

# #08 Police bail and remand

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**This guide provides an overview of the law on the pre- and post-charge detention of children by the police and examines the corresponding duties of the local authority.**

The guide gives practical tips on what can be done by practitioners to reduce the time spent by children in police custody and, in particular, how to avoid their detention overnight at the police station.

# Introduction

Police have the power to interview children under caution without arresting or detaining them – these are often referred to as ‘voluntary interviews’, or ‘caution plus three’. These interviews can happen at the police station,<sup>1</sup> sometimes by appointment, or outside of the police station. Such interviews can be an efficient way of reducing the amount of time that children spend in police custody, although it is important to remember that their rights under Code C of the Police and Criminal Evidence Act 1984 (PACE)<sup>2</sup> still apply to these interviews.

However, children are not interviewed under caution outside a custody suite as often as they could be. Many children find themselves arrested and detained in police custody for longer than necessary, despite government recognition that the custody environment is designed to hold adult suspects and that prolonged exposure to such a setting can be harmful to a child.<sup>3</sup>

Although s38(6) PACE stipulates that children who are refused bail after charge should be transferred to local authority accommodation, research shows that the majority of these children are unlawfully being kept in police cells on a daily basis.<sup>4</sup>

1 s29 Police and Criminal Evidence Act 1984 (PACE)

2 Police and Criminal Evidence Act 1984 (PACE) Code C (revised): Code of Practice for the detention, treatment and questioning of persons by police officers, Home Office, published 20 August 2019, last updated 4 November 2020, [bit.ly/3HMoTJH](https://bit.ly/3HMoTJH)

3 Concordat on children in custody: preventing the detention of children in police stations following charge, Home Office, published October 2017, last updated 16 January 2020, [bit.ly/3l0GiEC](https://bit.ly/3l0GiEC), p3

4 Research by Just for Kids Law found that 1,209 children were detained overnight (4 hours or more between midnight and 8am) post-charge by the Metropolitan Police Service in 2019

# Pre-charge

## Law and policy

The custody officer may only authorise a person's detention in police custody if there is insufficient evidence to charge and there are reasonable grounds for believing that their detention is necessary to secure, preserve or obtain evidence relating to the offence.<sup>5</sup>

Once the person's detention in custody has been authorised, children are subject to the same time limits as adults under investigation. The detention of any suspect must first be reviewed after 6 hours, and thereafter every 9 hours.<sup>6</sup>

The initial 24 hours can be extended to 36, and thereafter extended again by warrants of further detention for the most serious offences.<sup>7</sup>

Throughout this time, the police must observe the National strategy for the policing of children and young people:<sup>8</sup>

'It is crucial that in all encounters with the police those below the age of 18 should be treated as children first. All officers must have

regard to their safety, welfare and well-being as required under S10 and S11 of the Children Act 2004 and the United Nations Convention on the Rights of the Child.'<sup>9</sup>

Section 11(2)(a) of the Children Act 2004 states that when police officers are discharging their duties they must ensure that 'their functions are discharged having regard to the need to safeguard and promote the welfare of children'.

The College of Policing further clarifies:

'Officers must take into account the age of a child or young person when deciding whether any of the Code G statutory grounds for arrest apply. They should pay particular regard to the timing of any necessary arrests of children and young people and ensure that they are detained for no longer than needed in accordance with paragraph 1.1 of Code C. Officers should avoid holding children overnight in police cells unless absolutely necessary.'<sup>10</sup>

## Practical advice

The most frequent reason cited for the ongoing detention of a suspect is the need to obtain evidence by means of questioning the detained person.

Children must be interviewed in the presence of an appropriate adult. The adult's attendance can cause further delay, as availability can be an issue (for example, parents with other children to care for; scheme members being in high demand).

After the initial interview, detention may continue while co-suspects are interviewed; investigations continue that may necessitate re-interview; and the file is considered by the Crown Prosecution Service (CPS). Proactive representation at the police station can avoid this:

- Question whether the grounds for arrest and/or detention still apply. If the sole reason for detention is to secure evidence through questioning, a voluntary interview will achieve the same objective.
- Question whether a child should be detained while awaiting the availability of an appropriate adult to attend the interview. The other childcare responsibilities of parents are more likely to be an issue at night, and some appropriate adult schemes do not send representatives after midnight. This frequently means a night in the cell for children before the interview takes place, reducing their ability to effectively participate in the interview procedure. If a voluntary interview at a later date is not appropriate, consider applying for bail overnight with or without conditions.
- Any representations that are refused by the custody officer can be repeated to the PACE Inspector with reference to the duties outlined above.
- Question whether interviews of co-suspects, further investigations and consideration by the CPS can take place on police bail.

5 s37(3) PACE as amended by s54(6) Policing and Crime Act 2017

6 s40(3) PACE

7 ss41–44 PACE

8 National Police Chiefs' Council, April 2015, [bit.ly/31ZV2Kg](http://bit.ly/31ZV2Kg)

9 National strategy for the policing of children and young people, p8, [bit.ly/31ZV2Kg](http://bit.ly/31ZV2Kg)

10 College of Policing, Authorised Professional Practice (APP), 'Detention and custody / Detainee care / Children and young persons', Section 2 'Arrest and detention of children and young persons', [bit.ly/3cKHmb2](http://bit.ly/3cKHmb2)

# Post-charge

## Bail – the law

There is a presumption in favour of bail. Section 38(1) PACE states that the custody officer shall order the release of a detained child after charge unless one of the following exceptions apply:

- their name or address cannot be confirmed<sup>11</sup>
- there are reasonable grounds to believe the person will fail to attend court<sup>12</sup>
- their detention is necessary for their own protection<sup>13</sup> or to prevent physical injury to another or to prevent loss of/damage to property<sup>14</sup>

- there are reasonable grounds to believe that detention is necessary to prevent interference with the administration of justice or with the investigation of offences<sup>15</sup>
- their detention is in their own interests.<sup>16</sup>

In addition, s63B PACE permits detention after charge for the taking of a sample.

Unless exceptional circumstances apply, bail will also be refused for anyone charged with homicide, rape or related offences who has previously been sentenced to detention for any offence listed in s25(2) Criminal Justice and Public Order Act 1994.

## Practical advice

The police should contact the local authority / local YOT to obtain information to assist with deciding whether or not to grant bail. Often the reality of this is that the YOT are notified of the child's presence in custody, rather than an exchange of useful information taking place.

- During consultation, ask for the child's consent to contact anyone who could assist with compiling a bail package. This could include family members, Children's Social Care Services and the YOT.

The custody officer should hear from the legal representative and from the appropriate adult before reaching a decision on bail. To answer any concerns relating to the exemptions to bail listed in s38(1) PACE, consider proposing the following bail conditions in representations:

- conditions of residence
- reporting to a local police station
- doorstep curfew
- exclusion zones
- non-contact with named persons.

There is no statutory definition of 'their own interests' as a ground to refuse bail, but compliance with existing court orders and engagement with YOTs on a voluntary/preventative basis can be relevant to the decision-making process.

## Refusal of bail – the law

The custody officer must make a written record of the grounds for the detention.<sup>17</sup>

Section 38(6) PACE places a duty on the police to transfer children who have been refused bail to local authority accommodation rather than keeping them in the police station overnight. The 2 exceptions to this are:

1. where the custody sergeant certifies that it is impracticable to move the child to local authority accommodation; or
2. where the child has attained the age of 12 and no secure accommodation is available, and keeping the child in non-secure local authority accommodation (such as emergency foster care, a children's home or staying with family members) would not be adequate to protect the public from serious harm from the child.

11 s38(1)(a)(i) PACE

12 s38(1)(a)(ii) PACE

13 s38(1)(a)(vi) PACE

14 s38(1)(a)(iv) PACE

15 s38(1)(a)(v) PACE

16 s38(1)(b)(ii) PACE

17 s38(3) PACE

## Impracticable

The Home Office Concordat on children in custody states that:

‘the term “impracticable”, is often misunderstood. It does not:

- (a) relate to the availability of Local Authority accommodation or transport;
- (b) relate to the nature of the accommodation offered by the Local Authority;

- (c) relate to the child’s behaviour or the nature of the offence; or
- (d) mean “difficult” or “inconvenient”.<sup>18</sup>

The Concordat<sup>19</sup> states that if a child is not transferred due to impracticability, that should be cleared by a duty inspector.

## Availability of secure accommodation

Secure accommodation can only be requested when it is necessary to protect the public from serious harm from the child. This is a high threshold. Serious harm means ‘death or serious personal injury, whether physical or psychological’.<sup>20</sup> Despite this, over half of the requests made for local authority accommodation by the Metropolitan Police in 2019 were for secure accommodation.

PACE Code C para 16.7 states that chief officers should ensure that the operation of transfers under s38(6) PACE at the police station in their areas should be ‘subject to supervision and monitoring by an officer of the rank of inspector or above’.

The police must also present a certificate to the court explaining why the transfer failed.<sup>21</sup> This is called a ‘juvenile detention certificate’.

## Legal obligations of the local authority

Section 21(2)(b) Children Act 1989 places a corresponding duty on local authorities to provide accommodation when they are requested to under s38(6) PACE.

There is an absolute duty on the local authority to provide accommodation when non-secure accommodation is requested.<sup>22</sup> Once a local authority has received a request for non-secure

accommodation, they can decide where to place the child and whether it is a secure or non-secure placement (in accordance with s25 Children Act 1989). Transfer to non-secure local authority accommodation can be to a foster home, a children’s home or sometimes with a family member or friend.

In London, only 20% of requests for non-secure accommodation were accepted in the last six months of 2020. In 2020, there were 2,222 children held post-charge over the 18 police forces who responded to freedom of information (FOI) requests on this issue – all of whom therefore should have been transferred. There were significant regional differences, with some forces transferring no children (eg Bedfordshire, Gloucestershire) and other areas where over half of requests for non-secure accommodation were met (eg Essex, Hertfordshire, Devon).

Although the same absolute duty does not apply to requests for secure accommodation, there is a duty to have in place a reasonable system to enable them to respond to requests under s38(6) PACE for secure accommodation.<sup>23</sup> In 2021, the Court of Appeal found that the London Borough of Waltham Forest were in breach of this duty (*R (AR) v LB Waltham Forest* [2021] EWCA Civ 1185).

Transfer to secure local authority accommodation can be to a secure children’s home.

A police force can contact any local authority it chooses to request accommodation.<sup>24</sup> Once the request is received, that local authority is bound to provide accommodation under the Children Act 1989. The most sensible choices would generally be the authority in which the police station

18 Concordat on children in custody p12

19 Concordat on children in custody p12

20 s38(6A) PACE

21 s38(6)(a) and (7) PACE

22 *R (M) v Gateshead Council* [2006] EWCA Civ 221, para 41

23 *R (M) v Gateshead Council* [2006] EWCA Civ 221, para 43

24 *R (M) v Gateshead Council* [2006] EWCA Civ 221, para 23

is located, the authority in which the crime was committed or the authority in which the child is normally resident.<sup>25</sup>

Once a child is transferred to local authority accommodation, the duties in relation to the child also transfer to the local authority.<sup>26</sup> This includes the production of the child at the first available court sitting,<sup>27</sup> detention of the child under s38(6B) PACE 1984 (if the child runs away they can be charged with escape from lawful custody)

and placement of the child at the most suitable address. This means that the local authority can choose to return the child to their home address even if this had not been considered viable for conditional bail. Conversely, it can also result in the child being placed at a secure children's home if the criteria of s25 Children Act 1989 are met, even when the police have not requested secure accommodation.

## Arrests on warrant and for breach of bail

Section 38 PACE does not apply to children arrested for breach of bail under s7 Bail Act 1976 or on a warrant under s13 Magistrates' Court Act

1980. However, it does apply if the child has been charged with another offence and is not solely in custody for breach of bail.

## Practical advice

- The Home Office Concordat on children in custody provides practical advice to all involved in dealing with children in police custody. It recommends the provision of regional protocols such as those produced for London and Greater Manchester. These supplement the Concordat and provide regional-specific information on problem-solving and escalation processes. Refer to these documents if you become aware of a dispute between the local authority and police force that is causing delay to the child's transfer.
- Some children are in the care of one local authority who have placed them in another area, which again may be different to the one in which the police station is located. The local authority with pre-existing responsibility for the child, if not too distant, will be the ideal choice, as they should have the most information about them and be best placed to find the most suitable accommodation.
- Communication with the Emergency Duty Team (EDT) / Out of Hours Team (OOHT) of Children's Services is crucial. They could potentially provide additional information, which can assist with the decision about whether secure or non-secure accommodation is more appropriate. They are able to confirm that the police have fulfilled their obligations under s38 PACE and provide updates on the processing of the receipt of the request. Contact details for the EDT/OOHT of each Children's Service are usually available on the local authority website and can also be found on the regional safeguarding partnership websites. They should also be readily available in each custody suite.
- If the child is not transferred into local authority accommodation, a copy of the custody record and the juvenile detention certificate should be requested. The custody record should include a record of all contact with the local authority, and the juvenile detention certificate will record the reasons for the failure to transfer. These should be considered before deciding whether the ongoing detention of the child in police custody is potentially unlawful. This can be challenged by way of judicial review to an emergency out of hours High Court Judge.
- If the child appears in court the following day from police custody, there may be merit in asking the court to express its views to the police station in question. This can help develop change where the police station applies a blanket policy to children charged with certain types of offences without properly considering their obligations under s38 PACE.

25 Concordat on children in custody p14

26 s39(4) PACE

27 s46 PACE

# Relevant legislation, case law and resources

## Legislation

s38(6) PACE  
PACE Code C  
PACE Code C, Note for Guidance 16D  
s21(2)(b) Children Act 1989  
s25 Children Act 1989  
s11 Children Act 2004

## Case law

R (M) v Gateshead Council [2006] EWCA Civ 221  
R (AR) v London Borough of Waltham Forest [2021] EWCA Civ 1185

## Non-statutory guidance

Home Office Circular No 78/1992 – Criminal Justice Act 1991: detention etc of juveniles<sup>28</sup>  
Post-charge framework for transfers of children to local authority accommodation (flowchart), National Appropriate Adult Network (NAAN), 2015  
Joint letter from the Home Office and the Department for Education to Local Authorities in England, Lead Member for Children's Services, on the transfer of children from police custody to local authority accommodation under section 38(6) of the Police and Criminal Evidence Act 1984, 20 January 2015<sup>29</sup>  
Concordat on children in custody: preventing the detention of children in police stations following charge, Home Office, published October 2017, last updated 16 January 2020<sup>30</sup>

## Other useful information

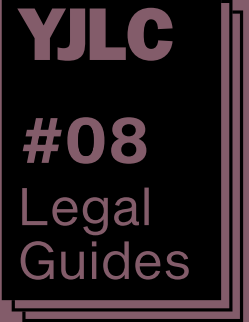
National strategy for the policing of children and young people, National Police Chiefs' Council, August 2015<sup>31</sup>  
College of Policing, Authorised Professional Practice (APP), 'Detention and custody / Detainee care / Children and young persons'<sup>32</sup> An introduction to judicial review, Public Law Project, 2018<sup>33</sup>  
How to apply for legal aid funding for judicial review, Public Law Project, 2016<sup>34</sup>

28 [bit.ly/32J7tO7](https://bit.ly/32J7tO7)  
29 [bit.ly/3nljriQ](https://bit.ly/3nljriQ)  
30 [bit.ly/3l0GiEC](https://bit.ly/3l0GiEC)  
31 [bit.ly/3lZV2Kg](https://bit.ly/3lZV2Kg)  
32 [bit.ly/3cKHmb2](https://bit.ly/3cKHmb2)  
33 [bit.ly/3DNSO19](https://bit.ly/3DNSO19)  
34 [bit.ly/3DFPm9j](https://bit.ly/3DFPm9j)

#08

Police bail and remand

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#01  
Turning 18

#02  
Intermediaries for  
child defendants

#03  
Child Criminal  
Exploitation

#04  
Criminal  
Behaviour Orders

#05  
Trauma Informed  
Lawyering

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#07  
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#09  
Court Bail  
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#10  
Diversion

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Sexual allegations

#12  
Anonymity

#### Youth Justice Legal Centre

[yjlc.uk](http://yjlc.uk)

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

#### Doughty Street Chambers

[doughtystreet.co.uk](http://doughtystreet.co.uk)

Doughty Street Chambers offers extensive expertise across numerous child rights-related areas and has wide-ranging experience in bringing ground-breaking litigation for and concerning children in public law, extradition, immigration, mental health, community care, prison law, trafficking, education, criminal justice, clinical negligence and inquests. Many of our members specialise in complex and developing areas concerning the rights of children, including female genital cutting (FGC) and children, abortion rights for vulnerable teenagers, unaccompanied minors' rights, the education rights of children in custody, inclusive education for disabled children, children's effective participation in criminal trials, and the rights of LGBTQI children.

#### Just for Kids Law

[justforkidslaw.org](http://justforkidslaw.org)

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.

#### Paul Hastings

At Paul Hastings, corporate social responsibility isn't just the right thing to do. It's smart business. We undertake challenging pro bono matters with the same intense focus we bring to all our work, while engaging and empowering our employees to advance change. We believe in supporting purposeful programs that have a meaningful impact on our communities around the world, including our commitment to the Youth Justice Legal Centre at Just for Kids Law, who we have partnered with for a number of years, to assist with their mission of providing much-needed legal guidance and training on youth justice law.