National Appropriate Adult Network

NAAN | Policy

PACE Code C Consultation Response

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Considerations

Introduction

The National Appropriate Adult Network (NAAN) warmly welcomes the extension of Appropriate Adult (AA) provision to seventeen year olds. This means that all children and young people in police in detention will have the right to this basic safeguard to their rights and welfare.

The Home Secretary is to be congratulated for moving straight to the statutory consultation phase, rather than choosing to appeal the judgement in [2013] EWHC 982 (Admin).

While the short consultation period has created challenges in developing a detailed submission, particularly for membership organisations who must themselves consult, it is recognised that the Home Office is working to implement the changes as soon as possible.

NAAN would like to see further protections extended to seventeen year old, AA access to custody records supported, and a more sophisticated approach developed towards the complex issue of consent to the various police procedures.

Appropriate Adults

The extension of Appropriate Adults to seventeen year olds is strongly supported and welcomed.

While this will undoubtedly mean a period of change and additional burden upon Appropriate Adult services, such services exist to support all children and they are supportive of the change.

In some areas services have already been extended to seventeen year olds for many months. In others, there has been a proactive response to the judicial review judgement and a positive response to increasing police requests for seventeen year olds following the emerging ACPO guidance.

Moving forward, the principle issues for AAs and scheme manager will be (a) securing appropriate resources and (b) clarity on the status of seventeen year olds relative to adults and children and young people.

NAAN has produced detailed information in relation to average increased resource requirements (see *An estimate of costs for extending statutory provision of Appropriate Adults to 17 year olds in police detention* (National Appropriate Adult Network, 2013). Local circumstances will dictate the specific resource requirements of each scheme.

Custody records

NAAN is concerned about the proposed revision to Code C 2.4 that requests to access the custody record may not interfere with the "justifiable needs of the investigation".

The custody record is absolutely central to the work of the Appropriate Adult and there should be no change that might hinder their right to access it. Vexatious or unreasonable requests can be dealt with under the caveat that they "may not unreasonably interfere with the custody officer's duties".

Concerns have recently been raised with NAAN in relation to the police in some areas limiting access to custody records, in order to save printing costs. Many police forces are now using computer-based custody records. In order to inspect the record, an AA must either be supervised while writing down critical information (inefficient for both parties) or the full record must be printed (costly for the police). The police are acting rationally, as the software was not designed with the ability to print a single page. This means that an AA's (or solicitor's) request for an update requires reprinting the entire document. This may well be repeated at the end of custody, due to the various rights to a copy of the custody record.

Further limitations on access would send the wrong message. While the motivation behind the proposal is no doubt aimed at exceptional circumstances, the language is open to wide interpretation. The word 'justifiable' is particularly open to debate. Such ambiguity could create inefficient friction between AAs and police.

Such a granting of additional powers to the police must not be taken forward without clear evidence as to why it is needed. Evidence would need to be clear as to how AAs access to the custody record has interfered with the needs of an investigation and how this resulted in a poorer justice outcome. Any evidence presented must also be weighed against the potential impact of this additional power to limit the AA's ability to carry out their statutory duty under s.38 of the Crime and Disorder Act 1998.

In most areas of the country, the police are supportive of the AA's right to access the custody record and it would be unfortunate if isolated poor practice were to be encouraged. It would be more sensible to consider amendments to the custody record software, or at least clear and agreed guidance for police and AAs as to what constitutes 'access' to computer-based records.

Interpretation

Under the revised Code C, detainees of all ages have access to interpreters to assist with foreign languages or hearing or speech impediments. However parents acting as Appropriate Adult appear to have access to an interpreter if they have a hearing or speech impediment but not in relation to foreign languages. This relates to all children and vulnerable adults. (Code C 13.6)

Parents

Children and young people are best protected when they have the support of someone they know well who has an interest in their welfare and an effective Appropriate Adult. In some cases, this may be the same person, while in others it may mean a family member and a professionally-skilled Appropriate Adult. This is an on-going debate which is rooted in questions about the seriousness of various offences, the skill level of various parents and the impact of emotional attachment (or otherwise) on effectiveness and outcomes.

In relation to contacting someone with responsibility for the welfare of the child or young person, which is a separate issue to who performs the AA role, there is a need to balance the rights of those children and young people with the rights of their parents.

As with regard to issues of consent (dealt with below), the guiding principle must be what is in the best interests of the detained person and their wishes must be taken into consideration. This is a statutory duty for any service provided by a local authority under the Children Act 1989 s.17 (4A). Under s.11 of the Children Act 2004, the police are under a duty to make arrangements to ensure that they exercise their functions having regard to the need to safeguard and promote the welfare of children.

In relation to younger children, it seems proportionate to have an assumption that parents will always be informed of their child's detention (apart from where there are other factors such as safeguarding concerns). However, it is in relation to seventeen year olds (and indeed sixteen year olds) they may carry a strong preference for a close Uncle or family friend. They may be living entirely independently from their parents and may even be estranged from them. They may prefer that their parents did not know they have been arrested. They may have a parent involved in crime or reinforcing negative attitudes or networks. In other families and communities the stigma associated with being arrested may generate particular harm for the child or young person.

The consultation proposals are therefore right not to apply a blanket requirement to inform parents. However, this is clearly an area which would benefit from further consideration, guidance and possibly future amendments to Code C.

Amendments to legislation

The current proposals are explicitly limited to changes to PACE Code C, eschewing amendments to primary legislation. There has been no indication of intent to make changes to the underlying Police and Criminal Evidence Act 1984 (PACE).

The High Court judgement required the Home Secretary to "at *least* to amend Code C" [emphasis added], not to *only* amend Code C. In order to comply with the ruling, PACE should be amended and this should be undertaken at the first Parliamentary opportunity.

There are no doubt relevant future Bills currently in planning and there are a number of potentially relevant Bills currently before parliament: -

- *Anti-social Behaviour, Crime and Policing Bill 2013-14 (Home Office)*
- *Children and Families Bill 2012-13 to 2013-14 (Department for Education)*
- *Age of Criminal Responsibility Bill [HL] 2013-14 (Private Member's Bill / Lord Dholakia)*

Use of the term 'Juveniles'

A variety of terminology and definitions are used in legislation in relation to people who are not deemed to be adults.

For practitioners, including Appropriate Adults, this can cause confusion, limit their effectiveness and result in poorer outcomes for children and young people.

In relation to PACE, the term "Juvenile" is defined as people between the age of ten and sixteen. This is not consistent with other legislation.

The Criminal Justice Act 1991(CJA) s.68 (Persons aged 17 to be treated as young persons for certain purposes) aligned much justice-related legislation by "substituting the age of 18 years for the age of 17 years". These are the: Children and Young Persons Acts 1933, 1963, 1969; Prison Act 1952; Rehabilitation of Offenders Act 1974; and Magistrates Court Act 1980 (Schedule 8 of the CJA).

As a result, for example, in the Children Act and Young Persons Act 1933, s.107 "Child means a person under the age of fourteen years" and "young person means a person who has attained the age of fourteen and is under the age of eighteen years". In s.99 the Act reinforces this by stating that if anyone has "attained the age of eighteen years, that person shall for the purposes of this Act be deemed not to be a child or young person".

Later Acts of Parliament have been clear and consistent. The Crime and Disorder Act 1998 established Youth Offending Teams and in s.38 (4)(a) assigned them the statutory duty for "the provision of persons to act as appropriate adults to safeguard the interests of children and young persons detained or questioned by police officers." In s.117 the Act states that a child is a person under the age of fourteen and a young person has not yet attained the age of eighteen.

In the Children, Schools and Families Act 2010 s.21 a "child" means a person under the age of 18, defined in Part 2 of the Act, relating to Family proceedings in court. In the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.91(6) "child" means a person under the age of 18.

However, some inconsistencies remain. The Children and Young Persons Act 1969 s.70(1) states that in Part II (including Schedule 3) and sections 27, 63, 64 and 65, "child" means a person under the age of eighteen; whereas in the other sections "child" means under 14 and "young person" means a person who has attained the age of fourteen and is under the age of eighteen years. Only in s.23 (Remands and committals to local authority accommodation) does "young person" mean a person who has attained the age of fourteen years and is under the age of seventeen years.

The Children Act 1989 s. 105(1) defines a child as a person under the age of eighteen. Section 21 (Provision of accommodation for children in police protection or detention or on remand, etc) (2)(b) states that "Every local authority shall receive, and provide accommodation for children whom they are requested to receive under s.38(6) of the Police and Criminal Evidence Act 1984". Since these sections of the 1989 and 1984 Acts clearly set out to establish corresponding duties, an obvious disconnect arises from the use of "children" (under eighteen) versus "juvenile" (under seventeen). The obvious danger is that practitioners will focus on one Act, while others focus on the other, leading to significant difficulties in collaborating at a practical level.

Changes prior to legislation

Where PACE or Code C extends a safeguard to ten to sixteen year olds and PACE does not *explicitly preclude* others, it can be extended to seventeen year olds via Code C without breaching legislation.

Where provisions of other existing legislation are relevant in underpinning provisions in Code C, they could be explicitly referenced in the Code, either in the main body or the Notes for Guidance.

Section 38(6)

In *requiring* transfers of "juveniles" (ten to sixteen year olds) to local authority accommodation, PACE 1984 s.38(6) does not *prohibit* transfers of seventeen year olds.

The Children Act 1989 s.21(2)(b) *requires* local authorities to receive and provide accommodation for *children* whom they are requested to receive under section 38(6) of PACE. It contains *no prohibition* on doing the same in relation to seventeen year olds. On the contrary, since s. 105(1) of the 1989 Act defines children as less than eighteen years of age, it is inclusive of seventeen year olds.

Furthermore, 1989 Act offers possible enablers for such a transfer, for instance by virtue of s.20(3) stating that, "Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation."

A clear parallel can be drawn with changes to youth remands enacted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The existing framework was criticised for not being compliant with the UN Convention on the Rights of the Child and s.91 amended it such that all children (ten to seventeen year olds) are now treated according to the same remand framework, permitting the court to remand a seventeen year old child to local authority accommodation as per ten to sixteen year olds.

Consent

Code C's treatment of consent

"Appropriate consent" is currently required for ten to sixteen year olds for: -

- Intimate searches (Code C Annex A 2(b) and 2B)
- X-Ray and ultrasound scans (Code C Annex K 1(b) and 3))
- Fingerprints, samples, footwear impressions, photographs, evidential searches and examinations (Code D 2.12 and Note 2A)
- Waiving the right to translations (Code C Annex M: 7(b))

Consent is complex matter, interconnected with issues of mental capacity and best interests. It is not a single decision but a dynamic state that can be given or withdrawn at any time. The actions which require consent in Code C range considerably in terms of their potential impact on a child or young person. PACE and its Codes currently deal with this issue in too simplistic a manner.

Transitions into adulthood

The High Court judgement stated, "Article 8, read with UNCRC [UN Convention of the Rights of the Child], requires a 17 year-old in detention to be treated in conformity with the principle that his best interests were a primary consideration".

'Best interest' is both a legal duty and a helpful tool in striking what is sometimes a difficult balance between protecting children and recognising their emerging independence as they transition into adulthood.

The nature of police detention means all children need the fundamental safeguard of an Appropriate Adult (it is not equal to visiting a GP). However, within that context, the uniqueness of each individual child and their particular circumstances must be recognised.

It is therefore reasonable that seventeen year olds are not *automatically* precluded from giving consent independently of their parents within the scope of Code C. However, it is critical to provide safeguards to ensure that all children and young people are safe and in a position to give genuinely *informed* consent.

In the absence of clarity within PACE itself, Code C would benefit from reference to other relevant legislation, case law and guidance in relation to the giving of informed consent.

Best interest decision making is well provided for in the UNCRC General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.

The issue of capacity is most developed in relation to consent to medical treatment in children, particularly in relation to mental capacity and mental health. The NHS publication *Consent – what you have a right to expect: a guide for parents*, provides a simple overview. Greater detail is provided below.

General principles

The General Medical Council's guidance on consent, which is based on current legislation and case law, states:-

- 44. Before accepting a patient's consent, you must consider whether they have been given the information they want or need, and how well they understand the details and implications of what is proposed. This is more important than how their consent is expressed or recorded.
- 54. You should involve children and young people as much as possible in discussions about their care, even if they are not able to make decisions on their own.
- 55. A young person's ability to make decisions depends more on their ability to understand and weigh up options, than on their age. When assessing a young person's capacity to make decisions, you should bear in mind that:
    - (a) a young person under 16 may have capacity to make decisions, depending on their maturity and ability to understand what is involved
    - (b) at 16 a young person can be presumed to have capacity to make most decisions about their treatment and care.

In its Children and young people toolkit (2010), the British Medical Association (BMA) sets out some useful principles: -

- The doctor must establish whether the child has the capacity to give consent
- All people aged 16 and over are presumed in law to have the capacity to consent to treatment unless there is evidence to the contrary
- If the child is deemed not legally competent, consent will need to be obtained from someone with parental responsibility, unless it is an emergency.
- Emergency treatment can be provided without consent to save the life of, or prevent serious deterioration in the health of, a child or young person

Further guidance is provided in *Assessment of Mental Capacity: Practical Guide for Doctors and Lawyers* (BMA; Law Society, 2010) which states, "Only if they are able to understand, retain, use and weigh this information, and communicate their decision to others can they consent to that investigation or treatment."

Sixteen and seventeen year olds

In relation to sixteen and seventeen year olds, the Department for Health's Seeking consent: working with children (2001) provides further guidance: -

- Once children reach the age of 16, they are presumed in law to be competent and can give consent for their own surgical and medical treatment
- If a competent child requests that confidentiality be maintained, this should be respected unless the doctor considers that failing to disclose information would result in significant harm to the child

- It is good practice to encourage sixteen and seventeen year olds to involve their families in decisions about their care, unless it would not be in their interests to do so
- A competent child aged sixteen or seventeen cannot refuse treatment if it has been agreed by a person with parental responsibility (or a Court) and it is in their best interests. Therefore, they do not have the same status as adults.

In fact, there are some examples of medical procedures (e.g. live organ donation, some non-therapeutic procedures and research where the presumption of competence for sixteen and seventeen year olds does not apply and the Gillick principle must be applied.

Gillick principle

Competent children may be referred to as Gillick competent, in reference to the influential House of Lords judgement in Gillick v. West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security (1985). Lord Scarman's comment in the judgement that, "It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved" is referred to as the test of Gillick competency. Although the judgement related to contraception, later case law, guidance and practice and interpreted it as applying more widely.

Under sixteens

In relation to children under sixteen, as stated above, the GMC guidance states that "a young person under 16 may have capacity to make decisions, depending on their maturity and ability to understand what is involved." In these instances, the Gillick test would be applied.

Assessing competence

On assessing competence to give consent, the BMA toolkit lists the following requirements: -

- the ability to understand that there is a choice and that choices have consequences
- the ability to weigh the information and arrive at a decision
- a willingness to make a choice (including the choice that someone else should make the decision)
- an understanding of the nature and purpose of the proposed intervention
- an understanding of the proposed intervention's risks and side effects
- an understanding of the alternatives to the proposed intervention, and the risks attached to them
- freedom from undue pressure.

The General Medical Council's 0-18 years: guidance for all doctors (2007) paragraph 24 states that in order to assess against these criteria, one "must make sure that all relevant information has been provided and thoroughly discussed before deciding whether or not a child or young person has the capacity to consent".

Paragraph 26 highlights that capacity to consent is not a simple binary decision but rather: -

- Maturity and understanding on an individual basis and with regard to the complexity and importance of the decision to be made.
- A young person who has the capacity to consent to straightforward, relatively risk-free treatment may not necessarily have the capacity to consent to complex treatment involving high risks or serious consequences
- The capacity to consent can be affected by their physical and emotional development and by changes in their health and treatment.

Responsibility for assessing competence

The medical approach to consent is built upon the medical professional's implicit and uncompromised interest in the welfare of the patient. Where intimate searches and examinations are carried out by a medical professional in a hospital this may be directly relevant. However, this is not the case in other elements of police procedure.

Those with parental responsibility (as defined by Part 1 of the Children Act 1989) have a role in *providing* consent when a child is not competent to do so. This is clearly outside the bounds of an (non-parent) Appropriate Adult's role. However, in relation to *assessing* competence, the BMA toolkit states that assessors need to be "skilled and experienced in interviewing young patients and eliciting their views without distortion".

The overarching guiding principle in relation to consent should be safeguarding and promoting the welfare of children, as required of police and Youth Offending Teams under s.11 Children Act 2004. There are clear difficulties in relation to the police fulfilling this role as it is a check and balance against their power. Responsibility should fall to someone skilled, independent and (in an ideal world) someone who knows the child well. In practice, it is likely to be the solicitor, the appropriate adult, or a social worker / support worker where there is an existing relationship.

Application to police detention

The guidelines above are a sophisticated approach to consent and would need to be transposed and applied to criminal justice.

For example, it might be considered appropriate that a sixteen year old with no mental vulnerabilities is presumed to have the capacity to consent to fingerprinting. However, the same might not be said of a seventeen year old with learning difficulties in relation to consent for an intimate search. At the same time, consideration must be given to the principle that emergency treatment can be provided without consent in order to prevent death or serious harm.

Recommendations

1. The Home Office should recognise that significant resources have already been spent on seventeen year olds in many areas and engage with local government to ensure that appropriate resources are available as soon as possible.

2. The amendment in relation to access to custody records should be deleted.

3. Parents acting as Appropriate Adults should have access to an interpreter where the child is fluent in English but the parent is not.

4. The wishes of sixteen and seventeen year olds should be listened to and respected in relation to informing parents. Appropriate Adults should have the opportunity to discuss concerns about informing parents with the child or young person. Further guidance should be developed for practitioners.

5. The Home Office should undertake to amend the Police and Criminal Evidence Act 1984 at the earliest opportunity to deal with the remaining inconsistencies.

6. In discussion with the Ministry of Justice and other relevant Departments, the term 'Juvenile' should be removed from PACE and any legislation linking to it, being replaced with references to 'children and young people' that are aligned with the vast bulk of UK legislation.

7. Additional safeguards should be extended to seventeen year olds where they do not contradict legislation, even if they go beyond its requirements.

8. Seventeen year olds should be brought under the auspices of s.38(6) transfers to local authority accommodation, first by amendment to Code C and then by legislative amendment to align with the Children Act 1989.

9. Code C's approach to the issue of consent should be reviewed and explicitly linked to legislation, case law and guidance outside PACE. It should move from being a potential 'tick box' exercise based purely on age to considering capacity and the potential impact of the particular procedures under consideration. (See *Application to police detention* above).

10. The requirement for the presence of an Appropriate Adult at any request for or giving of consent should be extended to a requirement that all relevant information has been provided and thoroughly discussed with the child before any decision is made as to their capacity to consent. The Appropriate Adult has an important role in ensuring that a child gives consent based on a clear appreciation and understanding of the facts, the implications and consequences of an action, and they should ensure legal advice is sought where appropriate.

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