

Legal privilege & confidentiality

Proposal to the PACE Strategy Board to clarify appropriate adult responsibilities in legal and private consultations with children and vulnerable people

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Legal privilege and confidentiality

Legal privilege (AAs in consultations between children/vulnerable adults and their solicitor)

The final sentence in PACE Code C 2023 note for guidance 1E is does not reflect the case law. A 2009 court judgement found the current wording to be “misleading”.

Code C 1E states: “A detainee should always be given an opportunity, when an appropriate adult is called to the police station, to consult privately with a solicitor in the appropriate adult’s absence if they want. **An appropriate adult is not subject to legal privilege**”.

However, case law, in particular *Bozkurt* [2001] and *A Local Authority v B* [2009], make clear:

- a) conversations with an AA are not privileged; however
- b) the presence of an AA at a conversation which would otherwise attract legal advice privilege does not destroy that privilege; and
- c) in legal consultations the AA is bound by the same confidentiality as the solicitor.

In *A Local Authority v B*, Hedley J concluded, “...it cannot be right either as a matter of principle or policy that a vulnerable juvenile should in practice be deprived of the opportunity of confidential legal advice...**the presence of an AA at a conversation which would otherwise attract legal advice privilege does not destroy that privilege**. What was said on that occasion cannot be revealed beyond the three people who were present at it...**the Notes and Home Office Guidance are misleading** insofar as they can be taken to suggest either that the presence of an AA destroys privilege or that privilege can only be maintained by an exclusive private interview with a solicitor...”.

In reference to Code C 1E, Zander (2023) states that, “The second sentence is the reason lawyers often prefer to see the detainee without an appropriate adult—because of a fear that the appropriate adult might be called at the trial by the prosecution to give evidence about admissions made by the suspect during their consultation. Given the text this is understandable, but the fear is misplaced...what needs to be added is (1) that the presence of an appropriate adult at a meeting between the detainee and their solicitor does not destroy the legal privilege that attaches to the exchange; and (2) **an appropriate adult who attends an interview together with a lawyer is bound by the same duty of confidentiality as the lawyer**”.

Confidentiality (AA consultations with a child/vulnerable adult)

Code C states the child or vulnerable adult’s right to ‘private’ consultations with the AA but does not clarify the extent of privacy and consequences of disclosure.

Code C 3.15 states: “If the detainee is a juvenile or a vulnerable person, the custody officer must, as soon as practicable, ensure that...the detainee is advised...of the duties of the appropriate adult as described in paragraph 1.7A; and that **they can consult privately with the appropriate adult at any time**”.

In *R v Ward* [2018], an AA overcame a vulnerable adult’s initial refusal of legal representation. While waiting for the solicitor, with Mr Ward in a particularly vulnerable state, the AA involuntarily received purported admissions. After legal advice, Mr Ward gave a ‘no comment’ interview. The Court of Appeal allowed the AA to be called as a witness to the admissions. To the extent they are aware, this case causes anxiety for defence solicitors, AAs and suspects.

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The AA's core purpose is to safeguard the interests of the person (Crime and Disorder Act 1998 s.38(4)). Amongst other things, they are expected to "support, advise and assist them" when they are asked to provide information or participate in any procedure (Code C 1.7A).

Common law has established that confidentiality applies where: (a) it is implicit or explicit that privacy should be expected; (b) information shared is non-trivial, sensitive, and not in the public domain; (c) there is a risk of disclosure to the detriment of that person. Where confidentiality applies, information must not be divulged to a third party unless:

- a) The individual consents to disclosure.
- b) There is a statutory basis for disclosure.
- c) A court orders disclosure.
- d) Disclosure is in the public interest (balanced against the interest in confidentiality)

While confidentiality is not legal privilege, it protects sensitive information and reduces the risk of unfair disclosure. Courts recognise the risk of undermining fairness presented by information obtained in breach of confidentiality. Just six months after *Ward*, in *R v H* [2018] the Court of Appeal held that a Youth Offending Service officer owed a duty of confidentiality to a child who had made purported admissions, stating it would be "*contrary to public policy to breach the confidentiality of discussions of [this] kind save for very good reason*".

Proposals to discuss

In Code C 1E:

- Remove: "An appropriate adult is not subject to legal privilege."
- Add: "If the detainee chooses to have the appropriate adult present during a legal consultation, the appropriate adult is bound by the detainee's right to legal privilege not disclose information shared within that consultation to any person who was not present."
- Add: "Private conversations between a detainee and the appropriate adult are subject to the common law duty of confidentiality."
- Add: "The custody officer should ensure that appropriate adults are advised that they must not disclose information without being clear of the legal basis for doing so."

In Code C 3.15:

- After "...consult privately with the appropriate adult at any time", add: "see note 1E."

References

- Imam Bozkurt v Thames Magistrates Court [2001] EWHC Admin 400 [\[Link\]](#)
- *A Local Authority v B* [2009] 1 FLR 289 [\[Link\]](#)
- Bath, C. (2014) Legal Privilege and Appropriate Adults, *Criminal Law & Justice Weekly Inappropriate Adults?* [\[Link\]](#)
- *R v H* [2018] EWCA Crim 2868 [\[Link\]](#)
- *R v Ward* [2018] EWCA Crim 1464 [\[Link\]](#)
- Dent, N. and O'Beirne, S. (2020) A Review of the Current Use of Appropriate Adults in the Criminal Justice System, *The Journal of Criminal Law* [\[Link\]](#) (paywall)]
- Zander, M. (2023) Zander on PACE: The Police and Criminal Evidence Act 1984 9th ed p.448

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