Griffiths, Interview).

Thus, these considerations affected how he advised Mark about entering his plea and the relevance of Mark's autism to his mitigation:

> '*…[I]n terms of mitigation…it was important to get a detailed report from an expert; to assess what his condition meant to him; how it impacted on the offences and how his risk could be managed in the future*' (*ibid*).

The imperative to get a good quality expert witness report was created by the '*woeful*' supervision Mark received from the Probation service as '*he effectively didn't receive any proper intervention to address his offending behaviour*' (op cit.). Although Mark's defence solicitor conceded that this was not an '*excuse*' for the repeat offending, his view was that '*if he had had that proper intervention*' there would have been '*a greater likelihood… [of him] complying with the prior SOPO*' (Mr Griffiths, Interview).

In the court observations, the defence solicitors and barristers placed greater emphasis on the personal 'sensibilities' of the particular defendant in making their case for mitigation to avoid the impact of a custodial sentence, rather than focusing on its relevance to culpability. For example, when Mark returned to court to be sentenced after he had re-offended, his barrister 'Mr Parkinson' relayed how Mark's psychiatrist had set out 'the deleterious effects' of a short immediate custodial sentence, submitting that this 'may lead to the occurrence of further offences'. Thus, in court, he recommended that the judge utilise a '*firestorm*' effect of putting a suspended custodial sentence in place, rather than immediate custody, in order to prevent Mark from re-

offending (Court Observation). He explained to the judge that Mark's '*Asperger Syndrome means the "firestorm" is useless unless there is a temporal aspect*' of a suspended sentence because, although Mark '*sympathises with*' the victims '*in the images*', unless there is an immediate response to downloading the images, he just '*looks at images and then feels guilty*' (Mr Parkinson, Court Observation). The defence barrister's speech in mitigation emphasised that Mark was '*aware of those difficulties and is coming to realise that he needs to deal with those difficulties'* but that their expert witness, Dr Toyah, had said in their report that '*the lack of good psychiatric support has been part of the downfall*' (op cit.).

The next main point in his barrister's speech in mitigation focused upon the support that Mark had received following his earlier offending. When Mark was discharged from a Section 3 Order in June 2014, '*despite the good work he was doing, this rendered him isolated and his computer became his life… [and] he only had a low level of support from the probation service'* (Mr Parkinson, Court Observation). However, his barrister argued that the '*situation [had] now changed*' as he was '*undertaking privately funded support to deal with these difficulties*' which involved writing '*person-centred essays that deal with the effects of downloading of images*' and was '*continuing to deal with and to face problems with empathy*' (*ibid*). What emerges here is that the impact that the defendant's autism had on personal mitigation depended on the quality of the expert witness reports and pre-sentence reports made by the probation service. This brings us back to Shapland's concern about consistency among magistrates and the judiciary in finding information about offender mitigation. A lack of consistency in obtaining such information for defendants with a known diagnosis of autism makes it paramount to have a diligent defence counsel who is capable of accessing good quality expert evidence.

In making his speech in mitigation at the Magistrates' Court, Robert's solicitor, Mr Myrrh, took a highly paternalistic approach in referring to Robert's autism:

> '*My client's long suffering mother expresses grave concern for his well-being and hers. …[He] has one conviction for violence against the mother who is very forgiving in the past and let the prosecution pass. This is the first time she has wisely stood her ground so my client accepts that he was abusive and violent to her. He does not fully appreciate the effect of his behaviour on his mother. For all of his life he has always had her support but he is no longer a small child [who can] have tantrums. He requires a great deal of care but he probably does not help himself because he does not take his medication. So the doctors have stopped prescribing it. The probation service can perhaps impress upon him to take medication*' (Court Observation).

Here, there is a clear attribution of Robert's offending behaviour to his autism but his argument was not structured around the underlying unmet mental health needs and the absence of social care support to enable him to live more independently without the intensive care and support of his mother. The social model of disability would prove helpful in developing a coherent principle of equality of impact for defendants with disabilities, especially if disability (including autism) and mental illness are considered in guidelines such as the *Overarching Principles*. We can see the current inclusion of disability in the list of mitigating factors, which impact on culpability as representing the 'impairment' branch of the distinction. For defendants with autism, this relates to the discussion in the 'psy' disciplines on the link between the committal of an alleged offence and the symptomatology of autism. However, the impairment branch of the distinction also requires sentencers to be alert to 'the degree of "sensibility" of the individual offender' and how the individual experiential aspect of their condition impacts on them because of the harms which are likely to result from incarceration.

These factors must be squarely and purposively considered by sentencers and determined more explicitly in the *Overarching Principles*. The disablement branch of the social model's distinction would also require a direct evaluation of the structural factors impacting on the disadvantage or restriction of activity, caused by the failure to

take account of impairment. These might include the failure of local authorities to support the needs of adults with autism in the community or the greater risk to longer-term institutionalisation because of delayed discharge from a court-ordered Hospital Order under the Mental Health Act 1983, akin to Ashworth's example of the 'demonstrably greater negative impact on women' (see above). Embedding the consideration of disability as a mitigating factor in the underlying principle of equality of impact, and not just culpability, would assist the courts in doing justice to difference for defendants with disabilities, including those with autism. Developing more detailed guidance on the provision of information to sentencers on personal mitigation related to the defendant's disability, which integrates the social model and an Equality rights-based approach, would be a positive step forward. Ensuring this is directly related to a revised set of *Overarching Principles* would also improve consistency in considering disability in mitigation, and would be transformative to the treatment and decision-making process about defendants with disabilities at sentencing.

2. Dividing practices in case disposal: conviction and sentence

Drawing on Foucault, Seddon focuses on the 'dividing practices' that channel individuals into prisons, rather than on the field of 'mentally disordered offenders' as a whole. This section analyses the technologies and programmes of governance applied in the dispositive decisions at sentencing for the cohort of defendants included in the case studies.[9] Whilst the range of options available at sentencing are determined in part by 'the offence and the characteristics of the offender', the 'sentencer has a fairly wide

[9] It should be noted that none of the seven defendants in the cohort who were convicted were given an absolute or conditional discharge. Ollie was the only defendant who was given a fine only and is not discussed further in this section. The fine was deducted from his disability-related benefits, Employment Support Allowance and Disability Living Allowance, of which he was in receipt.

range of possibilities in disposing of the case' (Sprack, 2012: 394), subject to the legislative framework laid down by the CJA 2003.

i) Actual or suspended sentence

In determining whether to impose a community (see Section 2(b) below) or custodial sentence, the CJA 2003 sets out the criteria which the sentencer must consider in order to establish if the offender has crossed the threshold for a custodial sentence (Sprack, 2012: 396). The court must not pass a custodial sentence unless one of three alternative justifications in Section 152 of the CJA 2003 are met. First, the court must be of the opinion that 'the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence' (Section 152 (2)), thus providing for the situation where the offender has to be sentenced for a combination of two or more offences. Second, the offender must 'fail to express his willingness to comply with a requirement which is proposed by the court to be included in a community order and which requires an expression of such willingness' (Section 152 (3)(a)). Third, the offender must fail to comply with an order for pre-sentence drug testing. The seriousness of the offence is one factor in determining whether a custodial or community sentence is passed. The test for this included in Section 143(1) of the CJA 2003, whereby the 'court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused'. In forming an opinion on whether the court can justify the passing of a custodial sentence, the court is obligated under Section 156 to 'obtain and consider a pre-sentence report' and, under Section 157, to 'obtain a medical report before passing a custodial sentence' where 'the offender is or appears to be mentally disordered'. Further, in the latter case, the court

must consider 'any information before it which relates to his mental condition (whether given in a medical report, a pre-sentence report or otherwise)' and 'the likely effect of such a sentence on that condition and on any treatment which may be available for it' (Section 157(3)(a) and (b)).

None of the defendants in this cohort received an immediate custodial sentence, though it was considered in Robert and Mark's cases. Mark and Robert were both given suspended sentences with suspended sentence orders during their 'supervision period'. The power of the court to suspend certain sentences of imprisonment is legislated for in Section 189 of the CJA 2003, and the aforementioned provisions relating to the passing of a custodial sentence apply equally to the passing of a suspended sentence (Section 189(6)). At the same time as exercising its power to suspend a sentence, the court may impose specific additional requirements by Suspended Sentence Order with which the offender must comply during 'the supervision period'. These requirements are listed in Section 190 of the Act. In Robert's case, the lead magistrate, the chairman, considered it to be a threat: '*We could say we have had enough and send you to prison today to make you accept and apologise. Yes?!*' (Court Observation). Robert, at the time of sentencing for the assault on his mother, was already on a suspended sentence '*because he was involved in cultivating cannabis plants in his flat because he rarely lived in the flat as he was abused by local thugs*' (defence solicitor, Court Observation). The Court Clerk, therefore, advised the three magistrates that:

> '*The Sentencing Guidance Council says that if the defendant commits a breach at the latter end or if the act is dissimilar or there are compelling reasons not to activate the suspended sentence. It is dissimilar and less serious and it is unjust to activate the suspended sentence in this case*' (Court Observation).

Consequently, instead of activating his existing suspended sentence or imposing a new term of custody, the magistrates decided to extend his '*suspended sentenced for 18 months*', telling him: '*[y]ou are not going to prison today*' (Court Observation). They

also gave him an 18-month community order but decided not to give him a restraint requirement to stay away from his mother's house, as they thought it would '*aggravate*' the situation with his mother.

Whilst the chairman said they were '*not going to go through*' the detail of the community order, after passing the sentence this lead magistrate spoke directly to Robert: 'I *am not being rude but you can read and write can't you? Do you understand everything today?*' (Magistrate, Court Observation) In the context of telling his mother that she did not '*deserve*' any more abuse, the magistrate admonished Robert further:

> '*you are going to end up in prison or a mental institution... [Robert], before you leave today you can learn to stand up straight. You don't need to lean on anything. We don't need to see you in court again and be nice to your mother*' (Court Observation).

This excerpt reflects what Beresford *et al* describe as a 'deficit deviant model' (2010) in professionals' understanding of disability. The solicitor perceived Robert's autism as biologically determined without any perception of the social barriers leading to disablement.

When Mark was sentenced the second time for downloading indecent images of children, his solicitor was convinced that the judge may have decided to give him a custodial sentence. As discussed in the last section, this led the solicitor to delay the entry of plea, because he was '*fairly certain*' that if they had not '*done that he would have ended up getting a custodial sentence because the sentencing court wouldn't have been aware of his special needs*' (Mr Griffiths, Interview). The due diligence on the part of the defence solicitor had an important impact on '*the judgement of between, possibly, a suspended sentence and a community order*', Mark's solicitor believed that:

> 't*here is no doubt he did cross the custody threshold, but the judge again, quite rightly… felt that a community order was better because it would give a longer period of supervision*' (*ibid*).

In court, the judge who sentenced Mark for the second set of offences of downloading indecent images of children, stated that his offending took him to the '*bottom range of the guidance for a period of 18 months in custody*' but recognised that '*unfortunately, the young man before him… clearly falls in the Asperger range of the autism spectrum and has difficulties*' (Court Observation). It was his '*judgement that he would receive full support and guidance in the community… it was unlikely that he would get this support in prison because he would get a shorter sentence due to his vulnerabilitie*s' (Judge, Court Observation). Therefore, the judge in this case imposed a community order and extended his Sexual Offences Prevention Order and Community Order with a requirement for him to undergo psychiatric support from a specialist, in the town where he was studying at university.

When Mark reoffended again in 2014, he was sentenced in the Crown Court to a 12-month sentence, which was suspended for two years. The judge suspended it '*with understandable hesitation*' as he saw the most recent offence as:

> '*a deliberate and cynical breach which would meet the threshold for incarceration. Against this background there is a sentence of prison for 18 months would be justified*' (District Judge, Court Observation).

The reference to the 'cynical breach' was because of Mark's '*quite deliberate download of software to hide [his] web history*' (*ibid*). The implications were '*that [he knew] the downloaded material that [he was] going to download was illegal*' (*ibid*). However, it appeared that the judge was persuaded by the submissions made by Mark's defence barrister described above that the suspended sentence would have a '*furnace effect*' and the medical report '*sets out the deleterious effects*' of '*a short immediate custodial sentence*' and that '*it may lead to the occurrence of further offences*' (Mr Parkinson, Court Observation).

Consequently, the judge also imposed 200 hours of unpaid work as a requirement and modified Mark's SOPO, making it indefinite and added a further prohibition not to use any device capable of accessing the internet including, but not limited to, a personal computer, laptop, '*unless internet capability is disabled and unless [he] make[s] the device available to the police when requested*' (District Judge, Court Observation). Under this Order, Mark was prohibited until further notice from:

> '*1) using any device capable of accessing the internet unless internet capability has been disabled;*
> *2) from deleting any internet history;*
> *3) from possessing any device capable of accessing the internet unless you disable that device;*
> *4) prohibited from any contact with children under the age of 18, whether inadvertent or unavoidable, without the consent of the child's parent or guardian who [themselves] know about your offending history*' (*ibid*).

Speaking directly to Mark, the judge stated that:

> '*If you commit any offence that breaches the SOPO then the overwhelming likelihood is you will serve 12-month in addition to any other sentence given by any other court. If you fail to fulfil the requirements of this order the likelihood is you will go to custody*' (*ibid*).

When Mark was sentenced for a second and third time for charges of downloading indecent images of children, the respective judges were sympathetic to Mark's vulnerability deriving from his autism, were persuaded that custody would have had a deleterious effect on him, and were reassured by the fact that he was receiving psychiatric care. They saw short prison sentences as failing to facilitate long-term psychiatric treatment. At sentencing, it was evident that the rigour and consistency of the medical reports was a pivotal factor in determining the outcome.

ii) Community Sentences

Under Section 147 of the CJA 2003, 'community sentence' means a sentence which consists of or includes a community order or a youth rehabilitation order. Where a person is over the age of 18 and they are convicted of an offence, Section 177 of the

Act applies. Section 177 defines a community order to include any of the following requirements may be imposed on that person by the court on conviction or before they are convicted: an unpaid work requirement, an activity requirement, a programme requirement, a prohibited activity requirement, a curfew requirement, an exclusion requirement, a residence requirement, a mental health treatment requirement, a drug rehabilitation requirement, an alcohol treatment requirement, a supervision requirement, and, in a case where the offender is aged under 25, an attendance centre requirement. Section 148 provides the threshold that a court 'must not pass a community sentence on an offender unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant such a sentence'. When the court has decided that the offence passes this threshold, the court must be of the opinion that the particular requirement(s) which form part of the community order are 'the most suitable for the offender' (Section 148(2)(a)) and the restrictions on liberty imposed by the order must be 'commensurate with the seriousness of the offence' (Section 148(2)(b)).

Patrick, Claire and Joseph were all given Community Orders. In Patrick's case, the district judge sentenced him for the racially aggravated assault as a youth court matter and, during the same sentencing proceedings at the youth court, dealt with the theft of copper and damage to a vehicle as adult matters. For the racially aggravated assault, he was given a 12-week Community Order with supervision and a 11pm to 6am curfew requirement for this period under Section 177(1)(e) of the CJA 2003. He was also ordered to pay a £150 fine *'not because of what it is worth – you can't put a figure on it – but because it is an appropriate starting point for what [he] did to that man*' (District Judge, Court Observation) and a £250 contribution towards prosecution costs. With regards to those offences dealt with in the adult court, Patrick received a 12-month

Community Order and was ordered to pay £60. This was to be paid out of his disability living allowance and employment support allowance over a 14-week period. The Community Orders given here are commensurate with the offence, however, the underlying logic informing the attitude towards decision-making is revealed in the District Judge's statement to Patrick, in passing his sentence. Here, she told him to '*grow up a bit: take responsibility for yourself and behave better to others'* and that *'if he [was] to breach his supervision order, [he] would find [her] in a different mood and lock him up!*' This response echoes the attitudes of the judges and magistrates in Robert and Mark's cases cited above. The paternalistic admonishments evidenced in each case denote a simplistic understanding of self-control. It should be recalled from Chapter 7 that Patrick was not able to read the oath at the start of his trial in the youth court for racially aggravated assault. These paternalistic admonishments reflect the performative aspect of passing sentence, rather than reflecting the specific logics applied to the case at hand.

Claire's case reflects how the dividing practices in her local authority and local mental health and learning disability services left her without support because '*there is a gap and [Claire] does not fit into their services*' (DC Kim, Offender Manager, Court Observation). Therefore, the proceedings themselves revealed how the criminal law sentencing options were re-purposed to obtain social care support for her. In interview, Claire's Offender Manager was quick to say that she did not want her to go to prison because of '*how vulnerable*' she was but that '*we have to use "bad", [getting the court to sentence her to a community order], to do some "good"*', to get a mental health requirement for psychological support and a residency requirement (DC Kim, Interview). At her court appearance before her final sentencing, Claire's Offender Manager explained to the judge why an adjournment of the sentencing decision was

requested to '*better understand why the defendant does what she does*', because the '*forensic psychologist says that her Autism is linked to her offending; dealing with this is linked to her treatment*' (DC Kim, Court Observation). The District Judge regarded this as '*an unusual situation*' in that '*an agency [the police] other than the probation service are providing assistance*' by trying to ascertain '*how and whether that could be combined in Mental Health Services*' (Court Observation). However, the District Judge was sympathetic and he explained directly, to Claire, that he thought it was:

> '*very important that the court is able to consider some sort of way forward for you rather than just considering a Community Order where you may only see the probation officer for 15 minutes once a week... You don't fall into one box but a little bit in lots of boxes. It seems to me that the court is more aware of what might be possible through this psychologist... so I'm going to adjourn your case...*' (Court Observation).

This exchange is insightful. As we saw in Chapter 5, the *raison d'être* for the development of the Autism Act 2009 and accompanying policy was to prevent people with autism '"falling through the gap" between mental health or learning disability support', and the use of the umbrella term 'autism' was to prevent exclusion on the basis of having an IQ >70 (DOH, 2010c: 26-7; 10). The NAO Report (2009) had also highlighted how failure to provide integrated support for adults with autism from diagnosis through to health management and help with day-to-day living can be costly and increase the likelihood of 'complex mental health interventions or coming into contact with the CJS' (DOH, 2010c: 26). The Autism Act 2009 and accompanying 2010 Autism Statutory Guidance had already been enacted by the time Claire's case went to court, which reminded all 'local authorities, NHS bodies and NHS Foundation Trusts who provide mental health and learning disability services… to review the [DOH] guidance about the adjustments to service delivery to include adults with autism' (*ibid*). Further, at that time, the 'Standard Contract for Mental Health and Learning Disabilities explicitly require[d] service specifications, and therefore service

providers, to demonstrate how reasonable adjustments for adults with autism are made' (*ibid*; see DOH, 2010f). However, despite Claire's low assessed IQ, the '*learning disability services just didn't want to know*' and she failed '*various tests and assessments social services [did]… of her needs*' and, therefore, the local social worker found her not to be eligible under the *Fair Access to Care Criteria* (see DOH, 2010f; Offender Manager, Interview). The excerpt above shows how Claire's Offender Manager worked closely with the Police and Crime Commissioner to put pressure on senior decision-makers in local social services to put together a funded package of support for her in the Community. They felt that this would only work if Claire was compelled by the court to be resident in the supported living placement that had been arranged by her Offender Manager and if a Mental Health Treatment Requirement was ordered for her to have sessions of CBT with a psychologist.

These recommendations were included in Claire's pre-sentence report, after extensive input from her Offender Manager. At the final sentencing, Claire was before a different District Judge. In sentencing Claire she said:

> '***District Judge****: [Claire] Other people have been doing lots of work around you to stop you getting into a situation where you are at serious risk of doing harm, not because you mean to but sometimes it's the way you behave. I'm being asked to give you a community order for 12-month, this is a special order. Given all the bad things you have had to deal with this is a good opportunity. I don't get invited to make these orders very often. You'll do your bit to make it work won't you?*
> ***Claire****: Yes*' (Court Observation).

Thus, in order for Claire to finally receive funded social care support and mental health intervention, she was subject to a twelve-month Community Order; along with a twelve-month Supervision Order; a six-month Mental Health Treatment Requirement to engage with a named psychologist, to undergo Cognitive Behaviour Therapy and a six-month residency requirement for her to be domiciled at the supported living placement that would be paid for by the Police and Crime Commissioner's budget. Under the

Sentencing Guideline, when determining the seriousness of the offence (culpability and harm) of possessing a knife, the court must identify the appropriate starting point. Where the weapon was not used to threaten or cause fear, as in Claire's case, the appropriate starting point is a high-level community order (Sentencing Council, 2008). The court must then consider the effect of aggravating and mitigating factors, with mental illness or disability being factors which lower culpability.

On the one hand, this problem-solving approach seems progressive. The Offender Manager and Police and Crime Commissioner re-purposed the criminal law to achieve a care package that social services had failed to put in place. On the other hand, utilising these criminal justice orders and attendant requirements to obtain the social care support and mental health intervention she was already eligible for flies in the face of the paradigm to which the Autism Statutory Guidance subscribes. This guidance emphasises that 'all health and social care organisations need to understand the principle of least restrictive care – which means identifying a range of interventions and seeking the least restrictive ones for people with autism' (DOH, 2015b: 46). This re-purposing of the criminal law, even with the intention to achieve an 'opportunity' for Claire to be better supported, is achieved through mechanisms which are not required to take account of this principle. Therefore, Claire's preferences – which are central to the personalisation model of social care – were not a central consideration: she was given a residency requirement which meant that she had to leave her family home to live in a new city in supported living accommodation, procured by the Offender Manager and social services. Conversely, the Autism Statutory Guidance states that people 'should live in their own homes with support to live independently if that is the right model of care for them' (*ibid*). There was only limited consideration of whether she should remain in or near to her home:

> *'She lives with her parents; she wants to leave but the difficulty we're having is that she tells them what they want to hear: "I don't want to leave". [So], it's hard to gauge what she actually genuinely wants'* (Offender Manager, Interview).

This approach seems insufficient when the guidance states that '[b]ehaviour others may find challenging lessens with the right support and individuals benefit from personalised care' (DOH, 2015b:46). Further, the approach of the sentencing judge, although willing to sentence Claire to these measures, also displays 'the lingering precedence given to a narrow, medical view of mental disorder', with a resultant 'focus on biological cure or management of the condition or person' (Clough, 2014: 2). Like the admonishments used for Patrick and Robert, the medical model of disability is evident, seeing the 'diagnosis and classification functioning as ends' (*ibid*: 3) with 'consequences and limitations stemming from the disability... seen as regrettable but inherent to the condition' (*ibid*).

In Joseph's case, after the jury agreed that the defendant had committed the acts alleged, the judge had to decide whether to give '*a Hospital Order, a supervision order [or] an absolute discharge*' (Judge, Court Observation). Following advice from the defence barrister (see below), who explained that Joseph had now been given '*an increase from 35 hours' social service support to 67 hours from social services to keep him in as much as possible*' (Defence Barrister, Court Observation), the judge gave Joseph a two-year Supervision Order. In his case, Joseph's social worker was the named person, rather than the probation officer, for the purposes of that Order. His defence barrister emphasised to the judge that whilst in the past '*there have been unreliable resources allocated to help him and the public*' the increase in social service support meant that he would '*live entirely independently*' with the additional help of '*the care and fortitude of his father*' (Mr Reilly, Court Observation). The availability of

intensive social care provision and the additional support of his parents were decisive in influencing the decision about the disposal of his case.

> '***Judge***: *[To Joseph, after making the supervision order]…you don't have to come to court again. This [Supervision Order] will be for two years. The court is pleased to know that Mum and Dad give lots of support to help you. You can go home now*' (Court Observation).

Indeed, as acknowledged by the presiding judge, that '*quality foundation of love… must be a great burden.*' The collateral impact of such intensive support for parents is discussed below.

ii) Hospital Orders under the Mental Health Act 1983

Part III Patients Concerned in Criminal Proceedings or Under Sentence of the Mental Health Act 1983, sets out four Hospital Orders which can be made for 'mentally disordered offenders' by the court at the point of sentencing. First, there is a Section 37 order which gives the power to the Crown Court or the Magistrates' Court on conviction, or once they are satisfied that the defendant has committed the act or omission, to order hospital admission or guardianship for up to six months in the first instance. With this order, there is the option to renew for a further six months, and then a year at a time after that. Second, where the court wants to test the appropriateness of a full Hospital Order, a Section 38 interim Hospital Order may be made initially for up to 12 weeks. Third, a Section 41 order provides for the power of higher courts to restrict discharge from hospital when a Section 37 has been used. Finally, the Section 45A power of higher courts to direct hospital admission is a 'Hybrid Order' as it is 'a prison sentence together with a requirement for hospital treatment with limitation directions' (Barber *et al*, 2009: 53). In the eight cases in the cohort for this study, only a Section 37 and the use of Section 37 with the Section 41 Power of the courts to restrict discharge were either considered or ordered by the court. The use of a Section

37 was proposed by the CPS but was quickly dismissed by the District Judge in Harry's case. It was also considered by the judge but ultimately dismissed in Joseph and Mark's cases. Samuel was the only defendant for whom the court made a Section 37 Hospital Order but, after some deliberation, the Crown Court judge decided not make an accompanying restriction order under Section 41. The court also put in place a SOPO, for seven years, and Samuel was placed immediately in a forensic hospital. At that point, Samuel had already been on remand for eight months. Unlike Claire and Joseph's cases, there was no interaction with social services or consideration of social care support. This section will focus on the use of a Section 37 Order for defendants with autism. Before examining these cases in more detail, it is necessary to examine the logics which are applied to defendants with autism more generally in the schema of applying Section 37 and the Mental Health Act 1983.

Once the defendant is convicted by the Crown Court or has been convicted or found to have committed the act or omission by the Magistrates' Court, the conditions in Subsection (2) of Section 37 must be satisfied before the relevant court can make the Hospital Order. These conditions are as follows:

> '(2)(a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from [mental disorder] and that either—
> (i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and [appropriate medical treatment is available for him; or]
> (ii) in the case of an offender who has attained the age of 16 years, the mental disorder is of a nature or degree which warrants his reception into guardianship under this Act; and
> (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section.' (Mental Health Act 1983).

Setting subsection (ii) to one side for our purposes, Section 37(2) can be split into four grounds which the court must be satisfied that the offender fulfils on the basis of

medical evidence to meet the conditions of compulsory detention. First, in the view of two registered mental practitioners, the offender is suffering from a *mental disorder*. Second, the *mental disorder* must be of the 'nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment' (Section 37(2)(i); emphasis added). Third, there is a requirement that 'appropriate medical treatment is available'(*ibid*). Fourth, after fulfilling the two prior conditions in Section 37 subsection (2)(i), and 'having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section' (Section 37(2)(ii); emphasis added). It is important to break down each aspect of these conditions in order to assess how the courts considered these conditions in relation to the defendant's autism.

Section 1(2) of the 1983 Act defines 'mental disorder' as 'any disorder or disability of the mind'. The 2015 *Mental Health Act 1983: Code of Practice* ('the Code of Practice') sets out a qualified and non-exhaustive list of clinically recognised conditions which could fall within the Act's definition of mental disorder. These specifically include '[l]earning disabilities' and '[a]utistic spectrum disorders (including Asperger's syndrome)' (DOH, 2015: 26). This Code of Practice 'provides statutory guidance to registered medical practitioners, approved clinicians, managers and staff of providers, and approved mental health professionals on how they should carry out functions under the Mental Health Act ('the Act') in practice' (*ibid*). It is interesting, however, that amendments made to the 1983 Act by the Mental Health Act 2007 inserted what is termed the 'learning disability qualification'. Sections 1(2A(a) and (b)) under the 2007 Act state that 'a person with a learning disability **shall not** be considered by reason of that disability' to be suffering from a mental disorder or

requiring treatment in hospital for a mental disorder 'unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part' (emphasis added). Thus, this amendment in Section 1(2A) provides a higher threshold for detention and treatment of persons with learning disabilities under the Act than for those with an 'autistic spectrum disorder'.

The 2015 version of the Code of Practice updates and now supersedes the 2008 version of the Code which followed the Mental Health Code of Practice 2007. Importantly, the most recent version of the Code contains more extensive reference to the inclusion of 'autistic spectrum disorders', emphasising that, like learning disabilities, these 'are forms of mental disorder as defined in the Act' (*ibid*: 28). The updated Code of Practice states that someone with a 'learning disability and no other form of mental disorder may not be detained for treatment or made subject to guardianship or a community treatment order (CTO) unless their learning disability is accompanied by abnormally aggressive or seriously irresponsible conduct on their part' (*ibid*; emphasis added). Replicating the substantive content of the 2008 Code of Practice (see DOH: 22), the 2015 Code states that this so-called 'learning disability qualification' does not 'apply to detention for assessment under section 2 of the Act'. Such conduct must be 'abnormally aggressive', not 'simply aggressive', and the Code of Practice lists the relevant factors which must be considered when assessing such behaviour (see DOH, 2015: 208). 'Irresponsible' is an ambiguous term which is best interpreted 'in the sense of liable to cause injury to herself or himself or another, rather than simply being rowdy or disruptive' (Herring, 2010: 556). The Code of Practice has also clarified this term and stresses that the conduct associated with the person's learning disabilities must not only be irresponsible but 'seriously irresponsible', and

sets out relevant factors for this criterion (DOH, 2015: 22). Barber *et al* suggest[10] that the intention behind the qualification was 'probably that such patients should be managed for preference under the Mental Capacity Act' via deprivation of Liberty Safeguards (2009: 23-4).

Significantly, for the purposes of this research, an analogous qualification does not apply to autistic spectrum disorders or Asperger's syndrome (DOH, 2015). Although the Code makes clear that, apart from the learning disability qualification, the Act does not distinguish between different forms of mental disorder, it does emphasise that autism is not a mental illness, but is 'developmental in nature' (*ibid*: 210). This means, therefore, that even if the person's autism is not associated with abnormally aggressive or seriously irresponsible behaviour, it is 'possible for someone with an autistic spectrum disorder to meet the criteria for compulsory measures under the Act without having any other form of mental disorder' (*ibid*). The drafting here is problematic as the Code goes on to qualify it, saying that whilst 'experience suggests that this is likely to be necessary only very rarely, the possibility should never automatically be discounted' (*ibid*).

The Act's definition of mental disorder includes the 'full range of autistic spectrum conditions' (*ibid*: 209). Therefore, the fact that individuals have a diagnosis of autistic spectrum disorder is sufficient for them to meet the requirements of the Act for mental disorder. Thus, despite the caveat in the guidance that the use of compulsory measures for people with autism will 'be necessary only very rarely', this group do not need to have met the threshold behaviour of 'abnormally aggressive or seriously irresponsible' behaviour before a Hospital Order is used (*ibid*). This caveat is irrelevant in terms of the legal test to determine mental disorder: autistic spectrum disorder is one

[10] The authors were commenting on the 2008 version of the Code.

of the clinically recognised conditions which could fall within the Act's definition. However, the caveat does suggest a policy attempt to differentiate this clinically recognised condition without going so far as to introduce an autism qualification to raise the threshold for this group. The rationality of policymakers drafting the Code is to avoid compulsory hospitalisation for people with learning disabilities unless a higher threshold can be met. Conversely, having a diagnosis of an autistic spectrum condition takes the person over the threshold of inclusion in the category of mental disorder but the Code attempts to be of more limited application to people with autism.

Further, the Code of Practice acknowledges that '[c]ertain groups of patients require consideration in addition to the general guidance that applies to all patients and is provided elsewhere in this Code' (*ibid*: 167). People with learning disabilities or autistic spectrum disorders, along with patients concerned with criminal proceedings, are considered in Chapters 20 and 22 respectively of the Code as such groups. Dedicating special attention to people with autism alongside people with learning disabilities in a section which elaborates upon the general guidance, suggests that there is a similar policy approach towards both groups. After consistently using 'autistic spectrum disorders' in the earlier chapters of the Code, Chapter 20 of the 2015 version shifts its language to the use of term 'autism'; clearly attempting to create a nexus with the Autism Act and accompanying Statutory Guidance. The shift in language also indicates that these policy developments are drivers of the specific consideration of autistic spectrum disorders in Chapter 20. This is corroborated by the 2015 Autism Statutory Guidance itself, which cross-references this Chapter of the Code, and emphasises that this is 'for professionals to ensure independence, dignity and respect to those they treat and assess' (*ibid*: 39). Yet the differentiation of people with autistic spectrum disorders from people with learning disabilities with regards to the application

of the ‘learning disability qualification’, without any explicit justification for differential treatment, makes the policy approach confused. It also sits awkwardly with the discussion of people with autism presenting with Challenging Behaviour in *Think Autism* (DOH, 2014; see Chapter 5).

Under the second ground of meeting the conditions for a Section 37 Hospital Order, it is ‘insufficient simply to show that a person has a mental disorder: the disorder must be such that it cannot be treated in the community, and hospital treatment is required’ (Herring, 2010: 558). Although the ‘caveat’ discussed above does not amount to an analogous ‘autism qualification’, it could be argued that it acts to emphasise the second ground in subsection 2(i) of Section 37 of the Mental Health Act 1983 by focusing on ensuring that the offender’s mental disorder ‘is of a **nature** or **degree** which makes it **appropriate** for him to be detained in a hospital…’ (emphasis added). The discussion in Chapter 7 showed how the district judge rejected the prosecution’s approach in Harry’s case and said the prosecution was not in the public interest. This ultimately led to the case collapsing. However, the prosecution’s attempt, at the behest of the police, to advise the court to subject Harry to a Section 37 Order as an alternative disposal if he was not convicted appears opportunistic. If the judge had found him unfit to plead and decided to allow the case to proceed as a trial on the facts, a Section 37 would only have been available as a disposal option for the judge in these circumstances if there was written or oral evidence of *two* registered medical practitioners recommending such an order. The prosecution and the police would have known of this evidentiary requirement. Yet, they had already accepted the defence’s expert witness evidence report, which said that a Hospital Order was not appropriate for Harry, and decided not to instruct their own expert witness to produce a report (see above).

Not only did the district judge reject the prosecution's blithe attempt to argue for this Hospital Order, contrary to the medical evidence that they had approved, he rejected an application of the second ground and the use of the Section 37 Order more broadly for defendants with autism. He told the court that '*no doctor would say that [he] needs a Hospital Order*' and went on to say that '*[Harry] suffers from a form of autism and therefore* ***it can't be right that all people with Aspergers' end up in hospital***' (Case Observation, emphasis added). The district judge's mentality reflected in this statement is stronger than the caveat contained in the Code that 'compulsory measures' will 'be necessary only very rarely.' Instead, he evinces a rationality which proceeds on the understanding that the compulsory hospitalisation of people with autism is something that should be limited. The normative language in his statement would seem to imply that there is a justification for differentiating autistic spectrum disorders from other clinical conditions which fall into the Act's definition of mental disorder, and applies something akin to the 'learning disability qualification'.

However, this was not the approach taken by the judge to Samuel's case. At sentencing, the Crown Court judge told the court that he shared the view in the report that '*a Hospital Order of Section 37 without a Section 41 restraint*' was '*necessary*' pending the availability of a forensic hospital place for him (Court Observation). The approach taken was to treat the decision of the court to give a Hospital Order as a matter of public protection because '*although it [was] not the most serious offence of this type*', he had '*touched the victim in a sexual manner*' and this was '*viewed seriously by the court*' (*ibid*). The judge emphasised that Samuel's '*antecedent history and conduct of the type*' meant that Samuel's interests and *'the interests of the public*' were '*concurrent*' in the judge's decision to give '*a Section* 37', and that he was '*detained there [and placed on] the [hospital's] sex offenders programme for people*

with learning disabilities' (*ibid*). His statement to the court indicated that the focus of his decision-making was around the public interest, rather than dissecting the second grounds as to whether Samuel's autism was of the 'nature or degree…which makes it appropriate for him to be detained in a hospital for medical treatment'. Indeed, the judge focused more directly on specific elements of the fourth ground of the conditions in Section 37(2). This implies that he saw the *actus reus* of the offence as evincing that the mental disorder is of a sufficient nature or degree to make it appropriate for Samuel to be detained in hospital.

The meaning of the third ground is that 'appropriate medical treatment is available'. As supplemented by Section 145(4) MHA, such 'treatment' means 'treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations'. Herring argues that this condition appears to 'indicate that if no medical treatment is available to the patient, then he cannot be detained under the Act' (2010: 559). He explains that the 'reasoning behind this is that if there is nothing the doctors can do to assist the patient, they should not be required to simply detain him or her, acting as a "warehouse" for the untreatable' (*ibid*). The Code of Practice is much more nuanced in its guidance, stating that:

> 'Compulsory treatment in a hospital setting is rarely likely to be helpful for a person with autism, who may be very distressed by even minor changes in routine and is likely to find detention in hospital anxiety provoking. Sensitive, person-centred support in a familiar setting will usually be more helpful. Wherever possible, less restrictive alternative ways of providing the treatment or supporting a person should be found.' (DOH, 2015b: 209)

In Samuel's case, the judge takes the existence of '*the [hospital's] sex offenders' programme for people with learning disabilities*' as being the appropriate medical treatment for Samuel. Indeed, the judge's statement to the court gives limited focus to the second and third ground of Section 37(2) and concentrates on the specific aspects of the fourth ground, which requires the court to have regard to the circumstances of the

offence and the antecedent history of the offender. There is no consideration of community alternatives and whether, under the fourth ground, 'the most suitable method of disposing of the case is by means of an order under this section' (Section 37(2)(ii)(b)). This can be seen in the Judge's statement that:

> '*Your antecedent history and conduct of the type seems to me that the interests of the public and of you are concurrent*' (Court Observation).

Despite the fact that the Judge deemed these antecedent offences to be '*minor*' (Court Observation) sexual assaults, he did not have regard to 'the other available methods of dealing with him'. Chapter 20 of the Code of Practice's specific guidance on autistic spectrum disorders illuminates the evidence-based good practice, which shows 'that most of their needs can best be met at home or in community settings' (DOH, 2015: 206). Indeed, the Code adopts stronger language. It states that '[d]etaining a person with learning disabilities or autism under the Act because there is no treatment available for them in the community is not a substitute for appropriate commissioning of care' (*ibid*: 214). In court, his defence barrister told the judge that his family would '*welcome that disposal as would [Samuel]*' (Court Observation). Samuel and his family did think that this was the best option. It was the only option presented to them by the medical practitioners who had given expert witness statements to the court. At the point of sentencing, Samuel had already been on remand in prison for nine months; this was partly due to adjournments whilst the court awaited these reports. In Samuel's words, his experience on remand was '*awful to say the very least*' (Written Correspondence). His mother was in her seventies and the terms of his SOPO were a '*restraint on [her] liberty*' (District Judge, Court Observation) such that she '*could not cope*' to have him back home on bail (Angela, Interview). Angela had repeatedly tried to get social care support for Samuel to live independently but he had always been assessed as not meeting the social care criteria by his local authority (Interview). It is not surprising that

a hospital placement for Samuel would seem to be the best option, and it was presented as a binary option between prison and a Hospital Order. In the circumstances, the latter option was preferable. Angela saw his time on remand in prison as:

> '*a complete miscarriage of justice and prison is not the right place nor will it help [Samuel] to address his offending behaviour. He realises what he did and has done in the past is wrong and inappropriate and says that he wants and needs help*' (Letter Correspondence).

There was no consideration of an alternative Community Order with a Mental Health Treatment Requirement. Further, the mentality of the district judge in this case was contrary to the Code of Practice, which recommends the 'least restrictive option' and emphasises the importance of 'maximising independence, and respect and dignity', as cited above (DOH, 2015b: 46).

The Code specifies that professionals and practitioners working with patients involved in criminal proceedings must be 'mindful of the need to ensure that the restrictions imposed on the patient are proportionate and kept to a minimum needed to meet the purpose and aim of the restriction' (*ibid*: 224). If we return to the Sentencing Council's *Sexual Offences Definitive Guideline* which was in force when Samuel was finally sentenced, the first step for the court is to determine which categories of harm and culpability the offence falls into (2014: 18). There were no category 1 harm factors in Samuel's case. He touched the girl's breast over the top of her bra which means it probably should not have fallen into category 2, 'the touching of naked genitalia or naked breasts' but category 3 (*ibid*) as factors within categories 1 and 2 were not present' (*ibid*). His case comes within culpability band B as no factors in category A were present (*ibid*).

In Step 2, 'the court should use the corresponding starting points to reach a sentence within the category range'. Where there is a sufficient prospect of rehabilitation' under Section 202 of the CJA 2003, a 'proper alternative to a short or

moderate length custodial sentence' would be 'a community order with a sex offender treatment programme requirement' (*ibid*). For category 3 harm in band B culpability, the starting point is a high-level community order, with a category range of a medium-level community order to 26 weeks of custody. The sentencer should then consider the aggravating and mitigating factors. Samuel's failure to comply with his prior court orders and the fact that his offence type was similar to his antecedent history meant that the statutory aggravating factors did apply to him and would have resulted in an upward adjustment of sentence. However, his autism was clearly a relevant mitigating factor amounting to 'mental disorder or learning disability, particularly where linked to the commission of the offence' (*ibid*). Samuel was also remorseful and pleaded guilty at the Plea and Case Management Hearing. There was no evidence of 'dangerousness' of the kind which would meet the criteria in Chapter 5 (Part 12) of the CJA 2003, and therefore it would not have been appropriate to award an extended sentence. Finally, the court must consider whether to give credit for time spent on bail in accordance with Section 240A of the CJA 2003.

When he was finally sentenced, after the extensive delays for adjournment and court listing, Samuel had been on remand for eight months. Even when the aggravating features of Samuel's case are taken into account, which may have put him at the top end of the Category, and bearing in mind his early guilty plea, it is likely that he would have been sentenced, at most, to 20 weeks of custody. This amounts to over half the time he had already served in custody on remand. This time on bail was not taken into account. At the time of writing, Samuel has been detained in an institution for nearly two years, serving eight months on remand and two years on the Section 37 Order. That is the equivalent of one-hundred-and-twenty-eight weeks' detention. That length of time, if given as a prison sentence, is one which would be ordered for an offence which meets a

category 1 level of harm and band A level of culpability, where, for example, the defendant has planned the forced entry into their victim's home. This is startling post-Winterbourne, and does not appear to meet the Mental Health Code of Practice's guidance[11] that 'the restrictions imposed on the patient are proportionate and kept to a minimum needed to meet the purpose and aim of the restriction' (*ibid*: 214).

This outcome is unsurprising given the court's peripheral consideration of defendants like Samuel being regarded as disabled citizens with attendant rights. Unfortunately, the Code of Practice embeds this issue. Chapter 3 of the 2015 Code of Practice focuses on 'human rights, equality and the duty to reduce inequalities'. It specifically references the Equality Act 2010 and the UNCRPD and explicates that the 'protected characteristic of disability includes a mental impairment…' (*ibid*: 31). However, rather than this material acting as paradigmatically central to the Code, it is presented as a preface to the Code and is not harmonised throughout. Further, Peay argues that the location of 'mentally disordered offenders' in Part III of the 1983 Act is, in itself, significant. Whilst 'this position is a logical one, coming as it does after the sections dealing with compulsory admission of civil patients, it has had the consequence of relegating them to a form of secondary status' (2013: 105). She goes on to argue that this affected the time given to deliberations about this material during the then draft Mental Health Bill and other reform committees on which she sat. This included the Joint Committee on Human Rights, leaving the 'profile of mentally disordered offenders, and the problems they raised' as 'relatively low' on the agenda 'throughout that reform process' (*ibid*). Even though the Bradley review and the subsequent Liaison and Diversion Agenda has led to a more concerted consideration of this group, they remained peripheral in the statutory provisions of the Equality Act

[11] The 2008 Code, applicable when Samuel was sentenced, is identical on this point.

2010. Finally, as discussed in Chapter 5, where adult defendants with autism are at the legal intersection of the category of 'Mentally Disordered Offenders', the statutory coverage of the Autism Act 2009 fails to extend to bodies within the CJS. This also explains the divided practices in the governance of defendants with autism and why their status as disabled citizens tends to be overlooked.

3. Governance through the family: the collateral impact on defendants' parents

The consequences of punishment for third parties are 'part of the powerful impact of deprivation of liberty' on the incarceration of the offender (Ashworth, 2011: 32). Condry has argued that our understanding of the concept of the 'collateral' effects of the criminal justice process on family members should be situated in the etymological origins of the word. She says that rather than using the more common adjectival meaning of 'collateral' of 'additional but subordinate; secondary', we should utilise its Late Middle English meaning 'situated side by side' or 'in parallel'. This connotation is via the medieval Latin *collateralis*, from the prefix *col-* 'together with' plus *lateralis* (from latus, later- 'side') (see OED, 2016; Condry, 2016, unpublished). The collateral or consequential effects of the sentence on third parties emerged through the fieldwork as an important theme in understanding the governance of the defendants in this cohort. However, this was not the only stage in the court process which had deleterious effects on the parents of defendants with autism. Consequences for family members, in parallel to the defendant, arose throughout the criminal process because 'relatives are involved with each stage of the investigation, which in some cases can take years to process from discovery to sentencing' (Condry, 2007: 52). Condry's book *Families Shamed* details how relatives of offenders are embroiled in the 'shaming process' which follows the discovery of a serious crime (2007). She suggests that the families' stigma 'is more than

just a shadow of the offender's stigma, and that it has roots in notions of kin contamination and kin culpability' (*ibid*: 6). The emotional response to the crime itself and the 'shadow of stigma' emerged as only part of the collateral impact upon the parents of defendants with autism in the present research. Life after discovery for the family of serious offenders has negative consequences on 'women in the middle' (Brody, 2004) because of the considerable caring responsibilities they faced around 'dealing with the various stages of the criminal process' (Condry, 2007: 52).

In the present research, these caring responsibilities were even more acute for the parents of the person with autism. Parents were repeatedly called upon throughout the criminal justice process to share their specialist knowledge about their son and daughter with various professionals who lacked sufficient knowledge of autism. In seven out of the eight cases, the defendant with autism was supported through the court process by one or more family members. The only exception was Claire, whose family never attended court with her (Court Observation; Interview). The 'core' family supporters were mainly either one or both parents of the defendant. Female family members did predominate this 'core' of support but in the cases of Harry, Joseph and Mark, both parents were involved at each stage of proceedings but only Joseph's father attended his court appearances. In Patrick, Samuel and Robert's cases the defendant's mother was the main supporter; their father having either died or been estranged from the family. Ollie lived with his grandmother and she attended court with him. Harry, Joseph, Patrick and Samuel had a wider group of supporters who came to attend court. In the cases of Harry and Patrick, this included their sisters.

In the cases of Harry, Samuel and Patrick, their mother's sister – the defendant's aunt – also attended court with them. Beyond this outer family circle, at the sentencing and trial appearances, Samuel, Robert and Joseph also had professional supporters who

attended court with the core family members. These ‘champions’ of the defendant included: former teachers, Independent Mental Health Advocates, autism-specific social workers and retired criminal justice professionals with specialist knowledge of autism. Close friends of the defendant also attended court in the cases of Ollie, Patrick and Harry. Space precludes discussion of the role of this outer circle of support and impact of proceedings on them. This section focuses instead on two factors which produced the significant collateral impact of the defendant’s governance on their *parents*: firstly, the role of the parent as advocate and primary care-giver and, secondly, the responsibilisation of parents for their adult child’s behaviour, and the consequential restrictions to their own liberty. The deleterious effects arising from these factors included stress and health problems; a threat or change to their employment, and a restriction upon their lifestyle, such as the need to move home or change their daily routines in order to accommodate the requirements of Community Orders.

i) The parent as carer-advocate

This first factor arose where the state had failed to provide adequate support to the person with autism. Wider literature about parents of ‘chronically mentally ill’ adults, has long characterised them as ‘*de facto* therapists’ (Thompson and Doll, 1982: 379), charged not only with the role of initiating psychiatric hospitalisations (Horwitz, 1978) but also ‘providing aftercare in their attempts to reintegrate the ill member back into the community’ (Cook, 1988: 42). When treatment programmes and attempts at reintegration into the community fail repeatedly, the family becomes the ‘only advocate willing and committed to help the increasingly chronic patient secure effective services’ (*ibid*; c.f Eckholm, 1986). Thirty years after these earlier findings on people with mental health problems, the first Autism Strategy found that ‘too many’ adults with

autism are still ‘reliant on the care and support of their parents both financially and for practical help’ (DOH, 2010a: 2). The revised Autism Statutory Guidance recognises that it is the parents and carers who are left to ‘pick up the pieces’ when ‘people with autism do not have the right preventative support’ and they ‘spiral into mental health crises’ which can result in ‘expensive and inappropriate inpatient admissions or even contact with the CJS’ (DOH, 2015a: 36). The role of being an advocate for an adult child with autism is an important theme in the qualitative literature (Graetz, 2010; Krauss *et al*, 2005; Ryan, 2010), which was reviewed in the meta-analysis carried out for the NICE Guideline for Autism (2012). However, NICE’s review of evidence found that there was scant qualitative research on the experience that parents had of public services for either themselves, or for their son or daughter, reflecting ‘the limited availability of services for adults [with autism]’ (*ibid*).

In the present research, the allied relationship of advocate and care-giver ‘left to pick up the pieces’, as the defendant moved through the criminal process, resulted from this lack of the ‘right preventative support’. Interviews, correspondence and court observations demonstrated the relentless demands of this carer-advocate role. Amanda, Mark’s mother, described being cast as a ‘*pushy parent*’ and the need for her to ‘*just step back*’ so that this ‘*box they were putting her in*’ did not impede her ability to be an effective advocate for Mark (Interview). To illustrate this point, she recounted her words to one of the detectives who ‘*literally had tears in his eyes*’ when he came to their home to arrest Mark for re-offending:

> ‘*I’ve been the parent/carer [but] I’ve been dismissed by probation [as a “pushy mother”]; probation have done absolutely nothing, they haven’t been trained in autism and have got no idea how to deal with him. We warned them…that would be the case*’ (Amanda, Interview)

The excerpt expresses the constancy of her advice to criminal justice professionals and the tendency to feel ignored when her own expertise about autism appeared to be

inadequate. The relentlessness of the parents' advocacy role is reflected in Samuel's description of his mother, Angela, '*work[ing] so hard getting together*' people to '*give a character reference*' but he was told that '*none of the people*' that she had found could give a reference (Letter Correspondence). Angela's letter described that she '*felt so helpless and at a loss to know what to do or who to contact*' after visiting Samuel in prison when the court had cancelled his court appearance whilst he was on remand:

> '*...[Sam] should not have been put through all that. It seems to me that the system lets [people] down enormously and causes unnecessary worry, anxiety, distress, solitude, isolation... to these very vulnerable people*' (Letter Correspondence).

In Robert and Joseph's cases, one of their parents was also a witness to the offences with which they were charged. In Chapter 7 above, we saw the difficulty this created for Robert's mother, Nicola, in deciding whether or not to be a witness for the prosecution as the victim of his assault. She repeatedly described the situation this had left her in as his main carer:

> '*I don't feel that I have the right support, I feel that I'm the vulnerable adult – I feel the CJS has failed me – I don't want him locked up. I just want programmes that are going to support him, like anger management... [or] a mentor that... that will listen that's not part of probation... [but] someone who could support and explain things...*' (Interview).

The difficulty of her dual position as care-giver and victim was evident in the dialogue in court following Robert's sentence:

> '***Defence Solicitor**: [My client's mother] has great regret that he is not able to live at home with her. Nevertheless, she steps in as his carer to assist with his finances, washing and meals but cannot have him live with her at her home. This has led to resentment on my client's behalf whether he appreciates it or not this is part of my client's condition.*
> ***Magistrate** [to Nicola]: I think you are very good but just be careful.*
> ***Nicola** [to Magistrate]: He won't go to the doctor. I am there to support him but I cannot take anymore.*
> **Magistrate** *[to Nicola]: ...Any more abuse, can you report it to the police please? Because you don't deserve it*' (Court Observation).

Being both carer-advocate *and* witness to the offence placed Nicola and Peter, Joseph's father, in very difficult positions both legally and in terms of their ability to support their adult child through the proceedings. In Joseph's case, Peter arrived at the scene to pick Joseph up and saw some of what had happened. When Joseph's first solicitor discovered this, he told Peter that he could not proceed to talk to him, as he may be '*a potential witness for the prosecution*', and Peter panicked as he described being '*stuck in this kind of legal nightmare*' where no solicitor who is supposed to be advising him '*will talk to [him]* 'and '*the person they're defending can't give instructions*' (Interview).

The deleterious effect of proceedings on the physical and mental health of the parents was a common theme. During the period after Robert's conviction, Nicola had a heart attack and a number of other acute health problems. The emotional challenges encountered by parents supporting their adult child through the criminal justice process is summed up by Mark's mother, Amanda:

> '*I think the whole thing is just really desperately sad...the repercussions of something like this… [mean our daughter is] now costing the NHS money because she's on anti-depressants; I'm on anti-depressants… I've had… loads of time off [work]. ...So, apart from the emotional fall-out these tragedies bring to families there [is] a cost: ...I feel desperate for my son… he didn't… want to be this sex offender which is [what] he's been now labelled for the rest of this life*' (Interview).

Joseph's father also described the emotional impact of waiting '*two-and-a-half years from the incident to [the] court trial*' as '*outrageous*' because it '*caused a huge amount of stress [for Joseph], which in turn caused stress*' for them (Interview). In Peter's view, Joseph '*would have been better on a supervision order two-and-a-half years ago rather than waiting*' until the trial of the facts to be given one (Interview). Like Amanda (Mark's mother), Joseph's father, Peter, also explained the impact of the case on his own livelihood. He was a foster carer and Joseph lived in their home so Joseph '*had to*

have an enhanced CRB' which could have affected their employability, and although Joseph did not have a '*criminal conviction… this [incident] is always going to be on a police database and it appears shocking*' (Interview).

In addition to the collateral impact of proceedings on the parents' health and employment, supporting their adult child through this process led to changes to housing and accommodation. Mark's family felt let down by the lack of specialist provision given by the probation service and social services in their domiciliary local authority (Amanda, Interview). Consequently, they instructed their solicitor to work with the court, police, probation and health service to move all of his support from the local authority where their family home was located to the local authority where Mark was at university. In order to achieve this shift in provision, she was emphatic with his social worker that the university is '*his permanent address now… he doesn't live with us anymore… I don't want him back… you will have to put him in a hostel, a police station or put him on the street*' (*ibid*). The family even considered moving house to be within Mark's university's local authority, so concerned were they about the mental health provision at their local psychiatric hospital and probation service. Although living in a different domiciliary local authority to Mark's parents, this was exactly the step taken by Joseph's parents, who '*moved house*' elsewhere in the country after Joseph was arrested, partly, because it was '*difficult*' for Joseph to live in their home town as '*his bail condition*' stated that he '*mustn't go near the [alleged victims] or their road*' (Peter, Interview). This made Joseph '*scared of going out anywhere*' as he was thinking: '*what if I see them in the shop?'* (*ibid*) Joseph's father explained that this meant they '*never allowed [him] to be alone*' and one of his parents or carers was always with him, so they were '*in a lockdown situation*' which meant they could not '*go out because you might accidentally meet*' the alleged victims, so it became '*really*

difficult living in that situation' (*ibid*). Like Mark's experience, this move to a different local authority also had a positive impact on Joseph's care and the new local authority was the '*best thing that happened*' to them because '*social services and others*' were '*phenomenal…in terms of support*' (*ibid*). The package of social care support increased to '*53 hours support a week*', an average of '*about 9 hours a day*'; which Peter described as '*huge*' compared to their original local authority where they had '*nothing like it*' (*ibid*).

As we saw above, the availability of this intensive social care provision informed the decision made by the judge about the disposal of Joseph's case. Not all the defendants' parents were present or able to provide this carer-advocate role, but the community order by the courts affected domiciliary arrangements in Claire's case too. Her parents did not attend court or play an active role through the court process but, until her sentencing, she lived with them. Claire's Offender Manager, DC Kim, said this was a dilemma for Claire because although '*she wants to leave them… she tells them what they want to hear: "I don't want to leave"*' but because '*her parents have never really known what's wrong with her*' and were '*very proud, well-off people... that has been difficult*' (Interview). The stipulation in Claire's Community Order to move into supported living accommodation in a different local authority would have marked a significant change in Claire's parents' domiciliary arrangements; affecting the regularity with which they would see her.

In recognition of the important role that family plays for people with autism, the NICE Guideline recommends that if 'the person with autism wants their family, partner or carer(s) to be involved' professionals should 'encourage this involvement and negotiate between the person with autism and their family, partner or carer(s) about confidentiality and sharing of information on an ongoing basis' (2013: 85). As

discussed in Chapter 5 above, this is for professionals who have direct contact with, and make decisions concerning the care of, adults with autism and would have best practice application for those working in the CJS. Importantly, the guideline also recommends that professionals should 'make sure that no services are withdrawn because of involvement of the family, partner or carer(s), unless this has been clearly agreed with… the person with autism and their family, partner or carer(s)' (*ibid*). Clearly, these steps were not taken in cases like Claire's, where the criminal law sentencing options were re-purposed to obtain social care support and Mark's Hospital Order was withdrawn (see above). It is troubling that when parents did play an active role as carer-advocate for defendants with autism, they became subject to greater incursions on their own liberty. Further, where parents were unable to offer sustained support, this led to more restrictive deprivations of liberty for the person with autism.

ii) Responsibilisation and governing through the family

Early theories which linked unemotional parenting styles with the causes of autism (see Bettelheim, 1967), have been emphatically disproved (see Abrahams and Geschwind, 2008). However, in the realm of public discourse about crime and its control, 'individualistic explanations for crime have held sway, firmly placing responsibility for crime with offenders and their families, while downplaying structural factors (such as material conditions or unemployment) and the complex processes that might lead to crime' (Condry, 2007: 4; Hill and McMahon, 2001). In the 1980s, the New Right blamed the breakdown of the family for the rising crime rates (Abbott and Wallace, 1992). By the 1990s, this discourse was utilised in debates about disorder where families and mothers, in particular, were blamed for the actions of their young sons (Hunter and Nixon, 2001). The Anti-Social Behaviour Act 2003 entrenched the

penalisation of parents for their children's behaviour (see Arthur, 2005). New Labour's criminal justice agenda centred on 'the responsibilisation of young people and their families' with a 'focus on "problem families" and a "parenting deficit" as a cause of youth offending' (Condry and Miles, 2012: 243). In the end, this criminalised 'inadequate parenting' (Muncie, 1999) and produced 'an analysis which failed to take account of structural inequalities'. No parenting orders were given to the parents of defendants in this cohort and all were over the age of 18 at the time of sentence. Nevertheless, analogies can be drawn between these measures and the restrictions imposed through Community Sentences placed on the defendant, which led to the responsibilisation of parents for their adult child's behaviour through net-widening.

Samuel's case is particularly illustrative here. The effect of the '*draconian*' prohibition in the terms of Samuel's SOPO effectively barred him '*from any public transport unless accompanied by an appropriate adult*' and that '*must have been his long-suffering mother*' (defence barrister, Interview). Samuel's mother, Angela, confirmed this as she recalled how Samuel '*would not tell other people about his offending*' due to his '*embarrassment about what he had done*', and this meant that he was '*not able to travel anywhere without [her]*' (Interview), thus also restricting her own liberty. The collateral effect of the terms of the SOPO responsibilised Angela for Samuel's behaviour on public transport. This 'governance through the family' was entrenched by the reliance of the state on Samuel's mother to have him reside with her during bail (see above). When she refused because she '*could not cope with this situation any longer*', bail was refused and no other alternative was sought.

In the lead up to Joseph's trial, Peter and his wife were '*finding it hard*' to support Joseph as he became '*more and more stressed*' about the court appearance [Peter, Interview]. On a trip to see the GP, for example, Joseph '*shout[ed] out in the*

street: "kill all Muslims!"' (Peter, Interview). After the protracted '*two-and-a-half years*' of waiting for his case to be listed, so frightened were his parents that an '*incident in the community*' like this might increase the likelihood of him being imprisoned, they '*had him sectioned... for the two weeks immediately prior to the court [appearance]; effectively just to keep him* safe' (*ibid*).

These cases show how parents are embroiled in the modes of governance where the state has failed to put in place the appropriate support for the defendant, whether provided by social care or criminal justice professionals. These approaches also, inadvertently, led to more restrictive deprivation of liberty for the defendant with autism within the community. Their rights as citizens with disabilities were not a focal point in decision-making. Instead, a more paternalistic set of strategies were employed to manage behaviour due to a distrust of the CJS achieving the 'right' outcome. Many defendants with autism may not be in contact with parents; they may be deceased or unable take on the role of carer-advocate. However, the case studies show the important role that parents of adults with autism can play in filling the gaps in local authority social care support, and the limited autism-specific knowledge amongst criminal justice practitioners. However, when they are present, parents appear to plug a significant gap when social care services have failed, and provide an intense resource of support throughout the court process. The parents' carer-advocate role increased the deleterious effects of the 'physical and emotional labours of parenting' (Holt, 2009). Furthermore, assisting their child in the CJS as their carer-advocate resulted in increased stress and disruption to employment. Somewhat ironically, the more central the role that parents play in supporting their adult child with autism, the more likely it is that punitive techniques of governance are deployed to 'responsibilise' parents in the management of their child's behaviour. The experiences of families are 'more than just the by-product

of criminal justice processes… the inequities they experience should be addressed in their own right, if a society is to claim to be just' (Condry *et al*, forthcoming: 1).

Not only do these techniques fail to take account of structural inequalities, like those which directly criminalise 'inadequate parenting' (Muncie, 1999; Condry and Miles, 2012), they infantilise the defendant and fail to recognise their rights to live independently and be included in the community under the Care Act 2014 (see below) and Article 19 of the UNCRPD. They also ignore the duty and power of local authorities to meet a carer's needs for support under the Care Act 2014 (see below).

Conclusion

Chapters 6, 7 and 8 have sought to shift the understanding of the governance of adults with autism from macro-level strategies and rationalities to the micro-level mentalities of governance in the technologies applied to defendants with autism at the different stages of decision-making, as their case moved through the court to their disposal at sentence. We have seen how the combination of professional culture and policy pressures for defendants to make early pleas shifted consideration of the appropriateness of prosecution and determination of culpability from plea to decisions relating to mitigation and the type of sentence given to the defendants in this cohort. Here, the extent to which the defendant's autism was relevant to culpability in deliberations about sentence depended on the quality and availability of expert witness evidence and other information available to the court. 'Dividing practices' emerged in the type of sentence given to the defendant and the nexus between health, social care and criminal justice systems (insert reference). There was also evidence of shifting epistemologies, with the civil and administrative processes being 're-purposed' (see Spivakovsky, 2014) so as to 'accommodate the goals of criminal law' and, criminal justice decision-makers re-purposing the criminal law to try to 'seek help' for the

person with autism and attain social care services. Although the intentions of criminal justice professionals may well demonstrate a 'best interests' approach towards the defendant, there was not a rights-focused approach which placed the person's disability at the forefront of decision-making. In turn, this overlooked equality law protection and more invasive governance of defendants with autism and their families through increased net-widening.

Chapter 9 – Conclusion: towards 'the creation of other possible ways of living'

Introduction

The present thesis has investigated *how adult defendants with autism are governed through English criminal justice policy and criminal court practice.* The research design sought to answer this question through connecting analysis of the more abstract technologies and broader political rationalities of governance, in Phases 1 and 3 of the research, with everyday practices and techniques of governance in the collection of case studies in Phase 2. Analysis of the broader rationalities of government in Chapter 4 revealed the dominance of vulnerability: a conceptualisation, it is argued, which masks the status of people with autism, and those with mental health problems and learning disabilities, as disabled citizens with rights. Chapter 5 explored the specific programmes of government developed through the Autism Act 2009 and related policy and the extent to which its programmes apply to people with autism who enter the CJS. It found that the imperative to get the Autism Act 2009 passed in Parliament before the uncertainty of the looming 2010 election, along with a reticent MOJ, meant that its statutory ambit did not cover public bodies within the CJS in a way which reflected the purview of the Equality Act 2010.

The cohort of case studies discussed in Chapters 6-8 incorporated 'the real' into this thesis' analysis. Chapter 6 illuminated the importance of the pre-trial process. Chapters 7 and 8 moved from an analysis of consideration of autism in dispositive pre-trial decisions through to mitigation and sentencing, demonstrating a failure of agencies to adapt techniques of governance to consider the defendant's autism and conceptualise them in terms of the protected characteristic of disability and the social model. Instead,

the discussion of the defendant in court showed the dominance of a functionalist (c.f. Parsons, 1951) conceptualisation of their autism. Such an approach, focusing on bodily normality and abnormality, 'foregrounds the ways in which disorder and deficiency cause a functional limitation or incapacity on the part of the individual' (Dowse *et al*, 2009: 35). The case studies also revealed a reluctance of criminal justice decision-makers to use strategies of diversion early in the criminal justice process, shifting consideration and differential disposal to the mitigation and sentencing stages of the court process (Chapters 7 and 8). At the end of the last chapter, we saw the collateral impact of difficulties for the defendant with autism of negotiating the CJS and this type of governance on the defendant's family. This is in direct contrast to the contemporaneous statutory developments in the Care Act 2014. Section 1(i) of the present chapter, therefore, looks at the relationship between adult social care and criminal justice and its relevance to the changing epistemologies for criminology and the urgent need for a more robust disability perspective within our discipline.

This thesis found that a significant barrier to defendants with autism being considered as 'disabled' under the Equality Act 2010 is the dominant rationality of vulnerability. Section 1(ii) argues that the critique of this rationality assists in 'the creation of other possible ways of living' (c.f. Foucault, 1984; O'Malley *et al*, 1997: 506-507). Section 2 looks at the normative case for reimagining defendants with autism through the social model of disability. Finally, Section 3 identifies research limitations and opportunities for future research.

1. Empirical findings: dividing practices applied to defendants with autism

i) The relationship between social care and criminal justice

Chapter 7 discussed how the 'guilty plea culture' led to criminal justice decision-makers justifying their decision to pursue the prosecution of the case to 'get help' for the individual. Yet in parallel to this strategy of government, in the cases of Joseph, Mark, Samuel, Ollie, Robert and Claire, family members and supporting professionals reported repeated failed attempts to get appropriate adult social care support for these defendants prior to the offending or throughout the criminal justice process. Chapter 8 provided evidence of shifting epistemologies in dispositive decision-making at sentencing, with the civil and administrative processes being 're-purposed' so as to 'accommodate the goals of criminal law' (Spivakovsky, 2014), and criminal justice decision-makers re-purposing the criminal law to try to 'seek help' for the person with autism and secure social care services. These are examples of the CJS stepping in to fill gaps left by the welfare state and local authority care provision. This is in direct contrast to recent statutory developments in adult social care law. The Coalition government expressly implemented the Care Act 2014 to make:

> 'the most substantial reform of the care and support system in England for over 65 years, enshrining individual rights and clarifying the roles and responsibilities of local authorities and other partners' (Norman Lamb MP, HC Deb 23 October 2014, Vol: 586, c80WH).

This Act synthesised the disparate pieces of legislation and statutory guidance which had proliferated in relation to the regulation of adult social care law.

Although many of its duties did not come into force until 1st April 2016, after many of the cases in this cohort went through the courts, the previous statutory

provision did place a duty on local authorities such that 'once a person has been identified [by them] as having an eligible need, councils should take steps to ensure that those needs are met, regardless of the person's ability to contribute to the cost of these services' (Section 29 of the National Assistance Act 1948 and LAC(93)10; Section 2 of the Chronically Sick and Disabled Persons Act 1970). Further, *Prioritising need in the context of Putting People First* was the statutory guidance on eligibility criteria for adult social care, when the cohort of case studies in this research were heard in courts, and reinforced this statutory duty at that time (DOH, 2010f: 25).

Section 13 of the Care Act now sets out the regulatory framework to assess the eligibility of care and support needs arising from or relating to a physical or mental impairment or illness. The Care and Support (Eligibility Criteria) Regulations 2015 ('The Regulations') and the accompanying DOH Statutory Guidance provide the detail of the eligibility criteria. The Regulations clearly state that adults who need care and support meet the eligibility criteria under the Care Act 2014 if:

> '(a) the adult's needs arise from or are related to a physical or mental impairment or illness;
> (b) as a result of the adult's needs the adult is unable to achieve two or more of the outcomes specified in paragraph (2)' (Section 2(1))

For the purposes of this section, such mental impairment comprises adults with autism (DOH, 2015a). Importantly, the outcomes specified in Section 2(2) include developing and maintaining family or other personal relationships, accessing and engaging in work, training, education or volunteering and making use of necessary facilities or services in the local community including public transport, and recreational facilities or services (*ibid*).

These outcomes are not hierarchical and local authorities cannot give priority to any one outcome; nor are they allowed to confine themselves to only providing care and support to people who are unable to achieve one specified outcome, such as managing

personal hygiene (Section 2(2)(a)). The *Revised Autism Statutory Guidance* explicates the relevance of the Care Act 2014 with regards to adults with care and support needs arising from their autism (DOH, 2015b: 36). Section 2 of the Act places a duty on local authorities to 'provide or arrange preventative services for people within their communities' (*ibid*). Local authorities, in discharging their duties on prevention, should 'ensure they are considering the needs of their local adult population who have autism, including those who do not meet the eligibility threshold for care and support' *(ibid).* Under the Care Act 2014, 'prevention' or 'preventative' support covers 'wide-scale whole-population' public health measures to more 'targeted, individual interventions aimed at improving skills or functioning for one person' or 'the impact of caring on a carer's health and wellbeing' (*ibid*). This objective of lessening the impact of caring on a carer's health and wellbeing is important in light of the collateral impact on parents of the defendants with autism recorded in Chapter 7. Further, in considering how to give effect to their responsibilities, the *Revised Statutory Guidance* states that 'local authorities should consider the range of options available, and how those different approaches could support the needs of people with autism' (*ibid*). However, for defendants in the present cohort such cognisance and preventative intervention, by their local authority, was largely absent despite these statutory requirements.

Furthermore, even under the statutory regime which pre-dated the Care Act 2014, local authorities were already 'required to assess people who are about to be discharged from hospital and may need community care services under the delayed discharges legislation' (*ibid*: 20). The DOH Guidance also set out the pragmatic approach of the Courts to the meaning of a person who 'may need community care services'. The case of *R (on the application of B) v Camden LBC and Camden and Islington Mental Health and Social Care Trust* ([2005] 1366 (Admin)) concerned a

'detained patient whose conditional discharge had been deferred until suitable hostel accommodation could be found'. It was held that 'the words "a person… may be in need of such services" refer to a person who may be in need at the time, or who may be about to be in need' (DOH, 2010: 20). The guidance elucidates that 'a prisoner who will not be given parole until suitable care arrangements are in place' would also be in a similar position.

Despite this ruling, as the *Care and Support Statutory Guidance* highlights, 'in the past, the responsibilities for meeting the needs of prisoners have been unclear, and this has led to confusion between local authorities, prisons and other organisations' (DOH, 2016a: para 17: 1). So, Section 76 of the 2014 Care Act deals specifically with prisoners and 'the responsibilities for provision of care and support for adult prisoners and people residing in approved premises[12]' (LGA, 2014: 9). Chapter 17 of the aforementioned guidance, issued under the Act, is dedicated to the application of the Act to prisons, approved premises and bail accommodation and emphasises that '[a]ccess to good integrated health and care support will be particularly important for' prisoners and that they should have access to the 'same level of care and support as the rest of the population' (DOH, 2016a, para: 17.2). Thus, under Section 76 of the Act, where 'it appears that adults in prison or approved premises have needs for care and support, they should have their needs assessed by local authorities and where they meet eligibility criteria, have services provided by the local authority in question' (LGA, *ibid*). The Section makes it clear that most 'duties on councils under the act – including [providing] information and advice and preventive services…' apply to prisoners (Donovan, 2015) and the 'threshold for the provision of care and support does not change in custodial settings' (DOH, 2016a: para 17.23). From April 2015, 'all local

[12] Approved premises are 'Premises approved as accommodation under Section 13 of the Offender Management Act 2007 for the supervision and rehabilitation of offenders, and for people on bail' (*ibid*).

authorities with a prison in their area received an additional non-ring fenced funding allocation to support these new responsibilities' (Anderson/ADASS, 2015). Importantly, for the purpose of cases like that of Samuel discussed above, the *Care and Support Statutory Guidance* states that under Section 76, people bailed to a particular address in criminal proceedings are, like those in prison or approved premises, 'treated for the purposes of the Care Act as ordinarily resident in the local authority where they are required to reside and the provisions in the Care Act apply accordingly' (DOH, 2016: para 17: 3). Had this been properly applied to his case, Samuel may not have spent nine months in custody.

When someone arrives in prison or approved premises, the prison or approved premises 'should inform local authorities if they believe that person has care and support needs' and where 'a local authority is made aware that an adult in a custodial setting may have care and support needs, they must carry out an assessment as they would for someone in the community' (*ibid*: 325). In cases like Samuel's, the transparency of the *Care and Support Statutory Guidance* in this area could transform the care they receive as it stipulates that 'people in a custodial setting have a right to self-refer for an assessment' and local authorities 'should work with the managers of the custodial setting to consider how to facilitate and respond to self-referrals' (*ibid*).

However, despite these positive changes, according to the Association of Directors of Adult Social Services (ADASS), implementation of Care Act provisions for councils to assess and respond to the social care needs of prisoners had a 'slow start' (Anderson/ADASS, 2015). Of 59 local authorities, only 33 responded to the ADASS survey; providing data for 79 of the 115 prisons in England. These authorities received 542 referrals from prisons during the first three months of the Act's implementation and in 60 prisons, only 10 referrals were generated; with even fewer, five or less, in 41 of

the prisons. The ADASS survey revealed that only 2 referrals were made for prisoners with an autistic spectrum condition. Representing 0.4% of the total number of referrals, there was 'under identification of such individuals' and this evidenced, therefore, that identification of prisoners with 'autistic spectrum condition is lower than one would reasonably expect within this population' and that they are 'often not recognised as having specific needs within the prison system' (*ibid*: 3; 10).

Conceptualising the person's status as a citizen with a disability, with the attendant equality law protection and rights to social care and support will be an important step towards closing this lacuna in implementation. Understanding the shifting epistemologies between health, social care and criminal justice will become even more important. Crucially, that the 'principle of equivalence of care forms the basis of the policy intent for the Act and this guidance' guarantees that 'those in need of care and support achieve the outcomes that matter to them, and that will support them to live as independently as possible at the end of their detention' (DOH, 2016: 322). What is striking is that the *Care and Support Statutory Guidance* goes further than this, adding that not only will this principle be necessary in ensuring that individual needs are met but that 'this will contribute to the effectiveness of rehabilitation and improve community safety' (*ibid*).

Although many positives may flow from such an approach, it will become all the more pertinent for criminologists to be alert to the re-purposing of social care to achieve criminal justice goals. What is writ large in the case studies analysed in Chapters 6-8 is that the individual experiences of impairment and social disadvantage are powerfully amplified when they come into contact with exclusionary techniques of governance at the intersection between social care, health and criminal justice. The issue of interconnecting pathways – criminal justice, clinical and adult social care –

along with the diversionary agenda for adult offenders with mental health problems and learning disabilities, present clears challenges to the epistemological framework within which criminology has developed, making the need for the disability perspective explored throughout this thesis especially pertinent. Chapter 4 drew attention to problems with broader rationales and strategies of governance of citizens with disabilities; this may further challenge criminology's existing epistemological boundaries. It is to this issue that we now turn.

ii) Strategies of governance in national policy: vulnerability not disability

Chapter 4 analysed findings from the policy texts relating to Liaison and Diversion, along with the data gathered in the research interviews. This material evinced the attraction of using the concept of vulnerability. In developing criminal justice and clinical governance strategies for policymaking around offenders with mental health problems and learning disabilities, it is possible to benefit from the expansive and flexible nature of the concept. There is an important divergence between the conceptualisation of the groups as vulnerable versus being disabled. The etymological origin of vulnerability derives from *vulner*/*vulnous*; denoting the person being 'a risk' and 'at risk' (Stanford, 2012). The former connotation derives from the Latin root 'wrong', implying that people deemed to be 'vulnerable' have an impaired ability to defend themselves within the judicial process or pursue their own best interests (Bartkowiak-Théron and Corbo-Crehan, 2012: 39).

The related connotation derives from the Latin route *vulnous*, meaning 'injury', associated with disadvantage and the vulnerable being susceptible to discrimination, misunderstanding and miscommunication (*ibid*). Therefore, Stanford argues people

conceptualised as ‘vulnerable’ have ‘constructed moral identities’ which reflect both their innocence (vulnerable/at risk) and culpability (as being dangerous/a risk). Bartkowiak-Théron and Corbo-Crehan argue that such use of ‘vulnerability’ is a labelling exercise, taking into account the complex nature of individuality, fractured across several categories. The intent behind such labelling is to ‘provide vulnerable people with a series of services intended to address the inequalities they would otherwise encounter in their dealings with the CJS’ (2012: 44). The intent behind such labelling may be laudable but the objectives should be carried out through an equalities and not vulnerabilities framework in order to escape the problems associated with these constructed moral identities. Instead, an equalities framework would illuminate the individual’s intrinsic rights associated with a protected characteristic.

In some ways, the category of vulnerability has natural appeal; reducing the complex problems of the populations designated as vulnerable, by the rationalities now evident in criminal justice policy, into simple caricatures of the individual connoting weakness and vulnerability to abuse. Such caricatures elicit public sympathy more easily perhaps than a purposive rights-based framework. However, the attraction of pragmatism in this context is outweighed by the operation of the vulnerability status in seriously undermining the individual’s autonomy to formulate preferences, plans and values and his or her ability to act in pursuit of those preferences, plans and values (*ibid*). This rationality of governance is, therefore, against the principles of non-interference and self-determination; leaving the moral obligation to respect another’s autonomy benighted by bringing the individual within the sphere of control and surveillance of the state. This is because conferring the status of vulnerability through legal instruments fails to connect this categorisation with an individual’s actual capacities. Thus, the individual is considered as belonging to a group of people pre-

determined as ‘lacking capacity’ (Williams, 2002: 303). Furthermore, it was evident from the research discussed above that the fluid category of ‘vulnerability’ is used as a strategy of government designed to ration services and opaque in its ability to achieve substantive equality; establishing a ‘problematic discourse’ and a cycle of inequality (*ibid*). Finally, as Stanford argues, the fluidity from vulnerability’s connotations of being ‘at risk’ to being seen as ‘a risk’ have negative implications: service users are invited to see themselves and others ‘in terms of a deficit model of self which they alone are charged with the responsibility of resolving’ (2012: 25).

Defendants with a disability, including autism, are not only human rights holders, but hold specific rights as recognised in the UNCRPD (Arts 12, 13, 14 and 15). They also have anti-discrimination protection under the Equality Act 2010 by virtue of having the protected characteristic of disability. However, as Dowse *et al* argue in relation to the Australian jurisdiction, these ‘umbrella protections’ ‘appear to have had limited impact’ on defendants with mental health disorders and cognitive disabilities (2009: 30). This idea was evinced in this thesis’ analysis of the broader rationalities of government which are applied to defendants with autism in Chapters 4 and 5 and in the techniques of government applied to them in the courts (Chapters 6-8). Dowse *et al* argue that addressing ‘current obstructions to the achievement of human rights protections’ for such groups involves addressing ‘the ways social structures and people in relevant agencies have positioned [these groups] in theory and in practice’ (*ibid*: 30). The positioning of defendants with autism, in the locale of policy on offenders with mental health problems, as ‘vulnerable’ amounts to such an obstruction in theory and practice. Thus there is both descriptive and normative value in repositioning these groups as disabled under the social model.

2. Normative Implications

The normative case for moving away from the rationality of 'vulnerability' and reimagining people with autism, and indeed those with mental health problems and learning disabilities, as people with disabilities from a social model perspective enables 'an iterative process of identifying, understanding and removing obstacles to resources combined with a deeper analysis of the dynamics of both impairment and disability' (Baldry *et al*, 2008: 32-33). Delimiting diagnostic categories and identifying those who fall within them 'is a complex process characterised by ambiguous relationships to the theoretical paradigms that shape our thinking about such people' (Dowse *et al*, 2009: 31). As we saw in Chapter 8 and section 1.i) above, the interconnecting pathways between health, social care and criminal justice require the consistent categorisation of defendants with autism as persons with a disability from a social model perspective. This will assist in promoting their status as rights holders with the protected characteristic of disability, which flows from the Equality Act 2010, as they move between the competing and fluid dividing practices of the health, social care and criminal justice systems. Focusing attention on the inequitable composition of the prison population and the role of imprisonment, Scott has argued that legitimacy's normative 'face' requires us, as a society, to be clearer about the core of offenders for whom prison is appropriate by taking a 'moral approach' that recognises that the sanction of imprisonment is entirely misapplied for certain categories of harm, and wrongdoers such as the 'mentally ill' (2007: 49; 68). Diverting categories of offenders, such as people with autism, into health or social care placements may better recognise and meet their needs but boundaries need to be drawn to prevent oppressive control by alternative modes of regulation, as seen in some of the case studies above. Where a coercive measure or detention regime 'is for prevention or regulation or administrative

convenience' states have been quick to claim 'it is not, by definition, punishment' but 'this privileging of purpose does not mitigate the pains imposed by coercive measures' (Zedner, 2016: 4). Therefore, to merely 're-label measures as non-punitive' is often nothing less than 'a cynical subversion of the criminal process and its human rights protections' (*ibid*).

Thus there is a normative imperative to develop the intellectual agenda outlined here; 'one about the nature of state authority and its power to punish' (*ibid*). Re-conceptualising people with autism, as well as those with mental health problems and learning disabilities by bringing together critical criminology and critical disability studies, brings disability to the centre of analysis in what Dowse *et al* call 'disabling critical criminology' (2009). In doing so, it provides a new perspective to 'make visible material structures, ideological discourses and experiences of impairment that fundamentally and differentially structure an individual's pathway into, around and often back into the CJS' (*ibid*: 39). This analysis situates the offending behaviours of persons with mental health or cognitive disabilities in 'individual and social systemic contexts, opening up new ways to identify conceptualisations, structure and interventions that enable the development of new individual, systemic and political engagement' (*ibid*). In doing so, it highlights appropriate social support for the particular individual and 'enables thinking around ways that can make it possible for individuals to more frequently take non-offending pathways' (*ibid*). This incorporates an interdisciplinary, 'life course perspective' into criminological research with the potential to highlight the ways in which, for example, impairment, gender and socio-economic status interact with each other (*ibid*). This better reflects the protected characteristic model, used across disability, age, gender reassignment, marriage and

civil partnership, pregnancy and maternity, race, religion or belief and sex in the Equality Act 2010, rather than the nebulous concept of vulnerability.

3. Limitations and Future Research

The relative scarcity of literature on decision-making about defendants with autism in the CJS meant that this research on the governance of defendants with autism was designed to be largely exploratory. The qualitative methodology, in employing 'cross-method' triangulation, aimed to surmount the limitations of each phase of the present research. As a result of its determination to relate the everyday practices and techniques of governance observed in the case studies of individuals in the courts to the broader political rationalities of governance examined in textual analysis and elite interviews, temporal and substantive limitations had to be imposed. It was not possible to take an historical examination of the governance of this group over the course of the last century, for example, which is why it aims only to be a 'history of the present' covering a period from January 2009 to March 2016. The substantive broader political rationalities embedded in the wider criminal justice policy and criminal law context could not be covered. Instead, the Liaison and Diversion agenda, as the locale for policymaking around offenders with mental health problems and learning disabilities, and within which adults with autism were subsumed, was chosen because this criminal justice policy was the main point of coalescence with the Autism Statutory Guidance (DOH, 2010c; 2015). Furthermore, this thesis was not able to examine rationalities of risk as they were applied to this group. This was because 'vulnerability' emerged as a dominant theme in Phases 1 and 3 of the study and had previously been comparatively under-researched in its application to defendants with mental health problems and learning disabilities and its application to defendants with autism. Finally, this thesis could not effectively incorporate an analysis of the application and awareness of the

UNCRPD amongst criminal justice decision-makers. This was because the Equality Act 2010 incorporates the social model of disability in domestic legislation, and there was already meagre research on its role in influencing the conceptualisation of defendants with disabilities more generally and autism in particular. One of the main findings of the thesis has been the paucity of understanding amongst criminal justice decision-makers of domestic equalities legislation for defendants with autism. This amplifies the need for future research to analyse the awareness of such decision-makers of the UNCRPD and the extent of its harmonisation.

The practical limitations of pursuing a cross-method research strategy for a doctoral thesis meant that each phase of the research had to be circumscribed. The thesis would have benefitted from more interviews with members of the judiciary and senior civil servants. However, the problems inherent in retrieving the sample of case studies, as described in Chapter 3, meant that this was not feasible. Then again, whilst the sample of case studies is small, the retrieval of each case was hard sought and revealed much about endemic problems in the identification of defendants with autism along the criminal justice pathway. Although repeated attempts were made to interview all the defendants with autism, their parent(s) and a legal representative for each of the case studies, it was not always possible or appropriate to do so. Nevertheless, that some of these studies comprised between one (Harry, Patrick, Ollie and Claire) and three (Samuel, Joseph, Robert and Mark) years of observation provided a longitudinal perspective with a rich array of source materials. Furthermore, the design of data collection and thematic analysis of these studies was informed by the coding of 72 Court of Appeal cases. The value of capturing data on what was happening to defendants in the lower courts, and the amount of source material that this produced, meant that space in this thesis precluded an analysis of these reported cases in the

higher courts. It is intended that the legal cases will be analysed in a post-doctoral project.

Although courts are open to the public, access is a matter of degree, thus limiting the observation method. Access to the informal discussions and exchanges that occur between various parties during adjournments may also be restricted and we, as researchers, cannot be omnipresent. We have to make choices about '"whose side we are on" at all stages of the ethnographic process' (Becker, 1967; Corcoran, 2005) and recognise the impact that such choices may have on our findings as well as our research participants. Nevertheless, as the site in which the power of the state is levied against its citizens, rendering justice more visible and accountable in our democracy, court observation has much to offer our discipline. The perceptible decrease in ethnographic research in this area is to the detriment of criminology.

On balance, the limitations outlined in this section are outweighed by the value of using a mixed-method approach, which has sought to incorporate 'the real' into criminological research by conducting specific case studies 'using contextually suitable methodologies to dissect effectively moral language and practices from above and below' (Lippert and Stenson, 2010: 488).

Conclusion

This chapter has connected broader political rationalities of governance with localised techniques of governance to reflect on the interaction between national policy on offenders with mental health problems, learning disabilities and autism, and court decision-making. Building on the intellectual resources garnered from the development of a disability perspective in Chapter 2 and its discussion of the entrenchment of the social model of disability in the Equality Act 2010, it posits that it is necessary to move away from the reductive mad-bad binary to the recognition of this group as citizens

with disabilities. The thesis draws on critical disability studies and criminological literature on 'doing justice to difference' to develop a disability perspective in criminology in order to analyse the governance of offenders with autism. It argues that there is descriptive and normative value in proactively categorising these groups as 'disabled' under the 'social model' of 'disability'; enabling an enquiry into other conditions of possibility. Much more purposive work needs to be done to proactively embed the Equality Act 2010 and the protected characteristic of disability into criminal justice policies and broader rationalities of governance. This Act, along with the UNCRPD, are too often treated as adjuncts to legislation and guidance on defendants with mental health problems and learning disabilities: the locale of policy-making under which autism is included. To correct this would require systematic harmonisation across numerous legislative instruments. Criminology and criminal justice studies must support this law-making venture by positioning people with disabilities more centrally within theoretical approaches and empirical research.

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