

# **Submission to the Home Office in response to revised PACE codes of practice C and H: the treatment of 17-year-olds in police custody and the translation and interpretation of essential documents for non-English-speaking detainees.**

**by HM Chief Inspector of Prisons and HM Chief Inspector of Constabulary**

## **Introduction**

1. We welcome the opportunity to submit information to the Home Office in response to the consultation on the treatment of 17-year-olds in police custody and the translation and interpretation of essential documents for non-English-speaking detainees.
2. Her Majesty's Inspectorate of Prisons (HMI Prisons) is an independent inspectorate whose duties are primarily set out in section 5A of the Prison Act 1952. HMI Prisons has a statutory duty to report on conditions for and treatment of those in prisons, young offender institutions (YOIs) and immigration detention facilities. HMI Prisons also inspects court custody, police custody and customs custody (jointly with HM Inspectorate of Constabulary), and secure training centres (with Ofsted).
3. Her Majesty's Inspectorate of Constabulary (HMI Constabulary) is also an independent inspectorate that is governed by the Police Act 1996, which states that 'inspectors of constabulary' will inspect every police force in England and Wales in relation to their 'efficiency and effectiveness'. HMI Constabulary's powers also include the ability to request (and be mandatorily given) information by chief police officers and the power to enter police premises (paragraphs 6A and 6B of Schedule 4A) as appear to HMI Constabulary to be required for the purposes of an inspection under section 54. Much of HMI Constabulary's work relates to the mainstream police forces in England and Wales. However, HMI Constabulary inspects other law enforcement agencies, including the Serious Organised Crime Agency, Civil Nuclear Constabulary, Armed Forces, National Crime Agency (once implemented), Ministry of Defence Police and HM Revenue and Customs.
4. Both HMI Prisons and HMI Constabulary are among the organisations that deliver the UK government's obligations arising from its status as a party to the UN Optional Protocol to the Convention Against Torture (OPCAT). OPCAT requires state parties to establish an independent National Preventative Mechanism (NPM) to inspect all places of detention. Article 19 (c) of the Protocol sets out the NPM's powers to submit proposals concerning existing or draft legislation.
5. In 2008, HMI Prisons and HMI Constabulary began a programme of joint inspections of police custody suites in England and Wales. The programme of police custody inspections is based on a mixture of chronology and risk assessment. Inspections take place, at a minimum, every six years. A risk-based approach is used to decide the chronology of inspections and

which forces will receive unannounced follow-up visits. Most inspections are completed within one week, but may take longer if more police custody suites are involved.

6. The six-year inspection cycle of joint police custody inspections will be completed in March 2014. The two inspectorates will have inspected all police custody suites in England and Wales, made recommendations for improvement in custodial practice and highlighted good practice.
7. When inspecting police custody suites, inspectors use detailed criteria, or *Expectations*<sup>1</sup>, to assess the treatment and conditions of those being held in police custody. These *Expectations* also offer a guide to senior police officers and to police and crime commissioners as to the standards that the two inspectorates expect to find in these settings and the sources of information and evidence upon which they will rely.
8. *Expectations* are informed by, and referenced against, the Police and Criminal Evidence Act (PACE) codes (1984), Home Office guidance on the safe detention and handling of persons in custody (2006) and international human rights norms. They are also based on the experience of the two inspectorates over many years and the contribution of a wide range of organisations including the Independent Custody Visitors Association, the Independent Police Complaints Commission, the Association of Chief Police Officers, the Police Superintendents Association, the Police Federation, the National Policing Improvement Agency, the Home Office, Inquest, the Care Quality Commission and representatives of forensic medical examiners.
9. Police expectations are grouped under four inspection areas:
  - Strategy
  - Treatment and conditions
  - Individual rights
  - Healthcare
10. Each expectation has a set of indicators against which evidence is sought to help judge whether that expectation has been achieved. References under each expectation link them to the relevant national or international legislation and guidance.
11. This joint HMI Prisons and HMI Constabulary response to the Home Office consultation on the treatment of 17-year-olds in police custody, and the translation and interpretation of essential documents for non-English-speaking detainees, draws from evidence generated by our joint inspections of police custody suites.

### **Treating 17 year olds as juveniles**

12. Under the Children Act 2004, a child is anyone under the age of 18 years. The United Nations Convention on the Rights of the Child, ratified by the UK, also defines a child as anyone under the age of 18. The Children Act 2004 further specifies that the fact that a child has reached 16 years of age, is living independently or is in further education, is a member of the armed forces, is in hospital or in custody in the secure estate for children and young people does not change his or her status or entitlement to services or protection. Obligations in relation to safeguarding and welfare also apply to 17-year-olds.

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<sup>1</sup> <http://www.justice.gov.uk/downloads/about/hmipris/police-custody-expectations.pdf>

13. In 2011 HMI Prisons and HMI Constabulary published a joint thematic inspection report, 'Who's looking out for the children?',<sup>2</sup> which focused on the appropriate adult provision for children in detention after charge. In this report we stated that children and young people coming to the attention of the youth justice system may have low educational attainment, communication difficulties, mental health problems, learning disabilities and learning difficulties and therefore require greater levels of care. As a result, we consider that all 17-year-olds in custody should be treated as juveniles and provided with the same safeguards.
14. We welcome many of the proposed amendments. However, we are concerned that the proposed changes:
- do not consider 17-year-olds in custody as juveniles; and
  - do not apply the safeguards in Codes C and H, currently applicable to juveniles (aged 16 or under) to 17-year-olds, except in relation to primary legislation (Section 38 of PACE) which relates to the requirement to seek local authority accommodation for juveniles. This cannot be extended to 17-year-olds unless it is amended by Parliament.
15. These concerns will be reflected throughout our commentary.

## **CI.5A**

### Appropriate Adult provision

16. HMI Constabulary and HMI Prisons consider that appropriate adults (AA) should be available at all times to support detained young people aged 17 and that they should be treated as young people in police custody.
17. The High Court judgement (HC v the Secretary of State for the Home Department and the Commissioner of Police of the Metropolis)<sup>3</sup> ruled that the UK government's practice of: treating 17-year-olds as adults; the failure to inform the parents of their child's arrest; and the failure to provide an independent, appropriate adult to 17-year-old children when detained and questioned at a police station about alleged criminal offences was "*inconsistent with the UNCRC and the views of the United Nations Committee of the Rights of the Child*".
18. Prior to this judgement we found little evidence that forces provided young people aged 17 years old with an AA. However, Avon and Somerset police displayed good practice in this regard and nearly always provided 17-year-olds who were in custody for the first time, or who appeared vulnerable, with an AA. It was observed that staff had a proficient awareness of safeguarding issues that could impact upon children and young people in police custody.
19. Following the judgement we have inspected several forces, who, in anticipation of a change to the PACE Code C are providing AA for all 17-year-olds in police custody.
20. We therefore welcome the change to the codes of practice that introduces this safeguard to 17-year-olds in police custody.

### Detention after charge

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<sup>2</sup> <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/whos-looking-after-children.pdf>

<sup>3</sup> <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/c-v-sshd-and-met-police-judgment.pdf>

21. Section 38 of PACE does not require custody sergeants to consider the grounds to keep a 17-year-old in custody, after charge, or seek local authority accommodation.
22. Our inspection evidence suggests that detainees who remain in custody for long periods, particularly overnight, are not offered basic reading material, showers, exercise. They are more likely to experience only basic interaction during cell visits, or if they ring their cell call bell. It is our view that 17-year-olds, as with other juveniles, should be given the opportunity to be located in a more suitable environment. The full extent of the provision for juveniles should be extended to 17-year-olds because the impact of prolonged detention in custody for a 17-year-old would be the same as for a juvenile. Although we are aware of the lack of PACE beds available for children and young people detained after charge, we believe that locating 17-year-olds in a more suitable environment would reduce any potential risks and increase the support and child-centred approach that a 17-year-old should be afforded outside of a custody suite.

### Consent

23. The proposed amendment in Code C1.5A states that appropriate consent is only required for a young person who has not attained the age of 17. Although the amendments to PACE would allow for an AA to provide advice and support to a 17-year-old, and for them to have legal representation when consent is required, for the reasons outlined in section 65 (1), the amendments introduce no additional safeguards. This means that the young person's consent would be deemed sufficient. With regard to Code C, Annex A – Intimate and Strip Searches and Code C, Annex K – X- Rays and Ultrasound scans and Code H, Annex K, 7(b), an AA would be present when a 17-year-old is told about the authority or grounds for the above procedures, but parental consent would not be required.
24. We are concerned that this situation relies on the assumption that all 17-year-olds are competent enough to make a decision about what course of action to take. Similarly to the application of the test of Gillick competency<sup>4</sup>, it is not enough for a young person to simply understand what they are consenting to – they should also have sufficient maturity to understand the process involved.
25. Parent or guardian consent is an important safeguard to ensuring that 17-year-olds understand the processes involved during detention. We therefore recommend that the proposals include the requirement that a parent or guardian give consent, in addition to that of the 17-year-old.

### **Code C 11.18 (c) and Code H 11.11 (C)**

26. This text lacks clarity and should be presented using clearer language, particularly as it relates to vulnerable detainees who require an urgent interview. Furthermore, we consider that “effective communication” can only be achieved if the interviewer speaks the same language or dialect, and cannot be achieved by any other means as implied in the amended provision.

### **Code C, Notes for Guidance 13B and Code H, Notes for Guidance 13B**

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<sup>4</sup> Term used in medical law to decide whether a child (16 years or younger) is able to consent to his or her own medical treatment, without the need for parental permission or knowledge.

27. Section 21 of the EU Directive concerning the right to interpretation and translation in criminal proceedings states that:

- *'there should be a mechanism in place to ascertain whether a person speaks and understand the language of the criminal proceeding.'*

28. Our inspection evidence suggests that custody staff have a range of approaches to determine whether a person in custody can understand English. It is positive to note that most staff recognise the complexity of the custodial process and, consequently, more often than not, will request an interpreter. Note B outlines what steps could be taken to determine whether a person in custody can speak and understand English, but it does not make clear what qualifications interpreters are required to have in order for them to "assess" the extent to which the person in custody can speak and understand.

29. Furthermore, we have found that some forces experience difficulty in securing interpreters (face-to-face or in person) for some common European languages and less common languages and dialects. Given this, we consider that it would not be favourable for a person in custody to be further detained in order for an assessment / confirmation of their ability to speak and understand English by an interpreter.

## **Section 65 (1)**

30. We are concerned that there is no Code H equivalent for both Code C, Annex A – Intimate and Strip searches and Code C, Annex K – X- Rays and Ultrasound scans. We would recommend that Code H is amended to reflect these annexes also.

31. Note 3E on page 13 of Code C should be amended from 'Safer Detention and Handling' to 'Authorised Professional Practice on Detention and Custody' in line with the body of consolidated guidance for policing, which was launched in October 2012.

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