

Police and Criminal Evidence Act 1984 (PACE)

The PACE system is divided into the Act itself, the Codes of Practice which are not law and the Notes for Guidance which are technically not part of the Codes¹. The Act contains no provisions relating to AAs for vulnerable adults.

Section 63B (Testing for presence of Class A drugs) defines who may act as AA for a juvenile² and requires that an AA be present in relation to testing juveniles for Class A drugs .

Section s.66 and 67 (Codes of Practice) require the Secretary of State to issue codes of practice and make revisions by statutory instrument subject to consultation and approval of Parliament. Codes are admissible in evidence and shall be taken into account by courts and tribunals where relevant.

Section 76 (Confessions) (2)(b) requires courts to exclude from evidence a confession that was made in consequence of anything said or done likely to make it unreliable, unless the prosecution can prove beyond reasonable doubt that it was not. This includes the omission of an AA when one was required (see *R vs Gill* [2004] in Paper C).

Section 78 (Exclusion of unfair evidence) (1) enables courts to refuse evidence that was obtained in circumstances that mean it would have such an adverse effect on fairness that they ought not to admit. Courts have excluded evidence and quashed convictions under this section due to the absence of an AA (Paper C).

Section 77 (Confessions by mentally handicapped persons) directs courts to have special caution before convicting where a case depends on a confession by someone "in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning" when an independent person was not present. Courts have struck out evidence on this basis. Independent AAs satisfy this requirement.

PACE Codes of Practice

All information relating to AAs for vulnerable adults is contained in the PACE Codes and is spread across Codes C, D, E, F and H³. Though the Codes are not law, in combination with PACE 1984 s.76-78 they have legal status and practical effect in case law and if they are not followed then courts may refuse to admit evidence and may quash convictions (see Paper C). This applies to their Notes for Guidance, despite the statement within the Codes that they are not part of them⁴.

The Codes set out the AAs purpose and powers, who may act, the thresholds defining when one is required, the actions police must take and the circumstances and procedures for which one must be present (see Paper I). These rules apply so far as is possible, to 'voluntary attenders' who are interviewed under caution without arrest).⁵

¹ Zander (2012). If the PACE Codes Are Not Law, Why Do They Have to Be Followed? *Criminal Law and Justice Weekly* <http://www.criminallawandjustice.co.uk/features/If-PACE-Codes-Are-Not-Law-Why-Do-They-Have-Be-Followed>

² Section 63B(10)(a) defines eligibility as parents, representatives of care organisations, local authority social workers or, failing those, anyone over 18 with the exception of those employed by the police. As currently enacted, a juvenile is aged under 17 years. However, the Criminal Justice and Courts Act 2015 will amend this to under 18 years.

³ Code C: detention, treatment, questioning and identification; Code D (identification, fingerprints, and parades); Code E and F (audio and visual recording interviews); of persons by police officers (or Code H for Terrorism Act 2000 cases).

⁴ Zander (2012). If the PACE Codes Are Not Law, Why Do They Have to Be Followed? *Criminal Law and Justice Weekly* <http://www.criminallawandjustice.co.uk/features/If-PACE-Codes-Are-Not-Law-Why-Do-They-Have-Be-Followed>

⁵ Although the Codes focus on detention, their requirements apply, so far as is possible, to voluntary attenders (interviewed without arrest but under caution regarding suspected involvement in an offence). This includes determining whether they require an AA under Code C 3.5(c)(ii). (Code C 3.21)

The Crime and Disorder Act 1998

Provisions relating to AAs

Sections 38 and 39 place a statutory duty on local authorities (via Youth Offending Teams) to ensure provision of persons to act as AAs for all children and young persons in their area, “to safeguard the interests of detained or questioned by police officers” – the only definition of AAs in legislation.

Sections 66ZA and 66B assign additional AA responsibilities beyond those in PACE. AAs must be present in relation to youth cautions and youth conditional cautions. The associated Code of Practice⁶ notes that as 17 year olds are excluded from this support⁷ “the authorised person must also bear in mind the provisions of PACE Code C concerning mentally disordered or mentally vulnerable offenders and the use of an appropriate adult” and “ensure that an appropriate adult is present...where there is reason to doubt the capacity or ability...to fully understand the nature and requirements of a youth conditional caution.”

Community Safety Partnerships

Section 17 requires local authorities to have due regard to the need to, and do all it can to, prevent crime and disorder, re-offending and the misuse of drugs, alcohol and other substances. All policies, strategies, plans and budgets must therefore be considered with the potential contribution to the above.

Sections 5 to 7 form the basis for CSPs including local authorities, police and clinical commissioning groups (CCGs) as statutory partners, require the implementation of joint strategies as per section 17 and provide reports to the Secretary of State.

The Human Rights Act 1998 (HRA 1998)

Article 2 (Right to life) imposes an obligation to protect individuals in state detention whose life is at risk, including from suicide. This includes a duty to put in place appropriate systems designed to protect lives. According to the ECHR (2015)⁸, in relation to police detention, this includes but is not limited to: -

- Freedom from abuse, bullying, threats, disrespectful treatment and neglect
- Freedom from unlawful restraint
- An effective risk assessment by a qualified practitioner as soon as practicable and timely access to medical and mental health treatment
- Access to support, plus information and advice in an appropriate format on how to access it

Article 6 (right to a fair trial) sets out a number of minimum rights. This includes being informed in a way a person understands and in detail, the nature of the accusation against them. Case law has held that Article 6 applies to suspects interrogated in police custody, with obvious implications for people with a mental vulnerability.

Article 8 (right to private and family life) has been interpreted broadly by courts and includes what is, in effect, a proportionality balancing test between the right and interference with it by a public authority (such as the police) in accordance with the law. Areas such as police fingerprinting and photography, for which AAs should be present, may come under this Article.

⁶ Code of Practice for Youth Conditional Cautions Crime & Disorder Act 1998 (as amended by the Criminal Justice & Immigration Act 2008 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012)

⁷ The Criminal Justice & Courts Act 2015 will amend this to all children under 18

⁸ Equality & Human Rights Commission (2015) Preventing Deaths in Detention of Adults with Mental Health Conditions. London: EHRC

Article 14 (discrimination) requires rights under all articles to be afforded without unjustifiable discrimination between groups, including people who are disabled.

The recent Equality and Human Rights Commission Inquiry published a Human Rights Framework for Adults in Detention and recommended its adoption and use as a practical tool in police custody (ECHR, 2015)⁹.

The Equality Act 2010¹⁰.

Sections 6 and 15: define disability as a physical or mental impairment, which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities; and prohibit unfavourable treatment that is not proportionate and legitimate where the disability was known or could reasonably have been.

Section 28 requires reasonable adjustments to be made to standard provisions, criteria, practices or physical features to avoid disadvantage. Reasonable steps must be taken to provide any 'auxiliary aid' without which a disabled person would be disadvantaged.

Section 149 establishes a proactive, public sector equality duty. Section 153 gives a Minister power to impose specific duties on specific public authorities following consultation with the Equality and Human Rights Commission.

The Mental Health Act 1983 (MHA 1983)

Section 1(2) states that 'mental disorder means any disorder or disability of the mind'. There are several hundred definitions of mental disorders alone (American Psychiatric Association, 2013)¹¹ but include Alzheimer's disease, autism, Down's syndrome, dementia, personality disorders, psychosis and schizophrenia. Learning disability (defined as 'a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning') is included for most purposes in the Act and always where the 'disability is associated with abnormally aggressive or seriously irresponsible conduct'. The PACE Codes use this definition, while the PACE Act retains the term 'mentally handicapped'.

Section 130A establishes *Independent Mental Health Advocates (IMHA)* to provide advice and support around rights, options and in raising concerns about the care received for those in secure mental health detention, although they are not legal advisers. IMHAs are provided by various organisations and funded by a Department of Health Grant passed down to local authorities.

The Mental Capacity Act 2005

Section 1 sets out five underpinning principles: presumption of capacity; right for individuals to be supported to make their own decisions; right to make unwise decisions; best interests; and the least restrictive intervention.

Sections 35 and 36 establish Independent Mental Capacity Advocates (IMCAs) to safeguard people to whom authorities are seeking to apply safeguarding powers and enable the local authority to "make such arrangements as it considers reasonable" to ensure IMCA availability.

Most 'mentally vulnerable' adults will not lack capacity but will still require, and cannot refuse, an AA. Where AAs have doubts about capacity they request a professional MCA 2005 assessment.

⁹ ECHR (2015) Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission

¹⁰ Principle 2 of the College of Policing's Authorised Professional Practice on investigative interviewing notes that Equality Act 2010 and the Human Rights Act 1998 must be complied with

¹¹ The Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5)

The Health and Social Care Act 2012

This Act created a new commissioning framework for health and social care in England, creating local Clinical Commissioning Groups (CCG) and the NHS Commissioning Board. Health and Wellbeing Boards (HWB) must be established by local authorities, and produce a strategy which feeds into CCG planning. Their statutory membership includes each local CCG, directors of both child and adult social services and the local director of public health. This transformation and integration is supported by the £3.8 billion Better Care Fund (BCF), a pooled budget that shifts resources into social care and community services for the benefit of the NHS and local government. As part of the changes, the revised Health and Care Professions Council extended to "regulating health, psychological and social work professionals". The HCPC also regulates Speech & Language therapists and is being accorded powers to set up voluntary registers for unregulated professions or related professions.

The Care Act 2014 (England only)

The Act provides a new framework for safeguarding adults and significantly increases local authority responsibility for health and social care.

Section 1 (*Promoting wellbeing*) requires local authorities carrying out any care and support function, to promote a person's well-being, including mental health and emotional well-being; protection from abuse and neglect; social and economic well-being; personal dignity and their contribution to society. Critically, the Act does not specify the services which must be commissioned.

Section 6 (*Local Co-operation*) creates a duty of co-operation between a local authority and partners (police, probation, NHS, local authorities) in relation to adults with needs for care and support.

Section 43 and Schedule 2 (*Safeguarding Adults Boards*) require each local authority to establish a Safeguarding Adults Board (SAB) to help and protect adults where there is reasonable cause to suspect they have needs for care and support, are at risk of abuse or neglect, and are unable to protect themselves. Statutory members include CCGs and chiefs of police. Annual strategic plans and reports must be made and shared with the Chair of the local Health and Wellbeing Boards.

Section 67 (*Independent Advocacy Support*): requires that, local authorities must, when engaging with a person under the Act, arrange for an independent person to represent, support and facilitate their involvement. This applies when they would experience substantial difficulty in understanding, retaining, using or weighing relevant information or communicating their views.

Though the Act focuses on vulnerable people as victims, its statutory guidance states that, "Everyone is entitled to the protection of the law and access to justice." It also states that where a suspected abuser "has care and support needs and are unable to understand the significance of questions put to them or their replies, they should be assured of their right to the support of an 'appropriate' adult if they are questioned by the police under the Police and Criminal Evidence Act 1984 (PACE)" (Department of Health, 2014)¹².

Social Services and Well-being (Wales) Act 2014

Alongside the Care Act in England, this Act establishes entirely separate social care legislation for England and Wales. Many of the principles and much of the wording are similar to the Care Act 2014. The duties to promote well-being, co-operate and share information are similar. Section 134 establishes Adult Safeguarding Boards,

¹² Care and Support Statutory Guidance, Issued under the Care Act 2014, Department of Health

though these will not necessarily be contiguous with local authority areas. Section 132 establishes a National Independent Safeguarding Board, supporting SABs and reporting on them to Ministers.

Autism Act 2009 (England)

The Act requires the Secretary of State to prepare and publish an autism strategy for meeting the needs of adults with autistic spectrum conditions by improving the provision of relevant services to such adults by local authorities, NHS bodies and NHS foundation trusts and to issue guidance to them to ensure implementation.

Under the strategy, 'Think Autism: Fulfilling and Rewarding Lives' (HM Government, 2014), priority challenge 13 is "If I break the law, I want the criminal justice system to think about autism and to know how to work well with other services". People with autism need access to support when suspected of committing a crime. The police should ensure they have access to expertise to support adults with autism.

The Department of Health is currently running a [consultation](#) on new statutory guidance. The draft guidance makes a number of relevant statements: -

- It applies to local authorities and health bodies working with justice system agencies
- Local authorities should ensure they are looking at the needs of their local autism population, including those who do not meet thresholds for care and support.
- Without "preventative support and safeguarding in line with the Care Act" people with autism can spiral into contact with the justice system.
- People with autism need access to support whether they are a victim, or witness, or are suspected of committing a crime.
- When people with autism come into contact with the criminal justice system it is often up to them, or their carer, to explain what having autism means. In some cases, it can positively change the way that police or courts view a situation.
- Police, probation services, courts and prisons should be supported so that they are aware of the communication challenges experienced by people with autism.
- The role local authorities, via Community Safety Partnerships (CSPs), is to bring agencies together to develop plans to support the Autism Strategy.
- The role of health bodies is to deliver on the Liaison & Diversion Programme to ensure people with autism are referred into services and diverted from offending, and to share information to enable more informed decisions about charging, case management and sentencing.

Local Authority Social Services Act 1970

Amongst others under Schedule 1, social services functions explicitly include: -

- the protection of the young in relation to criminal and summary proceedings (Children and Young Persons Act 1933 (c. 12) Part III)
- the welfare of persons who are blind, deaf, dumb or otherwise handicapped or are suffering from mental disorder (National Assistance Act 1948 (c. 29) sections 29 and 30)
- the welfare of mentally disordered persons (Mental Health Act 1959 section 8 and the Mental Health Act 1983 Parts II, III and VI)
- instructing an independent mental capacity advocate before providing accommodation for person lacking capacity (Mental Capacity Act 2005 section 39)

National Assistance Act (1948)

Section 1 states that a local authority may, with the approval of the Secretary of State, make arrangements for promoting the welfare of people aged eighteen or over who are blind, deaf or dumb, or who suffer from mental disorder of any description and other persons aged eighteen or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.

International Obligations

The UN Convention on the Rights of Persons with Disabilities was ratified by the UK in 2009. It has not been embedded into law but all UK government policies and practices must comply with the convention¹³. Article 13 requires effective and equal access to justice for people with disabilities in all legal proceedings, including at investigative and other preliminary stages and the promotion of appropriate training for police (amongst other professionals).

In 2003, the UK ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). A National Preventive Mechanism is co-ordinated by HM Inspectorate of Prisons. The aim is to strengthen protection for people who are vulnerable by virtue of being deprived of their liberty.

¹³ HM Government (2010) Creating a fairer and more equal society/ Available at <https://www.gov.uk/government/policies/creating-a-fairer-and-more-equal-society/supporting-pages/united-nations-convention-on-the-rights-of-disabled-people> (Updated August 2014) [Accessed 10/03/2015]