



This checklist is designed as an aide-memoire in relation to autism and its implications for decision-making at all stages of the prosecution process impacting on victims, witnesses and defendants. It also contains links to more detailed sources of support.

## Introduction – what is autism?

Autism<sup>1</sup> is defined in DSM-5 (American Psychiatric Association 2013) by persistent deficits in social communication and social interaction together with restricted, repetitive patterns of behaviour, interests and activities. These may be associated with sensory difficulties, notably over or under-sensitivity to certain light, sound, smell, taste or touch.

Although these deficits persist from early development and are life-long, diagnosis may not take place until later in life and not uncommonly can result from some sort of crisis.

Autism occurs across the intellectual spectrum and the diversity amongst its manifestations is huge.

Under the terms of the Mental Health Act 1983 Autism is defined as a Mental Disorder – not a learning disability, mental illness or specific learning disability – hence all those affected are categorised as vulnerable persons for the purposes of PACE and YJCE. Approximately 50% of people with Autism also have a learning disability.

The terms ‘high’ and ‘low’ functioning, whilst not formally recognised, are long-established terms used by experts to indicate overall level of functioning – low functioning describes a level akin to learning disability and high functioning captures all other levels.

The severity of autistic traits may fluctuate considerably over a lifetime depending on mental health and factors relating to social stability. The extent to which Autism impacts negatively on a person’s functioning varies according to the social and cognitive demands of a particular situation or task<sup>2</sup>.

Notably, regardless of severity, all those affected require some degree of support. Without support in place, even those whom present as intelligent and articulate will, by definition, have impairments in their ability to developing a proper shared understanding with others albeit these may not be recognisable to a third party. Similarly, difficulties in switching attention between topics and tasks should be expected in all cases.

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<sup>1</sup> Autism is the accepted term used by the National Autistic Society to describe people on the Autism Spectrum and includes: ASD, ASC, Asperger Syndrome, PDD etc see <http://www.autism.org.uk/>

<sup>2</sup> For a thorough overview see: [Autism: a guide for criminal justice professionals](#). On the National Autistic Society’s website [www.autism.co.uk](http://www.autism.co.uk)

In addition to the defining characteristics, there is a wide range of non-defining characteristics linked to ASD some of which are of particular relevance to issues such as intentionality and, consequently, culpability. Notably, emotional understanding of a situation lags behind intellectual understanding and, moreover, is limited. This has implications in terms of both decision-making ability and the understanding of the implications of the actions of self and others. Autism is also associated with polarised memory and recall abilities: whereas working memory (keeping things in mind), relational memory (who, what, where, when) and free re-call are impaired; in contrast, non-impaired semantic memory (facts), cued item-specific recall (e.g. was the apple on the table?) are not. Also, there may be giftedness in memory of subjects of special interest.

Especially pertinent to hate crime, Autism is strongly linked to mental health problems, most commonly, anxiety, stress, depression and suicidal ideation. The less severe the autism, the greater is the link to mental health problems. Such conditions tend to be long-lasting and difficult to treat. Autism significantly increases risk of suicide.

Please note that Autism is often undiagnosed or misdiagnosed so it is important to remain alert to the possibility that the suspect, the complainant or any witness may have Autism. Typically late diagnosis follows some sort of crisis, not uncommonly involvement with the criminal justice system either as a suspect or as a victim.

## 1. CHARGING DECISION: General Points

- Is there anything about the nature of the offence and/or behaviour of the suspect/complainant/witness that requires further information and/or clarification?
- Are there any euphemisms used (e.g. learning difficulties) that require further detail?
- Consult the Casework Hub Hate Crime pages.
- Beware of Unconscious Bias – challenge presumptions/assumptions that may be made by self/public/police etc. Remain open and objective – would further information provide more understanding of the issue?
- Has there been a diagnosis of Autism? What is the detail? Has the individual any additional intellectual disability? Have any additional mental health conditions been identified? Is more information needed before a decision can be made?
- Is the case likely to be dealt with in the Magistrates' Court or Crown Court?
- For Magistrates Court – Anticipated Guilty plea case or Anticipated Not Guilty plea case?
- Does the person have capacity to understand the charge?

### Hate Crime & Flagging

- Has *any* person, regardless of whether or not this is the victim, perceived this as a hate crime? If yes – has it been flagged as a **hate incident** (where the conduct does not amount to a criminal offence) or a **hate crime**?

- Consider the evidence which makes this a hate crime-this will involve analysis of hostility, motivation and vulnerability.
- Consider s146 CJA 2003 and specify which limb applies and the evidence that supports that:
  - S146(2)(a) “that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on a disability (or presumed disability) of the victim”.
  - S146 (2) (b) “that the offence is motivated (wholly or partly) by hostility towards persons who have a disability or a particular disability.”
- Has the interview dealt with identification of hostility?
- Has the case been flagged as involving a vulnerable victim?
- Does the case fall within any other hate crime categories, for example domestic abuse; homophobic; transphobic; racial or religious? Has it been flagged?
- Does the perpetrator have Autism and, if so, should alternative disposal be considered?

### Complainant/Witness considerations

- Are there any evidential implications due to the complainant's/witness' Autism?
- Is supporting evidence needed to satisfy s146 CJA 2003 and/or special measures applications?
- Is there any information in relation to a request for special measures? Does it provide sufficient detail about communication needs/specific memory difficulties/questioning style etc.?
- Are adjustments (Public Sector Disability Equality Duty under the Equality Act 2010) bespoke to the individual's needs required to enable them to give best evidence required in addition to Special Measures (under the YJCE)?
- What are the support needs for the complainant/witness? What is his/her preference? Note, however, that those affected have difficulty describing or even recognising their own difficulties, especially prospectively.
- Is there a need for the complainant/witness to be video interviewed? Is a statement going to capture the evidence accurately and fully?
- Is there a need for advance cross-examination or cross-examination in private?
- Is there a need for an intermediary at this stage?
- Have special measures been considered? Is there sufficient detail?
- Timing of victim personal statement (VPS): is the complainant able to provide a VPS? Is there a relative/carer who may be able to provide additional detail? The risk is that the Autistic victim may not fully appreciate the impact of the incident on them or, in some cases, even recognise themselves as a victim.
- Do we need to call the complainant/witness to prove the case?
- Has the court process been explained to the complainant/witness? Have we checked for understanding?
- Are special arrangements necessary for the Autistic witness' arrival or care at court?

## Considerations for Suspect

- Has it been ascertained that suspect has Autism? If diagnosis (particularly negative) has been made by the Force Medical Examiner, is there reason to obtain an assessment by an autism expert?
- Has the suspect been provided with an appropriate adult at all police stages impacting on legal rights (giving rights, at charge, issuing bail conditions etc.) as well as at police interview as required under PACE? [due to the status of all persons with Autism as 'vulnerable']. If none – are there any s76/s78 PACE 1984 implications?
- Are there any evidential implications arising from the suspect's ASD diagnosis? How can these be addressed as part of the case theory?
- What is the detail of the Autistic diagnosis? How does Autism manifest in the suspect's particular case? Does the suspect have an additional learning disability or other recognised condition? Is more information needed before a decision can be made?
- Public interest considerations – is a prosecution appropriate?
- Should alternative disposal be considered e.g. if there's a 'Liaison and Diversion Scheme' pilot operating in the Area.
- Consider relevance of Bad Character application.

## 2. GUILTY PLEA-SENTENCING: General Points

- If the case is being prosecuted as a hate crime, the advocate should ensure that court is advised which limb of s146 CJA 2003 we rely upon and the evidence that supports that representation:
  - S146(2)(a) "that, at the time of committing the offence, or immediately before or after doing so, the offender **demonstrated** towards the victim of the offence **hostility** based on a disability (or presumed disability) of the victim".
  - S146 (2) (b) "that the offence is **motivated (wholly or partly) by hostility** towards persons who have a disability or a particular disability."
- The HRS must record that s146 CJA was raised with the court and record the sentence and uplift announced. If the court does not announce an uplift, this should be recorded on the HRS and an action created for this to be referred to the Area Hate Crime Co-Ordinator so that this can be raised with HMCTS.
- HRS should also record that the Victim Impact Statement was read to the court.
- Does an Autistic suspect raise the issue of capacity to make a guilty plea?

### 3. NOT GUILTY PLEA: General Points

- Does a not-guilty plea by an Autistic suspect raise issues of capacity to make such a plea?

The range of toolkits available on the Advocate's Gateway includes one on autism and can be found at <http://www.theadvocatesgateway.org/images/toolkits/3AUTISM211013.pdf>

It includes the following which may also be useful in cases involving autism:

- Young and vulnerable witness case management summary  
<http://www.theadvocatesgateway.org/images/toolkits/1bCaseManagementSummary211013.pdf>
- Ground Rules Hearings  
<http://www.theadvocatesgateway.org/images/toolkits/1cGroundrules211013.pdf>
- Identifying vulnerability in witnesses and defendants  
<http://www.theadvocatesgateway.org/images/10identifyingvulnerabilityinwitnessesanddefendants100714.pdf>
- As part of the CMH, consideration should be given to holding a Ground Rules Hearing so that the court can provide directions to assist the complainant/witness/defendant to give evidence.
- Consider Criminal Practice Directions, in particular the following parts:
  - Part 3D: Vulnerable people in the courts
  - Part 3E: Ground rules hearings to plan the questioning of a vulnerable witness or defendant
  - Part 3F: Intermediaries
  - Part 3G: Vulnerable defendants
  - Part 29A: Measures to assist a witness or defendant to give evidence (now including provision of an intermediary for *suspects* at the trial stage)
  - Part 29B: Witnesses giving evidence by live link
  - Part 29C: Visually recorded interviews: memory refreshing: watching at a different time from the jury
- Ensure that as part of the trial review that checks are made as to whether there have been any developments in relation to the position with the complainant/witness/defendant and whether additional support and/or actions are required.
- Consider pre-court meeting with the complainant/witness and pre-court familiarisation visit.