Post-charge detention of children

A guide to transferring children refused police bail to local authority accommodation

National Appropriate Adult Network

The flowchart overleaf provided for general informational purposes only and does not constitute legal advice. While efforts have been made to ensure accuracy, laws and guidance may change and be interpreted differently depending on specific circumstances. You should seek your own independent legal advice before relying on or acting upon this information.

Early identification and planning for potential transfers is critical. Appropriate adults (AAs) have a key role in ensuring children's rights are respected in relation to refusal of post-charge bail and the requirement to transfer them to local authority accommodation. This includes identifying potential barriers to bail as early as possible and ensuring the Youth Justice Service (YJS) or Emergency Duty Team (EDT) are informed. This will enable the YJS to meet its responsibilities as per Youth Justice Board Bail & Remand Case Management Guidance to liaise with police to address concerns through bail information, supervision & support.

AAs have a statutory duty to safeguard the interests of detained children. Under PACE Code C 1.7A this includes the child's rights, entitlements and welfare, and the AA is expected, amongst other things to:

- support, advise and assist the child when they are given or asked to provide information or participate in any procedure under the PACE Codes of Practice
- observe whether police act properly and fairly to respect rights and inform a senior officer if not
- assist them to communicate with the police, while respecting their right to silence
- help them to understand their rights and ensure that those rights are protected and respected.

Key legislation

- Police & Criminal Evidence Act 1984 (PACE)
- Children Act 1989
- Sentencing Act 2020 Schedule 18
- Criminal Justice and Public Order Act 1994
- Secure Accommodation Regulations 1991
- UN Convention on the Rights of the Child 1989
- Human Rights Act 1998 Schedule 1 Article 5

Key case law

- R (M) v Gateshead Metropolitan Borough Council [2006] EWCA Civ 221
- AR (A Child), R (On the Application Of) v London Borough of Waltham Forest [2021] EWCA Civ 1185

Key official guidance

- Concordat on children in custody
  England (Home Office)
- Appropriate management & transfer of children & young people by police and local authorities
  Wales (Welsh Government)
- Youth remand concordat
  England & Wales (Ministry of Justice)

Also from NAAN | National Standards | National Training Course | Practitioner Guidance | Scheme Leader Guidance | Commissioning Guidance

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Key | Required → | Yes → | No ⇢ | Police custody officer | Local authority (LA)

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A. Post-charge: Are there grounds for detention of a child under 18? PACE s.38(1)

- **Reasonable grounds to BELIEVE:** s.38(1)(a)
  - Will fail to appear at court
  - Necessary to prevent another offence (if arrested for imprisonable offence); or (otherwise) injury, loss or damage
  - Necessary to prevent interference with justice or the investigation
  - Necessary to get sample for Class A drugs test (PACE s.63B, min age 14)
  - In their own interests (under 18 only)
- Cannot ascertain **name/address**; or reasonable grounds to doubt s.38(1)(a)
- **Charged with murder** s.38(1)(c)
- Charged with, AND **previously imprisoned long term for** listed serious violent or sexual offence AND there are no exceptional circumstances to justify bail CJPOA 1994 s.25(2) & (3A).

1. Is detention necessary AND proportionate? HRA. Find least restrictive way to manage risk. Regard to child's welfare Children Act s.11. **Detention is last resort, for minimum time** UNCRC Art 37(b). Seek YJS bail & remand support.

2. Duty to 'secure the transfer' to LA accommodation PACE s.38(6); applies any time of day or night. Usually local LA but discretion as to **most suitable LA** M vs Gateshead 26.

3. Is transfer practicable? PACE s.38(6)(a). Impracticable means (a) impossible due to exceptional circumstances or (b) in court so soon they would be deprived of rest or miss court. **NOT:** lack of accommodation/transport/staff; inconvenient/difficult; behaviour; or offence Code C 16D, Concordat.

4. Request accommodation from LA
Liaise with local authority ASAP.
Police **may not request secure** unless:

- child is 12 or older; AND
- secure is only accommodation adequate to protect public from **serious harm** in period before first court appearance. PACE s.38(6)(b).

If charged with violent, sexual, or terrorism offence specified in Sch.18 Sentencing Code, '**serious harm**' means death or serious personal injury (physical or psychological) caused by further such offences PACE s.38 (6A). No statutory definition of serious harm exists for other offences.

Very high bar for secure. Record and share specific risk, why it meets threshold, and why any alternative is inadequate for specific period. Discuss with AA and Youth Justice Service, consider representations. Clear with duty inspector Concordat.

5. Is secure accommodation lawful and appropriate? An LA which receives a s.38(6) request has an absolute duty to receive and provide accommodation Children Act 1989 s.21(2)(b); this is not limited to home LA M vs Gateshead 22. LA decides placement type; there is no absolute duty to provide type requested by police. If police request secure, LA should listen carefully, but if unconvinced challenge and discuss alternatives (liaising with YJS) Concordat. For s.38(6) secure is lawful (not mandatory) where, if otherwise placed, a child aged:

- **12-17** (inclusive) is either **likely to abscond** OR **likely to injure** themselves or others Children Act 1989 s.25(1), SAR 1991 6(1)(a), UKSI 2012/3134, UKSI 2015/1883
- **10-11** has **history** of absconding AND is **likely** to abscond AND suffer **significant harm**; OR is **likely to injure** themselves or others (welfare reasons) Children Act 1989 s.25(1).

Approval is required from the Secretary of State for Education before placing a child aged **under 13** in a Secure Children's Home SAR 1991 4, DofE guidance.

6. Is secure LA accommodation available? PACE s.38 (6)(b) (6A). Every LA must have reasonable system accommodation, exercised on request in so far as is practicable M vs Gateshead 43-45; there **must be a reasonable prospect in practice of providing secure accommodation** AR, R v Waltham Forest 65. Education Secretary can make grants for secure accommodation Children Act 1989 s.82(2) but lack of national funding does not negate legal duty on each LA AR, R v Waltham Forest 62-63. Contact YCS Placement Team for live 'PACE beds' availability in Secure Children's Homes.

7. *If police did not request secure go straight to (iii).* **Is LA plan adequate to protect public from serious harm before court?** Discuss risk mitigation and re-assess. Use local escalation process Concordat. Simple disagreement is not a justification; refusal to transfer must be properly **evidenced** and **recorded**.

8. Present (a)/(b) certificate to court

a. Impracticable PACE s.38(6)(a),(7)

b. 12+, non-secure inadequate, and secure not available, PACE s.38(6)(b),(7)

See Concordat for template.

B. Arrest on warrant not backed for bail MCA 1980 s.13; OR **breach of bail** without charge for absconding Bail Act 1976 s.7/s.6. Breach of bail does not remove s.38(6) duty if there is also a charge for any offence.

C. Arrest on warrant endorsed for bail MCA 1980 s.117(2).

(i) Police custody (no transfer)

- Until first available court PACE s.46
- If detained under s.38(6) and not provided with accommodation, police can recover reasonable expenses from home LA Children Act 1989 s.21(3)

(ii) Release with or without bail

- Must appear before court as directed PACE s.47(3) or MCA 1980 s.117(2)(a)
- Discuss any bail conditions Bail Act 1976 s.3A with YJS, AA, solicitor

(iii) Transfer to non-secure accommodation

- LA can detain PACE s.38(6B) and must ensure attendance at first available court PACE s.46
- Police responsibility ceases PACE s.39(4)
- Fostering, family, or friends may be appropriate
- Escape from lawful custody is an offence

(iv) Transfer to secure accommodation

- LA can detain PACE s.38(6B) and must ensure attendance at first available court PACE s.46
- Court order after 72 hours in 28 days SAR 1991
- Police responsibility ceases PACE s.39(4)
- Escape from lawful custody is an offence