

## Detaining children at the police station: a failure to comply with legislation

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\* The author has produced the paper at the behest of the NAYJ Board of Trustees who have approved and adopted the contents. The paper draws on information provided by Charles Bell who has conducted extensive research and analysis on the detention of children in police stations. The NAYJ is grateful to Charles for his contribution to the paper.

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### • Introduction: a cause for concern

In England and Wales, there is an emerging, albeit relatively recent, consensus that the use of custody for children is damaging, counterproductive, and should be used only as a measure of last resort as required by the United Nations Convention on the Rights of the Child.<sup>1</sup> At the level of policy, reducing the number of children in custody is one of just three high level targets by which the performance of the youth justice system is measured.<sup>2</sup> In terms of statute, a court imposing a custodial sentence on a child has, since 2009, been required to declare that statutory alternatives to custody (in the form of intensive fostering or intensive supervision and surveillance) 'cannot be justified for the offence' and provide a statement as to why it considers that to be the case.<sup>3</sup> More recently, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed the option of a custodial remand unless a custodial sentence is a likely outcome. The Act also brought remand arrangements for 17-year-olds into alignment with those for younger children so that the option of a non-secure remand to local authority accommodation is available to that older age group where bail is refused.<sup>4</sup>

<sup>1</sup> Article 37(b) of the Convention reads: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.

<sup>2</sup> Ministry of Justice (2010) *Breaking the cycle: effective punishment, rehabilitation and sentencing of offenders*. Cm 7972. London: The Stationery Office

<sup>3</sup> The provision is contained in schedule 4, paragraph 8(4) to the Criminal Justice and Immigration Act 2008

<sup>4</sup> Hart, D (2012a) *The Legal Aid, Sentencing and Punishment of Offenders Act 2012: implications for children*. London: National Association for Youth Justice

These shifts have been accompanied by a significant reduction in the number of children deprived of their liberty. In July 2013, 1,278 children below the age of 18 years were detained in the secure estate. While this number remains, in the view of the *National Association for Youth Justice (NAYJ)*, unacceptably high, it represents a decline of 57% by comparison with the equivalent figure (3,006) in July 2008.<sup>5</sup>

The NAYJ welcomes these developments but is concerned by the lack of any corresponding attention afforded to children who are detained at the police station following arrest.<sup>6 7</sup> There has been a considerable fall in the number of children arrested by the police of more than one third since 2000/01, largely a consequence of a decline in youth crime; the introduction, in 2008, of a government target to reduce the number of first time entrants to the youth justice system; and a greater use of informal disposals such as youth restorative disposals, or community resolutions, that allow the police to deal with low level matters without the need for arrest. Nonetheless, in 2010/11 more than 200,000 children were arrested and detained at the police station for a period of time. The fact that less than a third of these cases led to a substantive youth justice disposal would appear to indicate that there was insufficient evidence to proceed or the alleged offence was too minor to warrant a formal sanction in perhaps the majority of instances, which in turn raises the question of whether arrest and detention was merited in the first instance.<sup>8</sup>

All children subject to arrest, including from April 2013 17-year-olds,<sup>9</sup> are entitled to have an appropriate adult (AA) present at the police station to provide advice and support, make representations on their behalf, to confirm that any questioning is conducted fairly, and to ensure that their treatment accords with that laid down in Codes of Practice issued by the Home Secretary under section 66 of the Police and Criminal Evidence Act 1994 (PACE).<sup>10</sup> It is clear however that the attendance of an appropriate adult is not sufficient to guarantee that children's rights and wellbeing are adequately safeguarded.<sup>11</sup>

The Crime and Disorder Act 1998 includes, among youth offending teams' (YOTs) responsibilities, the coordination of the provision of persons to act as appropriate adults.<sup>12</sup> Most commonly, parents or carers act as the AA and generally, in such cases, no intervention is required from the YOT at that stage. It is perhaps not surprising that 'familial' AAs often lack a clear understanding of their role and not infrequently see their task as being to facilitate the police investigation.<sup>13</sup> Where parents or carers are unwilling or unable to attend the police station (or

5 Ministry of Justice (2013) *Monthly youth custody report - July 2013*. London: Ministry of Justice

6 Hart, D (2012b) *Children in police detention*. London: National Association for Youth Justice

7 Children may also be detained by the police on mental health grounds or to provide a place of safety.

8 Bateman, T (2013) *Children in conflict with the law: an overview of trends and developments – 2012*. London: National Association for Youth Justice

9 In a landmark judgement in April 2013, the High Court ruled that the exclusion of 17 year-olds from entitlement to an appropriate adult that had hitherto pertained, constituted a breach of the European Convention on Human Rights and was therefore unlawful under the Human Rights Act 1998. See R(C) v SSHD and Metropolitan Police. The full judgement of the court is available at [www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/c-v-sshd-and-met-police-judgment.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/c-v-sshd-and-met-police-judgment.pdf).

The government has indicated that it will amend the Codes of Practice accordingly and has produced a revised version of Code C. At the time of writing, the revisions have yet to be implemented but the Association of Chief Police Officers has written to Chief Police Officers advising them that 17-year-olds should be provided with appropriate adults with immediate effect rather than waiting for legislative change. (See Bateman, T (2013) *op cit*.)

10 Nacro (2003) *Acting as an appropriate adult: a good practice guide*. London: Nacro

11 Hart, D (2012b) *Children in police detention*. London: NAYJ

12 Section 38 of the Crime and Disorder Act 1998 lists a range of youth justice services that youth offending teams are responsible for coordinating

13 Jones, D (2005) 'The role of the appropriate adult' in Bateman, T and Pitts, J (eds) *The RHP companion to youth justice*. Lyme Regis: Russell House publishing

are disqualified from fulfilling the function for one reason or another<sup>14</sup>) the police are expected to contact the YOT to provide such a service, which is either delivered directly by the local authority or, more frequently, contracted out to voluntary or private sector providers.<sup>15</sup> It should not be assumed however that children in police custody are necessarily better served by such provision. A recent joint inspection, for instance, found that the support provided by AA schemes is often undermined by a 'process driven environment' that diverts attention from the welfare of the child.<sup>16</sup>

***The NAYJ is concerned that ... children are routinely left in police cells until they appear at court either through a lack of knowledge of the statutory requirements or a deliberate flouting of the law.***

In spite of such criticism, the latest edition of National Standards for Youth Justice Services, published in April 2013, provides little guidance in this regard, simply requiring that 'a local policy/protocol is in place which outlines the provision of an appropriate adult service (as required by section 38 of the Crime and Disorder Act 1998) in line with the National Appropriate Adult Network's National Standards'.<sup>17</sup> The latter standards offer helpful quality indicators in terms of recruitment, training and support of persons to undertake the role, but focus primarily on issues of process rather than what happens to children while they are in police custody.<sup>18</sup>

Recent research, undertaken by Charles Bell, has dealt with the issue of safeguarding children detained by the police in some detail and the NAYJ would refer the interested reader to the relevant report.<sup>19</sup> The current paper focuses on a particular aspect of the process: namely what happens to children who are refused bail following charge. Legislative provisions require that, other than in exceptional circumstances outlined in more detail below, such children should be transferred to local authority accommodation. (The duty is contained in section 38(6) of PACE and the process is thus often referred to as a PACE transfer.) The NAYJ is concerned that this rarely happens: children are routinely left in police cells until they appear at court either through a lack of knowledge of the statutory requirements or a deliberate flouting of the law.<sup>20</sup>

## • The legal framework: police bail

### ***The right to bail prior to charge***

Unless a child has been charged with an offence, the police have no power to refuse bail. However, depending on the circumstances, he or she may be bailed with a duty to surrender to a police station at an appointed future date and

14 Parents are precluded from acting as an appropriate adult where: they are suspected of being involved in the offence as perpetrator, victim or witness; their level of mental vulnerability is such that they would themselves require an appropriate adult if arrested; or if they are estranged from the child. There may be other circumstances where tensions between the parent and the young person are such that the former should be regarded as unsuited to provide the requisite levels of support and advice required of the role. (See Nacro (2003) *op cit*).

15 Bell, C (2013) *Safeguarding children detained by police officers: independent research* available at: <http://www.youthjusticematters.info/uploaded/Safeguarding1.pdf>

16 HM Inspectorate of Constabulary (2011) *Whose looking out for children? A joint inspection of appropriate adult provision and children in detention after charge*.

17 Youth Justice Board (2013) *National Standards for Youth Justice Services April 2013*. London: Youth Justice Board

18 National Appropriate Adult Network (2013) *National standards 2013*. London: National Appropriate Adult Network

19 Bell, C (2013) *op cit*

20 Howard League for Penal Reform (2011) *The overnight detention of children in police cells*. London: Howard League

time. Generally speaking if there is insufficient evidence to secure a prosecution, the child should be released unconditionally (although that may not preclude a subsequent arrest where further evidence comes to light). However, where the police intend to conduct further inquiries (eg interviewing witnesses or gathering forensic evidence) that may have a bearing on whether a charge will be brought, the custody officer may determine that the child should be released on bail.<sup>21</sup>

Alternatively, where the police consider that there is sufficient evidence such that there is a reasonable prospect of securing a conviction, they may also bail the child:

- To allow an assessment by the YOT to help inform the decision as to whether a youth caution would represent a more appropriate option than prosecution. Guidance indicates that the police should consider bailing for a full assessment where: *'they have identified risk factors or vulnerabilities including: mental, developmental or physical health concerns, homelessness, poor school attendance, mixing with offending peers, substance misuse (including alcohol), unsupportive parents, other offender(s) in household and unemployment.'*<sup>22</sup>
- To facilitate the delivery of a youth caution at a later time or in a more appropriate venue than the police station<sup>23</sup>
- Where a case has been referred to the Crown Prosecution Service (CPS) to determine the appropriate outcome if more time is required to allow an informed decision.<sup>24</sup>

No conditions may be attached to the bail other than when the child is released to allow the CPS to consider a youth conditional caution. In that event, conditions may be imposed, but only according to the same criteria that apply after charge. Failing to surrender to bail (conditional or unconditional) is an offence that renders the child liable to arrest without a warrant.

### **The right to bail following charge**

Where a child is charged with an offence, the custody officer must determine whether to grant bail pending the initial appearance in court. There is a statutory presumption in favour of unconditional bail except where the child has a previous conviction for murder, manslaughter, rape or other serious sexual offences and has been charged again with any of those specified offences. In such cases, the presumption in favour of bail is reversed. (In the case of manslaughter, the previous case must have resulted in long term detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 for the provisions to apply).<sup>25</sup> The legislation does not preclude the granting of bail but the police would have to be satisfied that there were exceptional circumstances in order to do so.

For all other offences, bail can only be refused, or conditions imposed, where the police have reasonable grounds for considering that one or more specified

<sup>21</sup> Section 34(5) of PACE

<sup>22</sup> Ministry of Justice (2013) *Youth cautions: guidance for police and youth offending teams*

<sup>23</sup> *Ibid*

<sup>24</sup> Section 37(7) of PACE

<sup>25</sup> Section 25 of Criminal Justice and Public Order Act 1994. The full list of relevant offences is: murder; manslaughter; rape; assault by penetration; causing a person to engage in sexual activity, involving penetration, without consent; causing or inciting a child under 13 to engage in sexual activity, involving penetration; sexual activity, involving penetration, with a person with a mental disorder impeding choice; causing or inciting a person with a mental disorder impeding choice to engage in sexual activity, involving penetration; or an attempt to commit any of the above offences.

criteria are satisfied.<sup>26</sup> Unconditional bail must be granted unless the police have reasonable grounds:

- For doubting information given by the child about their identity and where they live or the child's name and address cannot be ascertained
- For believing that the child would fail to attend court
- In the case of an imprisonable offence, for believing that the child would commit further offences on bail
- In the case of a non-imprisonable offence, for believing that detention is necessary to prevent the child from causing physical injury to any person, or loss or damage to property
- For believing that detention is required to prevent interference with the administration of justice, or the investigation of an offence
- For believing that detention is necessary for the child's protection or in his or her own interests.<sup>27</sup>

Taken together, these exceptions allow refusal of bail in a wide range of circumstances. On the other hand, each exception is quite specific. Other than in the case of a second grave crime where the presumption in favour of bail is reversed, bail cannot be refused purely on the grounds of the seriousness of the offence. Nor does a child's antecedent record, however extensive, preclude him or her from being granted bail. The nature of the offence and any previous offending may be relevant to assessing whether there are reasonable grounds for believing that the child will fail to appear at court or may commit further offences, but the logic of the argument must be a reasonable one. For instance, while there may be a risk of an adult absconding to avoid a likely custodial sentence, a child's options to move away from his or her place of residence will be much more limited. Similarly, the existence of a number of previous convictions over a period of time does not necessarily imply that there is a risk that the child is likely to offend in the short period between release from the police station and the date of their first court hearing.

Moreover, the existence of a ground for refusing bail does not entail that bail should be refused. The police are obliged to consider whether the imposition of conditions would be adequate to mitigate their concerns. Bail conditions available to the police are similar to those available to the court except that an electronically monitored curfew cannot be imposed.<sup>28</sup> There is, for instance, nothing to preclude a YOT from offering a programme of bail supervision and support if that would increase the prospects that bail would be granted. A child friendly practice requires that, wherever possible, practitioners advocate for bail on behalf of children to avoid them remaining in police custody. Where bail is granted, children will be released to appear at a youth court; if bail is refused, the police are required to ensure that the child is produced at the first available court which, in many areas, will mean that the first hearing of the case will be in the adult court.

<sup>26</sup> Section 4(1) of Bail Act 1976

<sup>27</sup> Section 38(1) of PACE

<sup>28</sup> Section 3A of Bail Act 1976. The police are also not able to impose a condition of residence in a bail hostel or require a suspect to attend appointment with a legal representative or for the purposes of preparing a report for court

## • The legal framework: the duty to transfer following charge

If bail is refused, the child must be brought before the court *'as soon as is practicable and in any event not later than the first sitting after he is charged with the offence'*.<sup>29</sup> Not infrequently however, it is not practical to produce the child on the day of charge, requiring that the child is detained overnight. On occasion, where the child is charged at the weekend or during a holiday period, there may be a delay of up to 72 hours. In such circumstances, the child must be transferred to local authority accommodation pending the court appearance unless:

- The child is 17 years of age
- Transfer would be *'impracticable'*
- In the case of a child aged 12-16 years, *'no secure accommodation is available and ... keeping him in other local authority accommodation would not be adequate to protect the public from serious harm from him'*.<sup>30</sup>

Significantly, there is a reciprocal duty on both parties. The police are required to *'secure that the arrested juvenile is moved to local authority accommodation'*.<sup>31</sup> Conversely, the local authority is required to *'receive, and provide accommodation for children ... whom they are requested to receive under section 38(6) of the Police and Criminal Evidence Act 1984'*.<sup>32</sup> The Court of Appeal has confirmed that the intent of the legislation is clear:

*'The custody officer who has made the decision to detain the juvenile must do everything practicable to see that the place of detention for that juvenile is in local authority accommodation and not at the police station. This is so whether or not the juvenile in question was previously in the care of the local authority. The local authority is equally obliged to do what it can to provide accommodation which will enable the juvenile to be accommodated outside the police station'*.<sup>33</sup>

As will become apparent in due course, this legislative clarity has not prevented the relevant agencies from sidestepping their statutory duties.

### **The anomalous position of 17-year-olds**

When PACE was introduced, the youth justice system dealt with children aged 10-16 years inclusive, with 17-year-olds treated as adults for criminal justice purposes. The Criminal Justice Act 1991 extended the jurisdiction of the youth court to include all those below the age of 18 years, but corresponding amendments were not made in relation to remand provisions or children detained in police custody. As indicated above, the anomaly was finally rectified so far as remand arrangements are concerned by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In 2013, the High Court, in the face of government opposition, ruled that the denial of appropriate adults to 17-year-olds was unlawful. The PACE Codes of Practice are currently being revised to take account of the Court's decision, but this will not extend PACE transfers to all children. The

<sup>29</sup> Section 46(2) of PACE

<sup>30</sup> Section 38(6)(b) of PACE

<sup>31</sup> Section 38(6) of PACE

<sup>32</sup> Section 21(2) of Children Act 1989

<sup>33</sup> Watkins, J cited in R (on the application of M) v Gateshead Council [2006] EWCA Civ 221

latter would require amendment to the primary legislation since section 38(6) of PACE only mandates transfer in the case of a 'juvenile', defined as a person 'who appears to be under the age of 17'.<sup>34</sup> Indeed, the draft Code, subject to consultation at the time of writing, goes out of its way to confirm that:

*'The statutory provisions in section 38 of PACE (Detention after charge) which apply only to an arrested juvenile ...shall not apply to a person who appears to have attained the age of 17 for the purposes of ... the requirement to transfer a person who has been kept in police detention after charge to local authority accommodation and the power of the local authority to detain them pending appearance at court'.<sup>35</sup>*

As a consequence, 17-year-olds refused bail after charge will continue to be automatically held in police cells pending their court appearance in the same way as adults.

The government has given no explicit indication that it intends to amend the legislation and the NAYJ considers that this failure is a wasted opportunity that betrays a lack of interest on the part of the authorities in older children's wellbeing. Police stations are not designed to accommodate children and, in the view of the NAYJ, no child should spend longer than necessary in police custody. Moreover, the current statutory provisions contradict the spirit of the High Court's judgement.

The Court did not concern itself explicitly with the issue of detention after charge. Nor did it rule out distinctions in treatment between children of different ages, provided there was a proper reason for so doing. However, the exclusion of 17-year-olds from the provisions of section 38(6) is the sole remaining anomaly within the youth justice system that operates to the disadvantage of that age group of children. Following the recent legislative changes under which 17-year-olds refused bail by the court are eligible for non-secure remands to local authority accommodation, it would appear that the government has accepted – at least in practice – that there are no good grounds for having separate arrangements for older teenagers. Conversely, the Court did endorse the principle that it is 'unlawful and unacceptable to treat 17 year-old detainees in the same way as adults'. But that is precisely the effect of excluding this age group from the presumption against children being detained at the police station after charge.

The NAYJ accordingly considers that not extending PACE transfers to 17-year-olds is untenable and in tension with efforts to reduce the use of custody in other parts of the system. The NAYJ accordingly urges the government to make the requisite legislative changes.

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<sup>34</sup> Section 37(15) of PACE

<sup>35</sup> Home Office (2013) Code C: Code of practice for the detention, treatment and questioning of person by police officers. Draft for consultation. London: Home Office

### **When is transfer 'impracticable'?**

What constitutes impracticability is clearly crucial to how the legislative provisions are implemented since it is permissible for the child to be held at the police station if transfer is impracticable. However, it is clear that the circumstances that would legitimately allow transfer to be circumvented will occur only rarely. Guidance produced by the Association of Chief Police Officers (ACPO), in 2012,<sup>36</sup> refers custody officers to, but regrettably does not replicate the contents of, a 1992 Home Office Circular for information on when a PACE transfer is not required. That earlier document confirms that placement is an issue for Children's Services and that the nature of the accommodation available does not provide a reason for refusing transfer on grounds of impracticability.

*'The construction of the statutory provision makes it clear that the type of accommodation in which the local authority propose to place the juvenile is not a factor which the custody officer may take into account in considering whether the transfer is practicable.'*<sup>37</sup>

The Code of Practice makes it equally clear that, unless the criteria which permit the police to request secure accommodation (outlined below) are engaged, difficult behaviour, serious offending and the time of day are not legitimate grounds for considering that transfer is impracticable:

*'Neither a juvenile's behaviour nor the nature of the offence provides grounds for the custody officer to decide it is impracticable to arrange the juvenile's transfer to local authority care. Impracticability concerns the transport and travel requirements and the lack of secure accommodation which is provided for the purposes of restricting liberty does not make it impracticable to transfer the juvenile.... The obligation to transfer a juvenile to local authority accommodation applies as much to a juvenile charged during the daytime as to a juvenile to be held overnight ....'*<sup>38</sup>

Against this background, it is clear that impracticability is intended to be interpreted very narrowly to refer to circumstances where there is an insuperable physical impediment to transfer: *'these might include extreme weather conditions (eg floods or blizzards), or the impossibility, despite repeated efforts, of contacting the local authority'*.<sup>39</sup> Where the police fail to transfer the child to local authority accommodation on the grounds of impracticability or if they request secure accommodation, they are required to produce a certificate, to accompany the child to court, outlining the circumstances. It is clear that this is intended to be a statutory safeguard to prevent impracticability being used as an excuse to keep the child at the police station.<sup>40</sup>

Impracticability is not therefore to be identified with inconvenience. In the view of the NAYJ, however, the

***In the view of the NAYJ the evidence strongly suggests that, all too often, this is precisely what happens. As a result, the legal safeguards are not working in the manner intended.***

<sup>36</sup> Association of Chief Police Officers (2012) *Guidance on the safer detention and handling of persons in police custody*. Second edition. Wyboston: ACPO

<sup>37</sup> Home Office (1992) *Criminal Justice Act 1991: detention of juveniles, Home Office circular 78/1992*. London: Home Office

<sup>38</sup> Note for Guidance 16D. Code C: Code of practice for the detention, treatment and questioning of person by police officers

<sup>39</sup> Home Office (1992) *op cit*

<sup>40</sup> Section 38(6) PACE

evidence strongly suggests that, all too often, this is precisely what happens. As a result, the legal safeguards are not working in the manner intended.

### **When can the police request secure accommodation?**

In most cases, the nature of the accommodation in which the local authority proposes to place the child is not a legitimate reason for the police refusing to transfer. There is however a restricted set of circumstances in which the police can request that the transfer is to secure accommodation. Where these grounds apply and no such accommodation is available, the child may legally be held at the police station pending the first court appearance.

This exception applies to children aged 12 – 16 years inclusive. It follows that children below the age of 12 years can never legally be detained at the police station following charge unless it is physically impossible to effect transfer.<sup>41</sup> For those above that age, the police may request secure accommodation if they consider that: *'keeping [the child] in other local authority accommodation would not be adequate to protect the public from serious harm'* from him or her.<sup>42</sup> The legislation goes on to define what is meant, in this context, by serious harm and clarifies that the threshold is intended to be a high one:

*'any reference, in relation to an arrested juvenile ... to protecting the public from serious harm from him shall be construed as a reference to protecting members of the public from death or serious personal injury, whether physical or psychological, occasioned by further such offences committed by him'.<sup>43</sup>*

One would anticipate accordingly that the police ought to request secure accommodation sparingly. Moreover, in determining whether the criteria that allow such a request apply, the police should take into account whether there is a genuine risk of serious harm occurring in the short period of time between charge and the child's first court appearance. (Thereafter the remand status of the child is an issue for the court.) If the police certify that such a risk does exist, they should request that the local authority provides a secure placement. Where no such placement is available the child may be detained in custody at the police station.

Where the local authority receives a request from the police to transfer a child to secure accommodation, there is no absolute duty to provide such accommodation. However, this is not intended to give licence to the local authority to adopt a default position that it cannot access secure accommodation or to refuse requests on the grounds of cost. The Court of Appeal has determined that:

*'when it receives a request for secure accommodation under section 38(6), a local authority may not simply ignore it .... [C]hildren should not be detained in police cells if that is at all possible.... [I]t is incumbent on all local authorities to have in place a reasonable system to enable them to respond to requests under section 38(6) for secure accommodation'.<sup>44</sup>*

<sup>41</sup> This would not preclude the local authority seeking a placement in secure accommodation where this was considered necessary. However such a placement could only be made where the welfare grounds for placement in secure accommodation, outlined in section 25(1) of the Children Act 1989 were met. Moreover, the Children (Secure Accommodation) Regulations 1991 require authorisation of any secure placement by the Secretary of State where the child is below the age of 13 years. In such circumstances, the placement in secure accommodation is not an issue for the police who are obliged to transfer under PACE irrespective of the intentions of the local authority

<sup>42</sup> Section 38(6) of PACE

<sup>43</sup> Section 38(6A) of PACE

<sup>44</sup> R (on the application of M) v Gateshead Council [2006] EWCA Civ 221

Where secure accommodation is available, the local authority must, before agreeing placement, also satisfy itself that the statutory grounds that allow it to place in secure conditions are met. Such placements are permissible only where:

*'any accommodation other than that provided for the purpose of restricting liberty is inappropriate because–*

*(a) the child is likely to abscond from such other accommodation, or*

*(b) the child is likely to injure himself or other people if he is kept in any such other accommodation'.<sup>45</sup>*

In addition, if the child is 13 years of age or younger, the approval of the Secretary of State is required.<sup>46</sup>

The criteria that allow the police to request secure accommodation are thus slightly different to those that permit the local authority to make a secure placement. The local authority must therefore make an assessment of whether the statutory provisions are satisfied independently of the police request. However, in the event that a local authority considers the grounds for a secure placement are not met, it should go back to the police and suggest that transfer to non-secure provision would be more appropriate.

## • Who cares?

It is difficult to determine in any comprehensive fashion the extent of compliance (or otherwise) with the above provision because of a lack of data. The government does not publish (or indeed routinely collate) information on the number of children refused bail after charge or what happens to them in the period prior to court. The Youth Justice Board has not published any such data since 2000 (see below). This national failure to capture the extent to which children are deprived of their liberty also appears to be replicated at local level among police and local authorities. Recent research undertaken by Charles Bell of a representative sample of local agencies found that most were unable to provide the requisite information.<sup>47</sup> It might reasonably be assumed that this lack of monitoring is indicative of a lack of concern.

The lacuna in the data itself may be explained, in part, by the limited emphasis placed on refusal of police bail and PACE transfer in guidance to police and youth justice practitioners. For instance, the Association of Chief Police Officers guidance on the *Safer detention and handling of persons in police custody* simply states that transfer will *'usually'* take place but that *'there are exceptions to this'*. Custody officers are then referred to a 21 year old Home Office circular.<sup>48</sup> The latest (2013) edition of National Standards for Youth Justice similarly has few references to what ought to happen to children after charge. It requires that a local remand management strategy is in place to ensure, among other things, access to: *'facilities to accommodate young people detained under section 38 (1) of PACE where, by virtue of section 38(6) of PACE, local authority accommodation*

<sup>45</sup> Paragraph 6(2) of the Children (Secure Accommodation) Regulations 1991 as amended by the Children (Secure Accommodation) Regulations 2012

<sup>46</sup> Paragraph 4 of the Children (Secure Accommodation) Regulations 1991

<sup>47</sup> Bell, C (2013) *op cit*

<sup>48</sup> Association of Chief Police Officers (2012) *op cit*

is required'.<sup>49</sup> Standard 3.46 expands on this somewhat and lists, among local authority responsibilities, putting in place arrangements for 'managing requests from the police for PACE beds and for receiving children and young people transferred from the police, as per PACE section 38 (1) and (6)'. While the reference to PACE implies a commitment to conformity with the statutory provisions, there is no clear indication within the standards themselves that transfer is a legal requirement and that the police and local authority have no discretion in most cases. Guidance within the national standards to police similarly does not emphasise what must happen where bail is denied: detention and transfer in accordance with the Codes of Practice are listed among police responsibilities, but this is unhelpfully qualified by the words 'where necessary'. National Standards produced by the National Appropriate Adult Network indicate that appropriate adults should have training on PACE transfer but provide no detail of the legislative requirements or what should happen to children refused bail after charge.<sup>50</sup>

**While the lack of data precludes the presentation of a comprehensive picture, it is apparent from the available evidence that children are routinely left overnight in police cells in breach of the legislative requirements.**

Earlier Case Management Guidance produced by the Youth Justice Board contains more detail and properly indicates that transfer is a requirement unless it is impracticable. It makes plain that difficulties in finding a placement or reluctance on the part of the local authority to accept the transfer are not legitimate reasons for the child to remain at the police station.<sup>51</sup> Moreover, in the event of a request for secure accommodation, the guidance indicates that where the local authority is unable to locate such accommodation, it should seek the assistance of the Youth Justice Board placement team.<sup>52</sup> Unfortunately, however, while the 2010 edition of National Standards explicitly referred practitioners to the Case Management Guidance, the latest edition does not. The status of the guidance, and the extent to which practitioners use it in their daily work, is accordingly unclear.

## • The impact on children in trouble

While the lack of data precludes the presentation of a comprehensive picture, it is apparent from the available evidence that children are routinely left overnight in police cells in breach of the legislative requirements. In 2001, Nacro's youth crime section reported on a Youth Justice Board analysis that showed that, in the three months from July to September 2000, of the 1,022 young people aged 10 – 16 recorded as being refused bail by the police: 84.6% were detained at the police station; 13.5% were transferred to non-secure local authority accommodation; and less than 2% were transferred to secure accommodation. It is highly improbable that those remaining in police custody all posed a risk of serious harm, or that transfer was impracticable in the sense of being physically impossible. More

<sup>49</sup> National Standard 3, Outcomes

<sup>50</sup> National Appropriate Adult Network (2013) *op cit*

<sup>51</sup> Youth Justice Board (2010) *Case management guidance. Section 3: Bail and remand management*. London: Youth Justice Board

<sup>52</sup> *Ibid*

***The NAYJ considers that this evidence, taken together, confirms that compliance with legislation that requires children refused bail after charge to be transferred to local authority accommodation is routinely subverted.***

alarmingly, of those children aged 10 –11, who, it should be remembered, cannot legally be held at the police station after charge unless transfer is impracticable (even if they pose a risk to the public), 73% were so detained.<sup>53</sup> Assuming that the quarterly figures were representative of the whole year, one might accordingly estimate that almost 3,500 children under 17 years of age were held in the police station pending their initial court hearing, many of them illegally. Given that the data were drawn from YOT records, it seems likely that the figures are an underestimate since they would not capture

cases where the police failed to request a transfer and may not include requests processed by out-of-hours services.

More recently, research commissioned by the Howard League for Penal Reform established that at least 53,000 children aged 10-16 years were detained overnight in police stations during 2008 and 2009.<sup>54</sup> Again the figures represent a significant understatement of the actual state of affairs since they derive from freedom of information requests and only 24 of the 43 police services in England and Wales provided data. Among those who failed to do so were the Metropolitan police who are responsible for a significant proportion of cases involving children. A joint inspection of the care of children in police custody, published in 2011, found that, in the areas inspected, one in six children were refused bail following charge. In nearly two thirds of the 49 cases reviewed, the police failed to request local authority accommodation. Worryingly, the inspectors considered that non-secure provision would have been appropriate in 67% of such cases.<sup>55</sup> In a more recent study still, information provided by the Metropolitan police in relation to one London borough confirms that 66 requests were made for local authority accommodation in the previous 12 months, but no transfers were effected.

Her Majesty's Inspectorate of Constabulary leads joint inspections of police custody facilities. Of the eight reports published between January and September 2013, three make no mention of the issue of transfer, suggesting that inspectors did not regard compliance with this legislative requirement as meriting attention. Four deal with requests for secure accommodation, without any reference to the fact that there is a statutory presumption of transfer to non-secure accommodation. In each case, the wording of the report is identical. Police said that:

*'they contacted social services to confirm the availability of secure Police and Criminal Evidence Act (PACE) beds for young people held overnight who could not be bailed, although **they were not aware of these beds ever being used**'.*<sup>56</sup> [Emphasis added]

Just one report refers to the potential for police to secure a transfer to non-

<sup>53</sup> Nacro (2001) *Police refusal of bail and transfer to local authority accommodation*. London: Nacro

<sup>54</sup> Howard League for Penal Reform (2011) *op cit*

<sup>55</sup> HM Inspectorate of Constabulary (2011) *op cit*

<sup>56</sup> This wording is replicated in reports on Westminster, Hampshire, Haringey and Gwent custody suites

secure local authority accommodation, but does not make clear that this is a legal requirement. In this instance too, it was apparent that children remained at the police station as a matter of course:

*'Some custody officers tried to avoid keeping children and young people in cells overnight .... Custody staff said that they would try to contact social services to arrange accommodation for young people who could not be bailed but **were always informed that none was available**'.*<sup>57</sup> [Emphasis added]

The NAYJ considers that this evidence, taken together, confirms that compliance with legislation that requires children refused bail after charge to be transferred to local authority accommodation is routinely subverted. As Her Majesty's Inspectorate of Constabulary maintains:

*'[I]n practice, the reciprocal duty on the police to transfer ... and 'on the local authority to receive' ... has been reduced to a short (or no) call to local authority staff requesting secure accommodation followed by the now standard response that none is available; and that under these circumstances, the [appropriate adult] is often precluded (by local policy) from making any representations at all.'*<sup>58</sup>

According to Ashford et al, lawyers with extensive experience of defending children in conflict with the law, such failures are explained by:

- considerable police resistance to transfer
- unwarranted police demands for the provision of secure accommodation to be provided
- the failure of the local authorities to provide accommodation to allow transfer to take place, particularly if the child concerned is not already looked-after.<sup>59</sup>

A further possibility implied by the Inspection report cited above is that, in many cases, the issue of transfer is simply not considered by any of the agencies involved.

As indicated previously, the legislation contains a safeguard. Where the police do not transfer a child to local authority accommodation on grounds of impracticability or they request secure accommodation, they are required to certify the reasons. The certificate must be produced at the first court appearance.<sup>60</sup> In principle, this process should provide a check on any failure by the police or local authorities to act in conformity with their statutory duties, while also facilitating monitoring by the YOT of the number of children detained at the police station and the reasons given for not transferring to local authority accommodation. In practice, however, this statutory provision is also ignored. Although no national data are available, a recent study that provides figures for one London borough established that a certificate was provided to court in fewer than one in ten cases where a child was detained at the police station.<sup>61</sup> It seems likely that this pattern of failure to furnish the court with the required documentation is representative of what

<sup>57</sup> Her Majesty's Inspectorate of Constabulary / Her Majesty's Inspectorate of Prisons (2013) *Report on an inspection visit to police custody suites in Essex*. London: HMIC

<sup>58</sup> *Ibid*

<sup>59</sup> Ashford, A, Chard, A and Redfern, N (2006) *Defending young people in the criminal justice system*. Third edition. London: Legal Action Group

<sup>60</sup> Section 38(7) of PACE

<sup>61</sup> Bell, C (2013) *op cit*

***NAYJ considers that it is unacceptable to allow budgetary considerations to determine that vulnerable children should be exposed to up to 72 hours confinement, in addition to any time detained prior to charge, in a police cell.***

happens in many other areas. Based on their extensive experience of representing children in trouble, Ashford et al contend that certificates 'are never considered in any court hearing'.<sup>62</sup>

- **The need for change**

The available evidence points to significant failings in the existing arrangements for safeguarding children while they are in police detention. It is well established that children who come to the attention of the youth justice system are among the most disadvantaged in society.<sup>63</sup> The most vulnerable children – those whose parents or carers do not attend the police station as appropriate adults, those without a stable address, those who have problems with alcohol, drugs or mental ill health –

are generally also those at greatest risk of having bail refused. A police station is, in the view of the NAYJ, an unsuitable environment for any child and is particularly ill-adapted for dealing with high levels of vulnerability. Although the Codes of Practice require that juveniles are accommodated in detention rooms, rather than cells, and should be detained separately from adults, in practice there is little to distinguish the provision allocated to the detention of children which is, in any event, frequently adjacent to that holding adult suspects.<sup>64</sup> Overnight detention is accordingly frequently a distressing, and potentially damaging, experience. Where a child appears at court in police custody, the chances of bail being denied are inevitably increased since a decision that deprivation of liberty is required has already been made. In this context, the NAYJ believes that immediate changes are required.

- **An urgent amendment of the law**

There can be no justification for excluding 17-year-olds from the provisions that require transfer to local authority accommodation. The government has accepted that this age group is sufficiently vulnerable as to require an appropriate adult, and has recognised that remands to non-secure local authority accommodation should be available where court bail is declined. International standards require that all children in trouble should be treated in a manner that is distinct from adults, but the current provisions entail that 17-year-olds are considered as adults for the purposes of police detention. In this context, the criticism by Shauneen Lambe, Director of Just for Kids Law, that the government is doing '*as little as they can to comply*' with the recent court judgement regarding the extended provision of appropriate adults to 17-year-olds, would appear well founded.<sup>65</sup>

The reason for the government's reluctance is likely to be financial. Seventeen

<sup>62</sup> Ashford et al (2006) *op cit*

<sup>63</sup> Yates, J (2010) 'Structural disadvantage, youth, class, crime and poverty' in Taylor, W, Earle, R and Hester, R (eds) *Youth justice handbook: theory, policy and practice*. Cullompton: Willan

<sup>64</sup> Nacro (2003) *op cit*

<sup>65</sup> Puffett, N (2013) 'Home Office under fire for 'short-sighted' custody plans' in *Children and Young People Now*, 19 September 2013

year-olds are much more likely to be charged than their younger counterparts accounting, in 2011/12, for almost 40% of convictions involving children.<sup>66</sup> The NAYJ however considers that it is unacceptable to allow budgetary considerations to determine that vulnerable children should be exposed to up to 72 hours confinement, in addition to any time detained prior to charge, in a police cell. Indeed, the fact that this age group is more likely to be affected is a powerful reason for extending the provisions. The NAYJ accordingly believes that the government should take steps as a matter of urgency to amend PACE so that children aged 17 years are subject to the transfer provisions in the same way as their younger peers.

- **Clarity in guidance and national monitoring**

Official guidance is frequently an important determinant of practice and, as indicated previously, National Standards for Youth Justice and ACPO's guidance on the detention of suspects both fail to emphasise the mandatory nature of the transfer provisions, the strict limitations to the circumstances in which they can be bypassed and the necessity of providing certification where those exceptions are thought to apply. This lack of emphasis is likely to have contributed to the widespread non-compliance with the legislation. The shortcoming could however be easily remedied. The NAYJ considers that both sets of guidance (and, where necessary, other relevant documentary materials) should be amended to clarify: that there is a statutory presumption of transfer other than in cases of impracticability; that impracticability is to be equated with physical impossibility and that difficulties identifying local authority provision do not constitute grounds for continued detention at the police station; and the circumstances under which the police may request secure accommodation, highlighting the high threshold associated with such requests.

The perception that transfer is not compulsory (or if it is mandatory may be safely ignored) is reinforced by the failure of any national agency to monitor the extent to which children are held in police cells after charge. In a culture where 'what's counted is what counts', this oversight sends out an unhelpful message to youth justice agencies.<sup>67</sup> In this context, the NAYJ believes that the Youth Justice Board,

***The NAYJ considers that both sets of guidance (and, where necessary, other relevant documentary materials) should be amended to clarify: that there is a statutory presumption of transfer other than in cases of impracticability; that impracticability is to be equated with physical impossibility and that difficulties identifying local authority provision do not constitute grounds for continued detention at the police station; and the circumstances under which the police may request secure accommodation, highlighting the high threshold associated with such requests.***

<sup>66</sup> Youth Justice Board / Ministry of Justice (2013) *Youth Justice Statistics 2011/12*. London: Ministry of Justice

<sup>67</sup> Pitts, J and Bateman, T (2010) 'New Labour and youth justice: what works or what's counted?' In Ayre, P and Preston-Shoot, M (eds) *Children's services at the crossroads: a critical evaluation of contemporary policy for practice*. Lyme Regis: Russell House publishing

Home Office and Ministry of Justice should collate and publish information, broken down by age, gender, and ethnicity on:

- Children refused bail by the police following charge
- The number, and proportion, of such children transferred to local authority accommodation
- Where transfer does occur, whether it was to secure or non-secure accommodation
- Where transfer does not occur, the reason for holding the child at the police station
- The production by the police at court of certificates where the custody officer determines that transfer is impracticable or requests secure accommodation to include an analysis of the grounds contained therein.

The collection of such data would necessitate local monitoring by the police, youth offending teams, local authorities and courts and would convey a proper sense that transfer of children is not a discretionary process.

### ● **Towards a child-friendly practice**

The NAYJ campaigns for a more child-friendly youth justice system and considers that ensuring that young people's interests are properly served when they are in police detention ought to be a priority for all youth justice practitioners. The organisation is deeply concerned that youth justice agencies appear, in many areas, content to leave children in the police station following charge in a clear dereliction of their statutory duties. It is apparent that ensuring that transfer to local authority accommodation occurs as a matter of course, in accordance with the legislative requirements, will require a sea change in both culture and practice.

There are, it should be acknowledged, some practical difficulties in guaranteeing effective communication between the relevant parties. The AA role is frequently fulfilled by family members and in such cases, the YOT will often have no knowledge of the child's arrest until disposal – and the issue of bail - have already been determined. Where the YOT does coordinate the provision of an AA, arrangements vary considerably around the country but in many cases, the service is delivered by volunteers, frequently through a commissioned voluntary sector provider. Where the child is arrested in the evening or night time, it will generally fall to out-of-hours services to deal with any police requests. Even where the YOT provides AAs directly, staff might not have direct access to local authority accommodation, which may require authorisation from Children's Services.<sup>68</sup> Given such diversity in organisational arrangements, it is imperative that a protocol to ensure proper communication between each of the relevant parties is in place that deals explicitly with the issue of bail and mechanisms for effecting transfer to local authority accommodation.

Such protocols will obviously reflect local circumstances, but should as a minimum:

<sup>68</sup> Bell, C (2013) *op cit*

- Include a requirement that the police notify the YOT (whether or not the latter provide the AA) at the earliest opportunity of any cases where there is a prospect that bail might be refused. Ideally, the protocol should identify a YOT point of contact for out-of-hours referrals even if they are not responsible for provision of out-of-hours AA services. Early notification will allow the YOT to make representations in relation to the issue of bail, to develop a bail support package where that is appropriate, identify suitable accommodation in the event that bail is nonetheless denied, and ascertain what secure accommodation is available where the criteria for secure placement are satisfied
- Ensure that the police provide the YOT with data, at regular intervals, on the number of children refused bail after charge and where they were detained pending court, including cases where family members or carers act as the AA
- Give clear guidance on the role of volunteer AAs in negotiating with the police on behalf of the local authority in relation to bail and requests for PACE accommodation following charge. Where the volunteer is not expected to engage in such negotiations, mechanisms by which the police can initiate the requisite procedures should be spelled out
- Detail responsibility within the local authority for identifying accommodation to allow transfer in accordance with the National Standards for youth justice
- Clarify arrangements for transporting the child to the placement and from the placement to court.

***If the commissioning arrangements for the provision of AA services do not include being present until the point of case disposal, making representations in relation to bail and negotiating transfer, then – in the view of the NAYJ – good practice requires that a representative of the local authority should attend the police station to facilitate such processes.***

Anyone acting as an AA on behalf of the YOT should have a good knowledge of the legislation in relation to bail and the provisions that apply following charge where bail is refused. They should have the necessary personal qualities and be adequately trained so that they feel comfortable to challenge police decision-making where that is required. AAs should attempt to influence the police so that bail is not refused unnecessarily and that any conditions attached to bail are reasonable.

In this context, it is important to note that the Children Act 1989 requires the local authority to provide accommodation for a child in their area who appears to need it as a result of:

- *'there being no person who has parental responsibility for him*
- *his being lost or having been abandoned; or*
- *the person who has been caring for him being prevented (whether or not*

***If the commissioning arrangements for the provision of AA services do not include being present until the point of case disposal, making representations in relation to bail and negotiating transfer, then – in the view of the NAYJ – good practice requires that a representative of the local authority should attend the police station to facilitate such processes.***

*permanently, and for whatever reason) from providing him with suitable accommodation or care’.<sup>69</sup>*

Where such circumstances pertain, the AA should liaise with Children’s Services with a view to the latter accommodating the child. In many cases, this will also address police objections and avoid the need for bail being refused.

Any request for secure accommodation where the relevant conditions are not met should be challenged, and a non-secure placement offered instead. In the event that transfer is deemed to be impracticable or the police request secure provision, the AA should remind the custody officer of the statutory duty to certify the reasons. It may also be beneficial for YOT court officers to ensure that courts consider any certification provided by the police and, if no certificate is provided in cases where it is required, request that courts

conduct inquiries of the police to establish why the legislative provisions were not adhered to.

Volunteer AAs should have a good knowledge of what can be offered and who should be contacted at the YOT to negotiate with the police in relation to bail support, transfer and secure accommodation. If the commissioning arrangements for the provision of AA services do not include being present until the point of case disposal, making representations in relation to bail and negotiating transfer, then – in the view of the NAYJ – good practice requires that a representative of the local authority should attend the police station to facilitate such processes.

Arrangements will only function in the manner intended if local authorities ensure that there is an adequate supply of appropriate accommodation to support PACE transfer whenever it is required. Given that the lack of a suitable placement does not constitute a legitimate ground for detaining a child at the police station, it is incumbent on the local authority to establish the likely demand for such provision. In the light of the failures identified in this paper, it is unlikely that it will be possible to base such an assessment on previous experience in the first instance: many local authorities do not keep records of requests for PACE transfers and where such monitoring is undertaken, accurate data is dependent on the police routinely requesting transfer when bail is refused.

While there is no absolute duty to provide secure accommodation, there is an obligation on local authorities to attempt to facilitate a transfer to a placement where it is properly requested. In every case, a genuine attempt to identify secure provision should be made and the nature of enquiries, and their outcomes, should

<sup>69</sup> Section 20 of Children Act 1989

be recorded. In the event that provision cannot be identified, the Youth Justice Board placement team should be contacted for assistance.

It is common practice for agencies to monitor compliance with their statutory obligations. The evidence reviewed in this paper, and from more extensive investigation elsewhere,<sup>70</sup> confirms that, in the case of PACE transfer, such monitoring is the exception rather than the rule. The NAYJ considers that this might be interpreted as an indication of the fact that compliance with these particular statutory requirements is afforded a lower priority than some others, reflecting, perhaps an apparent lack of concern at the national level. Local reporting mechanisms whereby information on children refused bail, where they were held pending court, and the grounds for any failure to transfer to local authority accommodation, should accordingly be developed. The NAYJ considers such data should be considered on a regular basis by YOT Management Boards and Local Children's Safeguarding Boards, both of which have representation by the police and local authority at senior management level. Such oversight would help to ensure accountability of all the relevant parties for their decision-making in relation to children refused bail after charge and would go some way to address the failure of agencies to safeguard children in police detention to the standard required by the legislation. Unless and until such accountability is taken more seriously than at present, the NAYJ fears that vulnerable children will continue to be confined in police cells unnecessarily, unjustifiably and unlawfully.

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<sup>70</sup> Bell, C (2013) *op cit*