Use of voluntary interviews and safeguards

Home Office PACE Strategy Group, 15 December 2016

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Background

Overall arrest rates in England and Wales have declined steadily over the last decade, particularly in relation to children (Home Office, 2016, see appendix one). Where data has been collected and analysed, there appears to be significantly increased usage of voluntary attendance for interviews under caution (HMIC, 2015) and this may rise as reforms to pre-charge bail come into force.

Police forces are increasingly encouraged to pursue this strategy, both due to the adverse impacts of custody (particularly for vulnerable people) and for financial reasons. However, over time, a range of safeguards and services have built up around custody – including the significant role of the custody sergeant. In terms of data and transparency, while arrest data is a national requirement and custody records are mandatory, very little exists around voluntary interviews (e.g. volume, location, application of PACE safeguards).

This paper aims to build on the positive changes made by police to avoid the unnecessary use of custody, particularly for the vulnerable. It seeks to instigate a discussion on how the net impact on suspects can be evidenced and the application of appropriate safeguards to voluntary interviews can be assured.

Police and Criminal Evidence Act (PACE) Codes

PACE provides a range of safeguards to all who are interviewed. Appendix two draws out the sections of PACE Codes that are relevant to the discussion: -

- PACE applies to people in custody at police stations, whether or not they have been arrested
- Although certain sections of the Code apply specifically to people in custody at police stations, those there voluntarily to assist with an investigation should be treated with no less consideration.
- Interviewers must ensure that the rights, entitlements and safeguards that are followed for suspects who have been arrested and detained are applied to suspects who are not under arrest, particularly access to free legal advice
- An officer of sergeant who is not involved in the investigation takes on responsibility for some responsibilities of the custody sergeant in custody.

Authorised Professional Practice (APP)

These principles are reiterated by the APP on Detention and Custody (APP), which includes a requirement to notify suspects in voluntary interviews that they may obtain free and independent legal advice. It also states that the interviewing officer must ensure that they follow any other provisions of Codes C, E and F that can be applied to suspects who are not under arrest (College of Policing, 2015).

Whilst PACE and the APP clearly offer safeguards for voluntary interviews, at present there is not enough known to confirm that they are being applied and some indications that they need to be strengthened:

- Solicitors have noted that clients are not aware of the gravity of attending voluntary interviews as they would if they had attended custody (JWP, 2014). This could make people more likely to waive their right to free legal advice.
- There is a lack of data regarding voluntary interviews with HMIC noting that only three of six forces they inspected could provide reliable data on voluntary interviews in the 12 months prior to inspection (HMIC, 2015).
- Data gathered by the National Appropriate Adult Network (NAAN) suggests that the percentage of organised scheme AA call outs that are for voluntary interviews (versus detentions) is growing but that it varies significantly between areas (NAAN, 2015).

OPCAT

The UK has adopted the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and has a duty to permit independent observers to have private interviews with all detainees (UN, 2002).

This duty applies to all who are detained whether in custody or in de facto detention. It includes "any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will." The UN Subcommittee of Prevention of Torture (SPT) have reiterated this in recent guidance stating that: "The SPT therefore takes the view that any place in which a person is deprived of liberty (in the sense of not being free to leave), or where it considers that a person might be being deprived of their liberty, should fall within the scope of the OPCAT if it relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function." (SPT, no date).

Observers must be able to:

- Regularly examine the treatment of persons deprived of their liberty.
- Make recommendations to relevant authorities to improve treatment.
- To submit proposals and observations concerning existing or draft legislation.

Observers must be able to access data on detainees and have the opportunity to hold private interviews with them.

PACE guidance states that "If a person who attends the police station voluntarily to be interviewed decides to leave before the interview is complete, the police would at that point be entitled to consider whether their arrest was necessary to carry out the interview." In this instance, the person would be considered to be in de facto detention and would be eligible for observations under OPCAT.

Independent custody visitors, HMIC and HMIP currently conduct the OPCAT role for police custody, but there is no similar oversight of voluntary interviews.

Suggested questions for discussion

- Does PACE currently contain appropriate safeguards in place (e.g. to avoid miscarriages of justice or unintended consequences) during voluntary interviews, particularly for vulnerable people?
- Are we able to judge whether PACE safeguards currently being implemented satisfactorily, given the data that is currently available?
- Are there opportunities to quickly develop the evidence base in this area by sharing data that already exists?
- How effective is the use of sergeants who act in place of the custody sergeant? How does this work in practice? What training do they have (e.g. criminal justice) and are they able to ensure PACE compliance?
- How do we ensure compliance with the UK's duties under OPCAT for voluntary interviews, which do not currently receive required oversight?

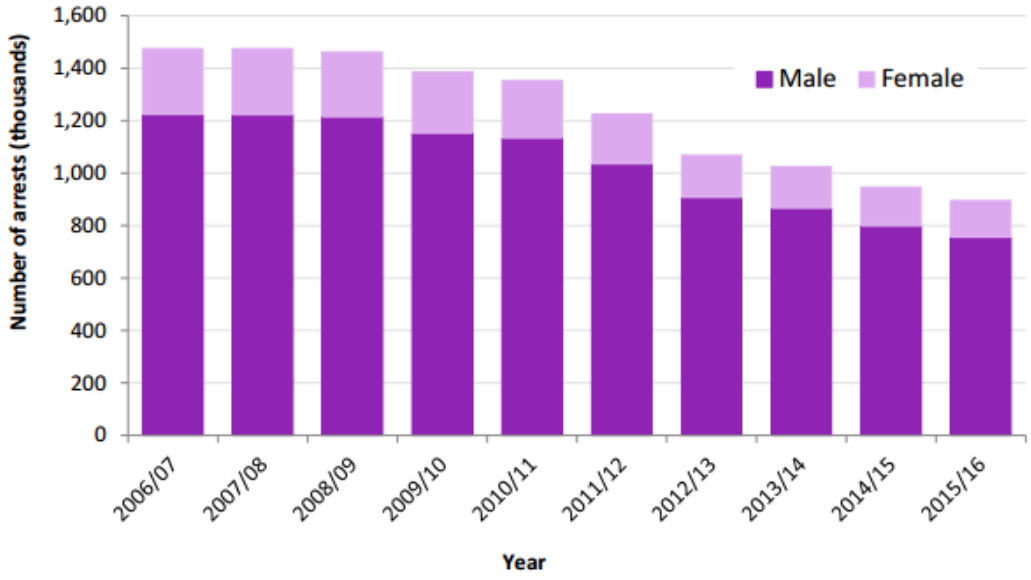
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Appendix 1

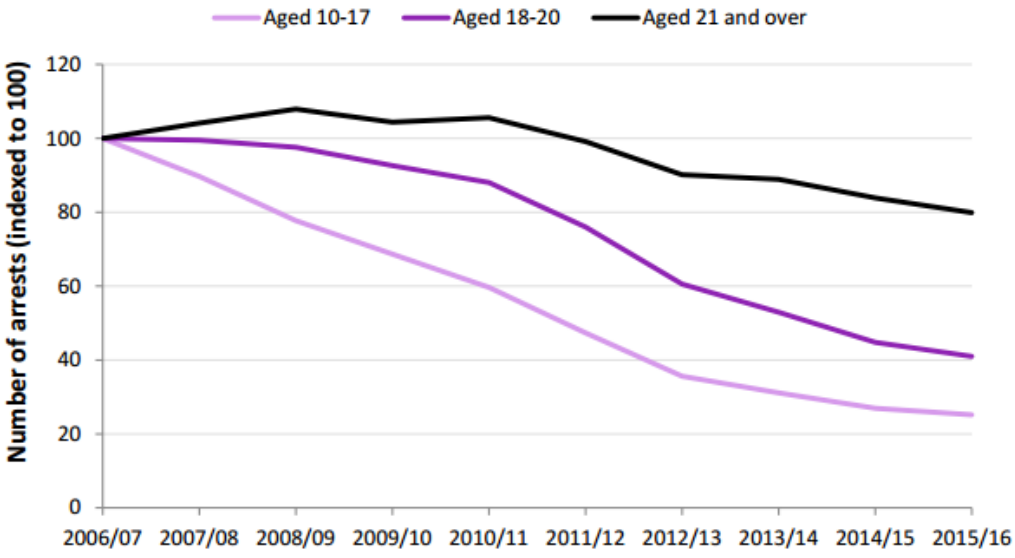
Police powers and procedures, England and Wales, year ending 31 March 2016
Statistical Bulletin 15/16
Home Office - 27 October 2016

Figure 3.1 Number of arrests, by gender, England and Wales, years ending 31 March 2007 to 2016



Source: *Arrests table A.01, Home Office*

Figure 3.5 Number of arrests (indexed to 100 in the year ending 31 March 2007) by age group, England and Wales, years ending 31 March 2007 to 2016



Source: *Arrests table A.01b, Home Office*

Appendix 2 – Relevant sections of PACE Codes and the College of Policing Authorised Professional Practice

Code C

1.10 Subject to paragraph 1.12, this Code applies to people in custody at police stations in England and Wales, whether or not they have been arrested, and to those removed to a police station as a place of safety under the Mental Health Act 1983, sections 135 and 136, as a last resort (see paragraph 3.16). Section 15 applies solely to people in police detention, e.g. those brought to a police station under arrest or arrested at a police station for an offence after going there voluntarily.
[Paragraph 1.12 is a list of people in custody to whom the Codes do not apply]

Note for guidance 1A Although certain sections of this Code apply specifically to people in custody at police stations, those there voluntarily to assist with an investigation should be treated with no less consideration, e.g. offered refreshments at appropriate times, and enjoy an absolute right to obtain legal advice or communicate with anyone outside the police station.
[The above guidance note is mirrored in Code H 1A]

3.21 (b) [Initial Action - Persons attending a police station or elsewhere voluntarily] If they are not arrested but are cautioned as in section 10, the person who gives the caution must, at the same time, inform them they are not under arrest, they are not obliged to remain at the station or other location but if they agree to remain, they may obtain free and independent legal advice if they want. They shall also be given a copy of the notice explaining the arrangements for obtaining legal advice and told that the right to legal advice includes the right to speak with a solicitor on the telephone and be asked if they want advice. If advice is requested, the interviewer is responsible for securing its provision without delay by contacting the Defence Solicitor Call Centre. The interviewer must ensure that other provisions of this Code and Codes E and F concerning the conduct and recording of interviews of suspects and the rights and entitlements and safeguards for suspects who have been arrested and detained are followed insofar as they can be applied to suspects who are not under arrest. This includes:

- informing them of the offence and, as the case may be, any further offences, they are suspected of and the grounds and reasons for that suspicion and their right to be so informed (see paragraph 3.1(b));
- the caution as required in section 10;
- determining whether they require an appropriate adult and help to check documentation (see paragraph 3.5(c)(ii)); and
- determining whether they require an interpreter and the provision of interpretation and translation services and informing them of that right. See paragraphs 3.1(a)(iv), 3.5(c)(ii) and 3.12, Note 6B and section 13.

but does not include any requirement to provide a written notice in addition to that above which concerns the arrangements for obtaining legal advice.

3.22 If the other location mentioned in paragraph 3.21 is any place or premises for which the interviewer requires the person's informed consent to remain, for example, the person's home, then the references that the person is 'not obliged to remain' and that they 'may leave at will' mean that the person may also withdraw their consent and require the interviewer to leave.

6 Right to legal advice - Note for guidance 6B A detainee has a right to free legal advice and to be represented by a solicitor. This Note for Guidance explains the arrangements which enable detainees to obtain legal advice. An outline of these arrangements is also included in the Notice of Rights and Entitlements given to detainees in accordance with paragraph 3.2. The arrangements also apply, with appropriate modifications, to persons attending a police station or other location voluntarily who are cautioned prior to being interviewed. See paragraph 3.21.

Code E – Audio recording

1.0 The procedures in this Code must be used fairly, responsibly, with respect for the people to whom they apply and without unlawful discrimination. Under the Equality Act 2010, section 149, when police officers are carrying out their functions, 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. See Note 1B.

1.5 The term:

- 'appropriate adult' has the same meaning as in Code C, paragraph 1.7 and in the case of a 17 year old suspect, includes the person called to fulfil that role in accordance with paragraph 1.5A of Code C.
- 'solicitor' has the same meaning as in Code C, paragraph 6.12.
- 'interview' has the same meaning as in Code C, paragraph 11.1A.

1.12 In the application of this Code to the conduct and recording of an interview of a suspect who has not been arrested:
(a) references to the 'custody officer' include references to an officer of the rank of sergeant or above who is not directly involved in the investigation of the offence(s);
(b) if the interview takes place elsewhere than at a police station, references to 'interview room' include any place or location which the interviewer is satisfied will enable the interview to be conducted and recorded in accordance with this Code and where the suspect is present voluntarily (see Note 1A), and
(c) provisions in addition to those which expressly apply to these interviews shall be followed insofar as they are relevant and can be applied in practice.
[Paragraphs 1.0 and 1.12 are mirrored exactly in Code F (video recording) by paragraphs 1.0 and 1.8. Paragraph 1.5 is also mirrored (Code F 1.5) though with different phrasing and the addition of "The corresponding provisions and Notes for Guidance in Code C applicable to those terms shall also apply where appropriate"].

ANNEX: PARAGRAPH 3.1(a)(iii) - EXEMPTION FROM THE REQUIREMENT TO AUDIO RECORD INTERVIEWS FOR INDICTABLE OFFENCES - CONDITIONS.
Part 2: Other provisions applicable to all interviews to which this Annex applies
9. Subject to paragraph 10, the provisions of paragraphs 3.21 and 3.22 of Code C (Persons attending a police station or elsewhere voluntarily) regarding the suspect's right to free legal advice and the other rights and entitlements that apply to all voluntary interviews, irrespective of where they take place, will apply to any interview to which this Annex applies. See Note A7.

Note for guidance A7 The interviewing officer is responsible for ensuring compliance with the provisions of Code C applicable to the conduct and recording of voluntary interviews to which this Annex applies. These include the right to free legal advice and the provision of a notice explaining the arrangements (see Code C paragraph 3.21 and section 6), the provision of information about the offence before the interview (see Code C paragraph 11.1A) and the right to interpretation and translation (see Code C section 13).

Code G

Note for guidance 2F …When making arrangements for the person's voluntary attendance, the officer should tell the person:

- that to properly investigate their suspected involvement in the offence they must be interviewed under caution at the police station, but in the circumstances their arrest for this purpose will not be necessary if they attend the police station voluntarily to be interviewed;
- that if they attend voluntarily, they will be entitled to free legal advice before, and to have a solicitor present at, the interview;
- that the date and time of the interview will take account of their circumstances and the needs of the investigation; and
- that if they do not agree to attend voluntarily at a time which meets the needs of the investigation, or having so agreed, fail to attend, or having attended, fail to remain for the interview to be completed, their arrest will be necessary to enable them to be interviewed.

Note for guidance 2G…If a person who attends the police station voluntarily to be interviewed decides to leave before the interview is complete, the police would at that point be entitled to consider whether their arrest was necessary to carry out the interview.

College of Policing APP

Persons attending a police station voluntarily who are not arrested

Where a person is interviewed as a suspect in a voluntary interview, is not arrested but is cautioned, the person giving the caution must tell them that if they agree to remain voluntarily, they may obtain free and independent legal advice.

The officer should give the person a copy of the written notice explaining arrangements for obtaining legal advice and specify that this includes the right to speak to a solicitor on the telephone. The officer should ask the person if they want advice and make appropriate arrangements if they do. No other written information needs to be provided.

The interviewing officer must ensure that they follow any other provisions of Codes C, E and F that can be applied to suspects who are not under arrest.