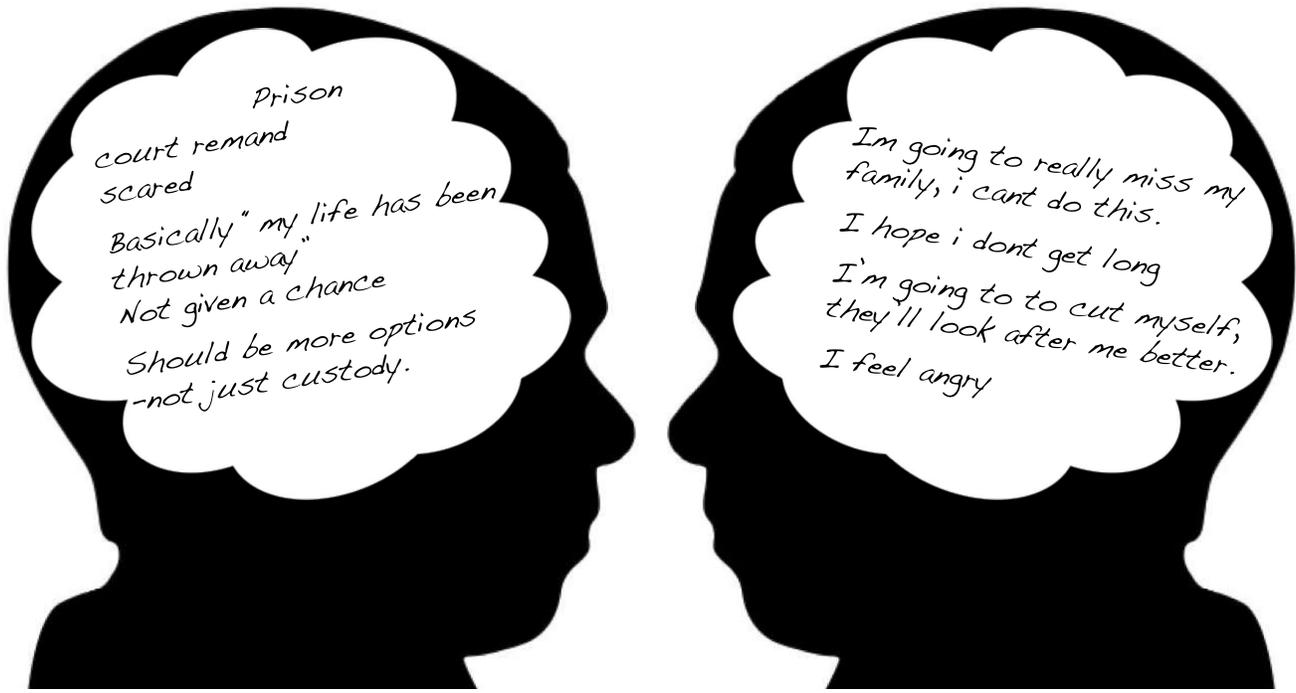


# Howard League for Penal Reform



## Children and sentencing

A guide for adults supporting children facing sentence in the criminal courts in England and Wales

*Thank you*

The Howard League could not have produced this Guide without the input from the 78 children and young people who participated in our workshops and questionnaires. The Howard League is also grateful to many more young people, parents, carers and professionals who have contributed to the thinking behind this Guide by bringing issues about sentencing to the Howard League legal team as part of our specialist legal work. Special thanks is also due to Kate Aubrey-Johnson, Dr Tim Bateman, Dr Poppy Harrison, Bridget Sercombe and Claire Sands.

*Front cover image:* reproduction of exercises completed by children in Howard League participation sessions, asked to write what came into their head when thinking about being sentenced at Court.

**Children and sentencing:  
A guide for adults supporting children facing sentence in the criminal courts in  
England and Wales**

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## Executive summary

This guide is for all adults who are working with and supporting children aged 17 and under who are being sentenced in the criminal courts in England and Wales. It is aimed at lawyers, youth justice professionals, social workers, experts and other supporting adults, including parents and carers. It is hoped that this guide will enable professionals and supporting adults to better understand each other's roles and responsibilities and to know what to expect during sentencing, in order that they may then work together to achieve better, fairer sentencing that is better for the child and reduces the likelihood of prison and reoffending.

The guide draws on the Howard League's legal and participation work to bring together young people's views, ideas for best practice and the legal framework, in order to achieve better outcomes for children facing sentence in the criminal courts.

Children in contact with the Howard League legal service identify the sentencing process as a troubling stage of the criminal justice system. Calls to the Howard League legal advice line for children in and at risk of prison reveal that children experience high levels of confusion and anxiety about sentencing.

In response to these concerns, the Howard League developed a series of legal pop-up sessions with children in trouble with the law. A wider group of young people was also invited to participate through questionnaires. The sessions and questionnaires both provided the children with an opportunity to learn about the law around sentencing and enabled the Howard League to gather the views and experiences of children and young people being sentenced.

Our participation work involved around 80 children and young people who attended workshops and completed questionnaires. Young people affirmed how important the sentencing process is to them, but also how inadequate it is at present. One young person told us *"it's something that will stick with you forever. So, for young people it should be less traumatic and more subtle. Fat chance!"*

The Howard League fed the experiences and views of children and young people on sentencing into the Sentencing Council's consultation on overarching principles for sentencing children, which resulted in significant positive changes to the final document which was published in 2017 (Sentencing Counsel, 2017b).<sup>1</sup> This Sentencing Council Guideline must be taken into account by all courts sentencing children (defined in the document as those under 18 at the date of the finding of guilt).

This guide has been written to ensure that practice reflects the new Guideline and recent legal developments. This guide supports adults to:

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<sup>1</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

- Give children practical information about what they can expect from the criminal justice system so that they can actively participate in the process, starting with the assumption that children have no knowledge whatsoever of the sentencing process.
- Understand the issues that children face during the sentencing process and the impact this has on them in the short and long term.
- Be aware that there is a duty on those working within and around the criminal justice system to treat children differently from adults, and to take into account their needs and vulnerabilities.
- Reflect on and react to children's perspectives, experiences and feelings.

The Howard League has produced materials for children to complement this guide. The child-friendly materials are designed to ensure children are able to do what they can to help themselves and to ask the right adults the right questions. A list of resources has also been put together for anyone wishing to explore further the issues raised in this guide, and this is available on our website.

## Section 1. Getting ready for sentence

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### Voice of the child in influencing their sentence

Children told the Howard League that they felt courts routinely failed to understand why they committed the crime or to look at the child behind the crime:

*"[Sentencers think] that we are all the same and just like breaking the law when really we all do different things for different reasons".*

Their perception of their experience in and leading up to court was being ignored and pre-judged or stereotyped by the professionals involved:

*"I feel that we get drowned out due to everything negative said, so [children's] people's views get overlooked like, who cares?"*

*"It feels as though your views are not taken into account. Judges do this over and over again all day long. So it's just routine for them. You just feel like another number".*

Children want to be a part of the decision making process and have a sense of agency. Even if a child is supported to have their say, they don't always feel their voice will be listened to. Children have a legal right to be heard and consulted on a fully informed basis about decisions that affect them.

This approach is supported by international and domestic law:

- Article 12 of the UN Convention on the Rights of the Child gives a child who is capable of forming his or her own views the right to express those views freely in all matters affecting them. It requires children to be provided the opportunity to be heard in any judicial proceedings affecting them, either directly, or through a representative or an appropriate body. The UN Convention on the Rights of the Child has been signed by every state in the world but one and has been affirmed by the English Courts, including our Supreme Court, as persuasive where fundamental human rights are engaged, as they are here in the sentencing process. See [Annex A](#) for more information.
- The Criminal Procedure Rules are the rules that criminal courts must follow. They require that the child and their parent, guardian or other supporting adult, if present, must be given an opportunity to make representations and introduce evidence relevant to sentence (Rule 24.11(7)). The Magistrates Court (Children and Young Persons) Rules 1992 also require that before a sentence is passed in the youth court or a case is sent to the Crown Court for sentence, *"the court shall inform the relevant minor and his parent or guardian, if present, or any person assisting him in his case, of the manner in which it proposes to deal with the case and allow any of those persons so informed to make representations"* unless the Court considers it *"undesirable"* to inform the child (Rule 11).

If the adults involved in the sentencing process comply with the current legal framework, children should no longer be left feeling ignored and unheard. The law makes it clear that the sentencing process should be child focused and that children should have a chance for their views to be fully taken into account.

The Sentencing Council Guideline requires the court to focus on the child, rather than the offence:

*“1.2 ...the approach to sentencing should be individualistic and focused on the child or young person, as opposed to offence focused.” (2017b, p.4).<sup>2</sup>*

This approach is supported by international and domestic law:

- Article 3 of the United Nations Convention on the Rights of the Child which sets out that the best interests of the child shall be a primary consideration in all actions concerning children.
- Article 40 of the United Nations Convention on the Rights of the Child which sets out that every child who is alleged to have committed an offence has the right to be treated in a manner which respects their dignity and human rights, and which takes into account their age and the desirability of promoting their reintegration into society.
- Section 44 of the Children and Young Persons Act 1933 which states that the court must have regard to the welfare of the child.

Preparation is always key. The next sections of this guide outline how to ensure that adults support children to prepare for sentence in a manner which will achieve the best results for children.

## Establishing trust and opening up communication

Children in the criminal justice system have described feeling that they were disliked or written off, even by the professionals there to help them, and that they were seen as *“a lost cause. Just put in a cell and throw away the key”*.

The court can only get a sense of the child and why he or she offended from the evidence and information before it. Similarly, professionals working with the child can only convey that information to the court if they know it.

*“To be honest I don't think you can fully understand young people by Judging behind a chair. They may think that it's [the offence] just what we are, but it's not, it's something we did”.*

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<sup>2</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

Trust and excellent communication between the child and the adults involved in the case are vital to ensuring that the court can take the child-focused approach that is required – particularly where the child has pleaded guilty, as it is likely that professionals will have less time to get to know the child than if he or she had been supported through a trial. Developing trust and good communication in a relatively short period of time can be challenging, so it is important to develop skills to establish trust and obtain a better understanding of the child and their offence.

The starting point should usually be the child themselves. To get the best information from a child about why he or she committed a crime, practitioners need to earn the child's trust, have a sufficient level of specialist knowledge and competency in the area of youth justice, make no assumptions about the child's knowledge, and take advice from people close to the child about how best to communicate.

## Practice Point: Establish trust

- Be up-front about your role, tell the child:
  - who you are;
  - what your role is (if you are on their side, say so);
  - how you will be working with the child and how the child can complain about you if they need to;
  - when the child can expect to hear from you; and
  - why you need to know the information you are asking them for, and that they can ask you questions too.
- Establish a positive relationship.
- Check yourself for bias, and be cognisant of particular biases within the criminal justice system against Black and ethnic minority and looked-after children.
- Be aware of the power imbalance.
- Identify any Appropriate Adult and ensure this person acts in the best interests of the child.

## *Be clear about your role: who, what, how, when and why*

Never assume that a child knows who you are or what your role is. Children often do not understand who each professional is or why they are there. Simple techniques such as ensuring children know your name, why you are involved and what your job is can be very helpful. Check at the end of a session that the child remembers this information.

Children also need to know whether you are 'on their side'. Young people told the Howard League that they often did not realise that lawyers are there to support them and as part of their role sometimes have to ask difficult questions simply in order to prepare a proper defence.

**If you are on a child's side, tell them that explicitly.** If you are in a more neutral role, explain that too, and find out who you can point the child to for support. Under s.7 of the Local Authorities Social Services Act 1970, local authorities with social services functions have a duty to provide, or to pay others to provide, independent

advocacy for looked after children or those in need, so this could be a good place to start. Children told the Howard League that they generally would appreciate a more up-front approach, and identified particular confusion about their Youth Offending Team (“YOT”) workers as people who were there to help them but also got them put in prison: “*I assumed YOT were the Police when I was young. No-one told me different*”. Children told the Howard League that they are not always sure what they can say to whom, or who they are supposed to be supported and advised by through the sentencing process: “*Can be confusing, it’s not explained well.*’ *F\*\*k knows who to ask*”.

Tell the child how you will be working with them and how they can complain about you if they need to. Flag up when and how the child can expect to hear from you and how you can be contacted if they have questions for you. Some of this will depend on the communication needs of the child, which is discussed in greater detail in the next section of this guide.

Young people have told the Howard League that they find questions annoying and sometimes think professionals are just being nosy. It usually helps to explain why you need to ask the questions and what you might do with the information. Encourage the child to ask you questions and think about some questions they might want to ask.

### **Establish a positive relationship**

Positive relationships with professionals are recognised as one of the most important factors in reducing offending. As Fergus McNeil says, “*desistance can...be provoked by someone believing in the offender; someone who perhaps carries hope and keeps it alive when the offender cannot do so for him or herself*” (2009, p.27).<sup>3</sup> This is especially true for children.

Instilling hope in the child and getting the child to think positively about his or her future may be key to encouraging a change in their attitude towards committing offences.

Beyond Youth Custody’s practitioner guide on engaging children in resettlement highlights that children make a clear distinction between professionals who they think ‘care’ about them and those who they think do not (2014).<sup>4</sup> Characteristics which are defined as ‘caring’ include empathy, a non-judgmental attitude, warmth, focussing on the issues identified by the child, a commitment to the child’s self-determination, and a willingness to go the extra mile.

### **Check yourself for bias**

Children have told the Howard League that they frequently feel that the professionals working with them do not like them. One young person felt as though they were just “*another scumbag off the street*”. Feelings of being disliked, whether or not that reflects reality, get in the way of positive interactions and communications. The prevalence of unconscious bias and the human tendency to make erroneous split second judgments

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<sup>3</sup> <https://pure.strath.ac.uk/portal/files/338775/strathprints008101.pdf>

<sup>4</sup> <http://www.beyondyouthcustody.net/wp-content/uploads/Engaging-young-people-in-resettlement-a-practitioners-guide.pdf>

when meeting people for the first time has been well documented (Kahneman, 2011). Initial impressions can be very difficult to displace, even in the face of evidence to the contrary, and can colour professional relationships in the future. Children can be perceptive and their feelings of being disliked might be accurate. Professionals need to reflect on the risk of conscious and unconscious bias and take action to counter it, especially given how important relationships are in preventing reoffending and ensuring children are fairly represented in the court room.

Addressing bias can be a difficult and uncomfortable process involving a high degree of introspection. At the time of writing there are no published guidelines or toolkits which specifically deal with addressing bias in the youth justice system. The Howard League has developed a guide for antiracist lawyers in consultation with an expert advisory board to prompt and assist practitioners to counter racism in the criminal justice system.<sup>5</sup> Attempting to identify biases may involve writing them down, thinking about why they might exist, organising mutual peer-checking for bias with colleagues, and recalling occasions when the person has held a biased assumption only to be proven wrong. Once professionals are aware of their own biases, they should find it much easier to address any hidden impacts by rehearsing their interactions with the children they are working with and taking time to consider whether they would act the same way if they were faced with someone with different characteristics. These characteristics may be race, age, gender or even something as simple as a personality type. If you find that you have developed feelings of dislike towards a child, take the time to assess why you feel that way and think about ways you can overcome it. A change in personnel can also be considered.

In particular, professionals should be cognisant of any bias which they or others in the criminal justice system may perpetuate against certain sub-groups of children, especially Black and ethnic minority and looked-after children.

### ***Be aware of the risk of bias against Black and ethnic minority children***

The Sentencing Council Guideline states that there is:

*“1.18 ...evidence to suggest that black and minority ethnic children and young people are over-represented in the youth justice system.” (2017b, p.6).<sup>6</sup>*

This is supported by various reports of the Ministry of Justice (2015b; 2017a; 2017b; 2017c)<sup>7</sup> and the Howard League’s own interactions with children, the majority of

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<sup>5</sup> <https://howardleague.org/legal-work/making-sure-black-lives-matter-in-the-criminal-justice-system/>

<sup>6</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>7</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/480250/bulletin.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480250/bulletin.pdf);

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/669094/statistics\\_on\\_race\\_and\\_the\\_criminal\\_justice\\_system\\_2016\\_v2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/669094/statistics_on_race_and_the_criminal_justice_system_2016_v2.pdf);

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/641481/Explor](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/641481/Explor)

whom, when questioned, say that they feel the colour of their skin makes a difference in sentencing:

*“A white guy is more likely to get less than us.”*

*“I’m white, most of the Judges are white. But, I had Asian co-defendants and they did get sentenced differently.”*

A disproportionate number of BAME children are brought into the criminal justice system: in the year ending March 2020 one third of child arrests in England and Wales were of Black and ethnic minority children, but Black and ethnicity children made up only 18 per cent of the 10-17 UK population (Youth Justice Board, 2021, p. 8).<sup>8</sup> The overrepresentation of Black and ethnic minority children (and especially Black children) continues throughout the criminal justice process, and in fact becomes more disproportionate at each stage: in 2019/20, more than half of all children in custody were from ethnic minorities and nearly one in three were Black.<sup>9</sup> The Ministry of Justice admits in its report that:

*“The effect of higher prosecution rates, custody rates and longer ACSL [Average Custodial Sentence Length] for Black, Asian and Mixed ethnicity juvenile offenders are contributing factors in explaining why there are a growing proportion of juveniles from non-White ethnic groups in secure estates, relative to the population” (2017a, p.64).<sup>10</sup>*

The Youth Justice Board published a detailed analysis of disproportionality in remand and sentencing in 2021. It found that children from all ethnic minority backgrounds have worse youth justice outcomes than white children, and that Black and mixed-race children experience the worst disparities in outcomes. This cannot be explained by demographic or offence-related factors: even when all other factors are the same, practitioner assessments represent Black and mixed-race children as riskier than children of other ethnicities. Professionals should bear this research in mind and use it as a prompt to reflect on their own assessments of risk (Youth Justice Board, 2021).<sup>11</sup>

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/956621/youth-justice-statistics-2019-2020.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/956621/youth-justice-statistics-2019-2020.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/956621/youth-justice-statistics-2019-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956621/youth-justice-statistics-2019-2020.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/956621/youth-justice-statistics-2019-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956621/youth-justice-statistics-2019-2020.pdf)

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/669094/statistics\\_on\\_race\\_and\\_the\\_criminal\\_justice\\_system\\_2016\\_v2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/669094/statistics_on_race_and_the_criminal_justice_system_2016_v2.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/952483/Ethnic\\_disproportionality\\_in\\_remand\\_and\\_sentencing\\_in\\_the\\_youth\\_justice\\_system.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952483/Ethnic_disproportionality_in_remand_and_sentencing_in_the_youth_justice_system.pdf)

It seems that the charges of institutional racism raised by the inquiry into police handling of the racially motivated murder of Stephen Lawrence in 1993 have not been sufficiently dealt with (Home Office, 1999).<sup>12</sup> The Lammy Review, an independent review of the treatment of, and outcomes for, Black and ethnic minority individuals in the criminal justice system highlights that urgent action is required to deal with this on a national level, and the risk of this should be raised in individual cases (Ministry of Justice, 2017c).<sup>13</sup> Due to the experiences of biased treatment which Black and ethnic minority people may experience themselves or be aware of within the criminal justice system, there is considerable reported mistrust by Black and ethnic minority people of criminal justice professionals, including their own lawyers (Ministry of Justice, 2017c, p.6).<sup>14</sup> Adults need to be careful to keep promises made, and make active efforts to establish a relationship of trust and confidence.

It is important for adults working with Black and ethnic minority children facing sentence to be aware of the risk of bias. Adults should do everything possible to counter it, starting by acknowledging the risk to the children they work with. They should consider providing additional support throughout the process to enhance Black and ethnic minority children's confidence in the system. The Sentencing Council Guideline now provides a firm basis for raising it at the point of sentencing (see below).

### ***Be aware of the risk of bias against looked-after children***

The Sentencing Council Guideline also recognises that looked-after children are overrepresented in the criminal justice system. It states that:

*"1.16 ...[w]hen dealing with a child or young person who is looked after the court should also bear in mind the additional complex vulnerabilities that are likely to be present in their background... In some instances a looked after child or young person... may be before the court for a low level offence that the police would not have been involved in if it had occurred in an ordinary family setting."* (2017a, p.6).<sup>15</sup>

Despite looked after children accounting for less than 1% of the total population, 37% of 15-18 year old boys held in Young Offender Institutions and almost two-fifths of children held in STCs during 2015-16 had been in local authority care at some point (Howard League, 2016a),<sup>16</sup> and children aged 16 and 17 living in children's homes are at least 15 times more likely to be criminalised than non-looked after children of the same age (Howard League, 2017a).<sup>17</sup>

Adults working with children facing sentence need to be aware of the risk that looked after children, including Black and ethnic minority looked after children, are

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<sup>12</sup> <https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry>

<sup>13</sup> <https://www.gov.uk/government/organisations/lammy-review>

<sup>14</sup> <https://www.gov.uk/government/organisations/lammy-review>

<sup>15</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>16</sup> <http://howardleague.org/wp-content/uploads/2016/02/Criminal-Care.pdf>

<sup>17</sup> <http://howardleague.org/wp-content/uploads/2017/07/Ending-the-criminalisation-of-children-in-residential-care-Briefing-one.pdf>

overrepresented. This may include providing additional support throughout the process to enhance looked after children's confidence in the system. The Sentencing Council Guideline now provides a firm basis for raising it at the point of sentencing (see below).

There are practical implications too. By definition, looked after children may not have a parent who is personally invested in them or the person officially supporting them at court may not have day to day knowledge of the child. It is essential to ensure that key trusted adults are involved in the process to provide practical and emotional support: that may include the allocated social worker, a residential care worker or a foster carer. It may also be that the child's care package needs to be reviewed to ensure that the least restrictive sentence can be imposed (see the below section of this guide on sorting out a child's accommodation).

### **Be aware of the power imbalance**

Professional adults advising children in the criminal justice system will always appear to children to be in a position of power. Children told the Howard League that it is "*intimidating standing in front of the Judge*" and that judges are not "*on a level playing field*" but "*see young people as being below them*". As one young person put it, "*they even sit up higher than us in court!*"

Professionals should be aware of this power imbalance and try to avoid behaviour and scenarios that might make the child feel even more vulnerable. For example, this might involve thinking about the number of adults that may be present in meetings with the child or where the child is sitting, and how these might make the child feel. What can feel like a relaxed or informal environment for an adult may be intimidating and unfamiliar to a child. The more unfamiliar faces, the more a child is likely to feel cornered, and to provide guarded responses as a result.

### **Make sure the child has an appropriate "supporting adult"**

Children will be formally provided with the support of an independent Appropriate Adult when arrested and held in police custody (Code C of the Police and Criminal Evidence Act 1984). When the police detain a child they must inform an Appropriate Adult as soon as is practicable and ask them to attend. Appropriate Adults are not just observers but support, advise and assist; ensure the police act fairly in accordance with the child's rights; and help communicate between the child, police and other professionals. See the National Appropriate Adult Network website for further information about Appropriate Adults at the police station.<sup>18</sup>

Access to Appropriate Adults does not extend to court proceedings which is unfortunate as the court process is protracted and legally and procedurally technical. Children at point of sentence will still require the kind of support that an Appropriate Adult provides at the police station.

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<sup>18</sup> <http://www.appropriateadult.org.uk/>

Section 24.2(c)(ii) of the Criminal Procedure Rules 2015 makes reference to ‘supporting adults’ being allowed to attend Youth Court hearings unless otherwise directed by the court. There is no formal compulsion for the court to provide a child with access to a ‘supporting adult’, nor is their role defined. A ‘supporting’ adult will do as the name suggests. There are other references to this role in the Criminal Practice Directions 2015. It is good practice to make sure a child has a supporting adult in court.

The Court may summons a child’s parents or guardian to attend court where the defendant is under 18, and must do so where the defendant is under 16 (Children and Young Persons Act 1933, s.34A; Youth Court Bench Book, 2020, page 1ff<sup>19</sup>).

## Practice Point: Open up communication

- Be specialist– working with children is an expert business.
- Make no assumptions about a child’s understanding, experience or knowledge.
- Think about each child’s individual communication style.
- Get advice on how best to communicate with the child.
- Consider any special needs that may need to be addressed and get professional advice where necessary.

## Be specialist

It is widely accepted that working with children is a specialist business. While some professionals involved with children in trouble, such as social workers and YOT workers, are based in specialist services, there is currently no specialist qualification for solicitors, barristers or police working with children.

Lawyers should ensure that they are sufficiently specialist to do the work. The Inns of the Court College of Advocacy has released guidance which states that youth advocacy is an “*area of practice which requires considerable skill and expertise*” (2017).<sup>20</sup> It has also produced a guide for practitioners involved in sentencing (The Inns of Court College of Advocacy, 2017).<sup>21</sup> The Youth Proceedings Competences issued by the Bar Standards Board (“BSB”) reinforce the key competences that barristers who work in the youth courts must have, highlighting that “*one of the fundamental components of effective advocacy within youth proceedings is having specialist knowledge relating to youth justice matters*” (2017, p.6).<sup>22</sup> As of February 2018, the BSB requires barristers working in the youth courts to register that fact as part of the Code of Conduct for barristers in England and Wales: they are competent

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<sup>19</sup> <https://www.judiciary.uk/wp-content/uploads/2020/06/Youth-Court-Bench-Book-June-2020-1.pdf>

<sup>20</sup> <https://www.icca.ac.uk/youth-justice-advocacy>

<sup>21</sup> *Ibid.*

<sup>22</sup>

[https://www.barstandardsboard.org.uk/media/1821763/bsb\\_youth\\_competencies\\_2017\\_for\\_website.pdf](https://www.barstandardsboard.org.uk/media/1821763/bsb_youth_competencies_2017_for_website.pdf)

against the Youth Proceedings competences and guidance: by registering, barristers declare that they are competent against the Youth Proceedings competences and guidance (Bar Standard Board, 2018).<sup>23</sup> Similarly, the Solicitors Regulation Authority (“SRA”) has recognised that additional guidance should be provided to those practising in the youth court, and has developed a toolkit including expert advice and videos on how best to represent and communicate with children (2016).<sup>24</sup>

In addition to the guidance provided by the BSB and the SRA, solicitors, barristers and YOTs are able to get support in developing specialist techniques from a range of organisations, including the Youth Justice Legal Centre and the Speech, Language and Communication Needs programmes offered by I CAN, a charity that supports children with speech, language and communication difficulties.<sup>25</sup>

The first step towards a specialist approach is to acknowledge that the child is a child. It may be important to explain to the child that when this the term is used, it is not to belittle them and to acknowledge that the child may not think of themselves as child-like. However, terms like “youths” and “young offenders” are loaded with negative connotations. It was for that very reason that the Howard League argued that the 2017 Sentencing Council Guideline should include the term “children” instead of “youths” (Howard League, 2016b).<sup>26</sup> Crucially, the law applies different rules and principles to children that benefit them. Some of the key principles are set out at [Annex A](#) of this guide. There are a number of textbooks, such as ‘*Defending young people in the criminal justice system*’ published by the Legal Action Group (Ashford, Chard and Redhouse, 2006), and websites such as that run by the Youth Justice Legal Centre which practitioners can use to keep abreast of the relevant law.<sup>27</sup>

### **Make no assumptions**

Many children awaiting sentence have limited to no experience of the criminal justice system or sentencing process. It is important to remember that what can feel like an average day at the office for a practitioner may be an entirely new experience for a child, and one which may make children feel “*scared, lost, confused, worried, upset*”. Even those children who appear to be experienced users of the criminal justice system may still lack understanding of the process. They can also be good at masking their lack of knowledge and skills. Children have told the Howard League that they often “*don’t understand what’s happening*” and that “*courts use words we don’t understand*”.

It is also important not to make assumptions about a child’s family or life experiences. For example, the Howard League found that experience of bereavement is common among children in the criminal justice system. Making sure you are aware of any particularly significant bereavement is important so as not to cause unnecessary distress. Children in contact with the criminal justice system are also more likely to

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<sup>23</sup> <https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/the-handbook-publication/>

<sup>24</sup> <http://www.sra.org.uk/solicitors/cpd/youth-court-advocacy.page>

<sup>25</sup> <http://www.ican.org.uk/>

<sup>26</sup> <https://howardleague.org/wp-content/uploads/2016/08/Howard-League-Sentencing-Council-Consultation-Response-03082016.pdf>

<sup>27</sup> <https://yjlc.uk/>

have experience of the care system and may have differing views about their contact with social care. Be sure to ask a child who they trust, rather than assume that the child will trust someone because that is their statutory role.

### ***Think about the child's preferred communication style***

Always ask the child about their preferred communication style. Consider whether they respond better to oral updates, visual images or letters. If corresponding in writing, first check if the child can read by asking them to read something, either out loud or asking a question based on something in the text. It is important to do this sensitively. Some children with a learning disability or visual impairment may prefer letters to be sent on coloured paper. Think about the vocabulary you use and your style of speaking or writing, and make sure to check the child's understanding of key words and concepts. Avoid using jargon, acronyms, jokes that might be misinterpreted and sarcasm, as these may lead to unnecessary confusion.

Remember always to check that the child has understood what you have said. It is also important to explain to teenagers that adults may refer to them in court and in reports as children because they are children in law (even if they don't feel child-like) and it ought to work in their benefit to for the court see them as children.

### ***Get advice on how best to communicate with the child***

The low age of criminal responsibility in England and Wales means that children are expected to understand, and are frequently subjected to, concepts that are significantly more advanced than their learning stage. Put another way, the age of criminal responsibility falls at Key Stage 2 of the National Curriculum, which caters for children aged seven to 11.

It is essential to think about each child's age, individual learning style and any special needs that may need to be addressed. This is not a simple job. If possible, take advice from those who have already considered these issues independently of the criminal justice system. If a child has a statement of special educational needs ("SEN") or an education, health and care ("EHC") plan, this may be a good starting point. Talking to parents, carers, teachers or therapists is also helpful if permitted. If you are a parent, be sure to speak to practitioners working with your child, as you may be the best expert in effective communication with him or her.

The assessment and planning interventions framework 'AssetPlus', developed by the Youth Justice Board, takes into account the speech, language and communication needs of children in order to support practitioners in identifying tailored outcomes and targets and to develop a suitable offending plan (2014a).<sup>28</sup> YOT workers should make sure that the assessment is up to date, and other practitioners may want to obtain permission to see the most recent AssetPlus assessment (or at least relevant sections of it) to inform their communication with the child.

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<sup>28</sup> <https://www.gov.uk/government/publications/assetplus-assessment-and-planning-in-the-youth-justice-system/assetplus-assessment-and-planning-in-the-youth-justice-system>

## **Consider any special needs that may need to be addressed and get professional advice where necessary**

There are many children in the criminal justice system who struggle to communicate effectively and for whom no amount of informal adaptations will be sufficient. Indeed the Royal College of Speech and Language has stated that “*SLCN [Speech and Language Communication Needs] is much more prevalent in the offending population than in the general population*” and advises that practitioners working with children would benefit from support to build the specialist skills and techniques associated with practicing good communication (2017, p.8).<sup>29</sup> In such cases, it may be necessary to obtain an initial speech and language assessment for the child. This will help to diagnose any particular communication issues, ascertain whether they fully understand their situation and provide a suggested approach for working with the child going forward. An assessment by a speech and language therapist can be completed by the NHS for children up to 19 years old. Independent Parental Special Education Advice (“IPSEA”), a charity focused on providing support for children with special education needs, has a number of free resources available online and operates an advice line service to assist individuals working with children who have special needs.<sup>30</sup>

Other helpful resources include the Advocates’ Toolkits, which are available online at The Advocates’ Gateway,<sup>31</sup> and “communication passports”, which are available for download online (see the Resources section later in this guide).<sup>32</sup>

Depending on the particular difficulty faced, another option may be to consider involving a third party, such as an intermediary or a language therapist, who can work on improving the pathways of communication and provide practical advice. Intermediaries are communication specialists who act as impartial members of the justice system and play an important role in enabling vulnerable victims, witnesses, suspects and defendants to give complete, coherent and accurate evidence to police and to courts in order to ensure their effective participation. Intermediaries who work with victims and witnesses are registered by the Ministry of Justice, however the Ministry has not yet made full provision for intermediaries to work with defendants, so intermediaries engaged in this work will usually not be registered.

The Criminal Practice Directions 2015 as amended by the Criminal Practice Directions Amendment no. 2 (2016) direct the court to consider a number of supporting measures for vulnerable defendants in accordance with the court’s duty under the Criminal Procedure Rules 2015 to “*take every reasonable step to encourage and facilitate the participation of any person*” (s.3.9(3)(b)), including vulnerable defendants, so that they may give their best evidence, comprehend the proceedings and engage fully with their defence. Regard should also be given to the welfare of a child defendant (s.44 of the

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[https://www.rcslt.org/speech\\_and\\_language\\_therapy/slt\\_work\\_settings/justice\\_slcn/justice\\_evidence\\_base2017](https://www.rcslt.org/speech_and_language_therapy/slt_work_settings/justice_slcn/justice_evidence_base2017)

<sup>30</sup> <http://www.ipsea.org.uk/contact/advice-and-support>

<sup>31</sup> <http://www.theadvocatesgateway.org/toolkits>

<sup>32</sup> <http://www.communicationpassports.org.uk/Creating-Passports/Templates/>

Children and Young Persons Act 1933; Parts 1 and 3 of the Criminal Procedure Rules 2015; Sentencing Council Guideline, 2017a, p.4, para. 1.1).

In light of this, it is possible for child defendants to apply to court for the assistance of an intermediary to enable them to effectively participate in the trial. The Equal Treatment Bench Book makes clear that "all young witnesses should ideally have an intermediary assessment as, no matter how advanced they appear, their language comprehension is likely to be less than that of an adult witness" (The Judicial College, 2018).<sup>33</sup> However, case law has held that defendants need to present a clear evidence-based argument for an intermediary to be provided, and ultimately it is rare for an intermediary to be ordered and even rarer for the intermediary to be funded to remain throughout the trial. An intermediary is more likely to be considered appropriate in cases where a sentencing hearing is complex and turns on issues affecting the child, for example their participation in an alternative therapeutic package. The Youth Justice Legal Centre has produced a detailed guide on the use of intermediaries for children (2020).<sup>34</sup>

## Practice Point: Keep children informed in an appropriate way

- Keep the child informed - even if nothing is happening, let them know you are still there and contactable.
- Think about how to best deliver news: a letter that the child does not properly understand can be upsetting.

## Keep the child informed about what is happening and what will happen next

Children told the Howard League that they found waiting for sentence and endless adjournments frustrating. Not knowing what is happening can be disempowering and can make children feel out of control. One young person described being "*chucked in a cell not knowing what [was] going to happen.*" In these situations, keeping the child informed of the process and providing a reason for any delay can help significantly with allaying their concerns. Map out the whole legal journey for the child so they can see where they are in the process and what will happen next. Remember that most children are likely to associate sentencing with prison, even though this is rare for children and much can be done to avoid prison unless the child is convicted of a sentence that carries a mandatory prison sentence, such as murder. Children may not feel comfortable with being described as children, vulnerable or immature in court or in reports prepared for court. It is therefore important that adults explain why these terms might be used and how they fit into getting the appropriate outcome for the child.

## Think about how best to deliver news

Getting official letters is not something most children often experience. Getting a letter from a lawyer or a social worker might be a stressful experience, especially if the child

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<sup>34</sup> <https://yjlc.uk/wp-content/uploads/2020/10/YJLC-Guide-Intermediaries24-3-21.pdf>

is waiting for important news. If a child is in prison, thought might need to be given as to how the child will receive the letter - whether it will be slipped under the cell door, whether it can be stored confidentially and whether anyone will be available to go through it with the child. Oral information can also be confusing, especially if the child is tired or nervous. It may be a good idea to make sure that important information is conveyed to trusted adults, with the child's consent, who can go through it with the child at a later date.

## Practice Point: Check understanding of key information

- Make sure the child understands what has been said:
  - Can the child explain it back?
  - Ask the child how he or she will remember what has been said.
  - Do you need to explain the information to the child again, perhaps in a different way?
  - Would it help to have a short break?
- Have you understood what the child has said?
- Is the child susceptible to yielding under pressure?

## Make sure the child has understood

Checking that a child understands what is being said and that professionals understand what children are saying is critical. One young person told the Howard League that language in court can "*be confusing, it's not explained well. I do not understand the terminology used*". The Howard League's legal team has often been told by clients years later that the information contained in their pre-sentence report was not accurate, or that they did not say or mean certain things attributed to them. Speech and language therapists working with Bradford and Milton Keynes YOTs identified that a significant number of children do not understand some of the seemingly basic but crucial terms that are used in court, including words like: 'victim', 'breach', 'guilty', 'liable', 'remorse' and 'conditional'. As one young person told the Howard League "*if you don't understand something you are likely to think it is unfair*". As explained by the Equal Treatment Bench Book, silence does not necessarily mean that a person understands. It could mean that "*they do not understand, they are unable to understand [or] that they feel intimidated or inadequate*" (The Judicial College, 2018, p.21)<sup>35</sup>

The Howard League has found that simple techniques such as asking a child to explain information back to the professional can help with gauging whether a child has understood the information provided - avoid just asking if they have understood. The Howard League has found that many children in the criminal justice system have become adept at masking gaps in their understanding.

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<sup>35</sup> <https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>

Even if the child has understood the information at the time, it does not mean it has sunk in. It is often useful to talk to the child about how he or she will remember what has been said. It can be helpful to discuss techniques like writing down key points or updating a trusted adult with key information.

If the child has not understood, it is rarely helpful to simply repeat information in the same way. The Howard League once represented a deaf child who disclosed after many years of being in the criminal justice system that he simply had no idea about many of the key concepts that affected him, such as his offence or even what “parole” was. It is often a good idea to break down key concepts and use different words, examples and even diagrams or drawings.

Particular attention should be given to children where English is a second language, as understanding in such cases can be doubly problematic. Literal translation may not be sufficient to ensure an understanding of the content, so extra care should be taken that unfamiliar legal terms are explained to a child their own language and not lost in translation.

Children will often benefit from a short break, especially if they are feeling overwhelmed or frustrated by a situation. The Howard League has noticed that asking children if they want a short break may not be enough as children may feel like they are inconveniencing professionals or simply want the experience to be over and done with. Sometimes it is more helpful for the professional to ask for a short comfort break or to suggest they need to get some refreshments and then share that with the child.

If there are concerns that a child might not understand, or simply be too overwhelmed by, criminal proceedings to effectively participate, then this should be flagged up as soon as possible. This may in particular be the case with very young children, given the low age (ten) of criminal responsibility in England and Wales.

### ***Have you understood what the child has said?***

There is often too much focus on children misunderstanding or not listening to adults and too little on adults misunderstanding or not listening to children. Children have frequently told the Howard League that they have felt misquoted by professionals. It is therefore critical that professionals pay close attention to exactly what a child says to them and should seek to clarify anything that is unclear, contradictory or capable of being misconstrued, and ensure that accurate records are taken of meetings. Notes of meetings – particularly where they contain quotes of significance – should be checked with the child whenever possible. It should also be borne in mind that children may change their minds, or explain certain facts or issues better or differently to different people at different times. This may be as a result of external pressure, as discussed below.

### ***Is the child susceptible to yielding under pressure?***

Children are more suggestible than adults and are considerably more likely to accept or at least not object to suggestions made to them by professionals. Studies have found that, compared to adults, there is a higher risk of children feeling pressured into making false confessions (Redlich and Goodman, 2003). In the context of sentencing,

this can have a huge impact on the mitigation that is available to the child. In light of this evidence, professionals should aim to establish an environment of trust where the child feels able to correct any misunderstandings.

## Gathering relevant background information

It is essential to get the right information from the right people because courts are now required to take into account the background of the child in accordance with the Sentencing Council Guideline:

*“1.13 Factors regularly present in the background of children and young people that come before the court include deprived homes, poor parental employment records, low educational attainment, early experience of offending by other family members, experience of abuse and/or neglect, negative influences from peer associates and the misuse of drugs and/or alcohol.*

*1.14 The court should always seek to ensure that it has access to information about how best to identify and respond to these factors and, where necessary, that a proper assessment has taken place in order to enable the most appropriate sentence to be imposed” (2017a, p.6).<sup>36</sup>*

## Practice Point: Make sure all the relevant information is obtained

- Involve the child where possible
- Gather all relevant existing information including medical notes, social care records, education records, Child and Adolescent Mental Health Service (“CAMHS”) records and YOT records.
- Look out for concerns that have not been followed up or fully investigated.
- Obtain positive character references from people who know the child.
- Look out for any evidence of criminal exploitation and/or any past National Referral Mechanism (NRM) referrals.
- Consider getting expert reports, e.g. a child forensic psychologist or psychiatrist.
- If a child is on remand, get evidence from the placement and social worker.

## Involve the child where possible

The child is the primary source of knowledge about his or her own life. Young people have consistently told the Howard League that they often do not feel involved in the sentencing process and that it feels like something that is done to them: “*go in, shut up, let [the YOT Worker] talk, go*”. Where a child has sufficient capacity to provide you with information, start with the child. Explain that the Court will need to see as much information about them as a person as possible, to encourage the Court to hand down

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<sup>36</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

the least harsh sentence. Explain what type of information helps and ask the child to provide you with ideas about how best to get it. It might be a good idea to help the child prepare a statement or letter for the court. In the Youth Court, children are often asked questions by the Court and the child will need to be prepared for this (see below).

## **Gather all relevant existing information**

Getting all relevant information about a child is essential in providing the court with an accurate picture of their circumstances, background and vulnerabilities. Consider obtaining GP records and medical notes, social care records, education records, and CAMHS and YOT paperwork (such as risk assessments). This is usually personal sensitive data that the child is entitled to see under the Data Protection Act 2018 for free (see [Annex C](#) for a template subject access request letter). Section 45 of the Data Protection Act provides the child with the right of access to the data. Section 45(3) requires the organisation to provide the information "without undue delay" and section 54(2) requires the information to be provided within one month, unless an exemption applies,

However, in the Howard League's experience, it is always preferable to develop good working relationships that will allow exchange of information that is relevant and in the child's interests. If the information is not provided upon request and a formal application has to be made, it often takes longer than one month to receive information. A child can appeal to the office of the Information Commissioner but this also takes time, and it is therefore important to make the request as soon as possible. More information about data requisitions is available on the Information Commissioner's Office website.<sup>37</sup>

If a child is or has been looked after by a local authority, reviews and care plans ought to be available and may prove a helpful source of information. There is a template letter for requesting this information at [Annex B](#) of this guide.

Some children have a SEN or a health and education plan, and others may have diagnosed mental health needs. It is important to get documentary evidence as this may be powerful material in arguing for a more appropriate sentence which meets any health needs related to the child's condition. Where a SEN or another report or plan is referenced in other documents about the child, always try to obtain the original reports and read those first hand rather than rely on secondary sources, to ensure that all information is accurate. The point of sentence might be a good time to get this information, either through statutory services or through a report commissioned by the defence team.

If you encounter any ambiguities in a child's background, consider seeking more information from other professionals who have worked with the child, family members or medical staff to get the full picture so you can provide the court with the relevant information it needs. Be aware that Black children are often subject to "adultification"

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<sup>37</sup> <https://ico.org.uk/>

(being treated like adults and having their needs and vulnerabilities overlooked) and look out for racial bias in official records. If you suspect that a child has been misrepresented, it may be useful to speak to family or community members to get a fuller story.

Youth Offending Team workers should include this information in any reports they write. Relevant information can be passed on to or gathered by the child's advocate/defence lawyer, who will decide which parts are relevant and should be put before the court.

### ***Look out for concerns that have not been followed up or been fully investigated***

Adults involved with the child should be as thorough as possible and fully explore any leads that might suggest that the child has a particular communication or learning difficulty. This ought to have been done at the trial stage, but it should not be overlooked just because a child has pleaded guilty. The Howard League has frequently found references in reports to concerns about possible illnesses or difficulties which suggest vulnerabilities such as autism or ADHD that require further investigation but have not been followed up, sometimes due to the chaotic nature of the lives of many children in the criminal justice system. It is important to follow these up before sentence as they may affect the child's culpability and ultimate sentence.

Reports may sometimes say that a concern has been ruled out, but it is always best to check this has been done thoroughly. For example, it is well known that a high proportion of children in prison have acquired brain injuries but children are rarely properly examined for this (Williams, 2012).<sup>38</sup>

### ***Obtain positive character references from people who know the child***

Children may not (without prompting) think to let professionals know about adults in their lives and communities who can offer testimony to another side of their character, and give the court reason to believe that they are capable of and committed to change. Talk to the child about the people involved in the child's life who can provide a different story, whether they are trusted teachers or support workers at school, a mentor, a family friend, or anyone else who may be relevant, such as someone that the child is connected to through a religious group, sports club or youth group.

Make sure to check that the person is a credible witness, whether they have any previous convictions and how well they know the child. Ask them to prepare a letter addressed to the court but send it to the child's defence lawyer so the lawyer can look at it first and send it on to the court if appropriate. The letter should set out who the writer is, whether or not they are of good character (i.e. no previous convictions), how well they know the child and what their experience of the child has been, if possible providing concrete examples of positive behaviour and promise. See [Annex D](#) for a template letter.

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<sup>38</sup> [https://www.barrowcadbury.org.uk/wp-content/uploads/2012/11/Repairing-Shattered-Lives\\_Report.pdf](https://www.barrowcadbury.org.uk/wp-content/uploads/2012/11/Repairing-Shattered-Lives_Report.pdf)

## ***Consider getting expert reports***

Expert reports can be crucial in making sure the court has all the relevant facts, presented in a convincing manner. Experts producing reports should be:

- independent (and not connected with the child's Youth Offending Team), and aware of and able to comply with the criminal procedure rule on experts;
- specialist in the assessment and treatment of children (and be able to demonstrate this);
- registered with their professional body (e.g. for psychologists the Health and Care Professions Council and for psychiatrists the Royal College of Psychiatrists - you can check by looking the expert up online on the respective websites);<sup>39</sup>
- if conducting a risk assessment, forensic experts (and able to demonstrate this);
- not involved in treating the child;
- formally trained in any measures they are using, and using only validated and age appropriate measures that have been developed, tested and refined with children (unless there is good reason to use other measures); and
- able to access all relevant information including medical notes, social care records and educational history, and adults who know the child.

It is very hard to change a sentence later based on expert evidence that could have been available at the time, and so it is always best to get this right the first time.

It may be useful to instruct an expert who can talk about a child's cultural background or social environment, including experiences of trauma arising from discrimination, in the context of mitigation.

## ***Evidence from the placement and social worker if the child is on remand***

Where a child has been remanded to custody, the child will become a "looked after child" as a matter of law (Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.104). The child ought to have an allocated social worker and looked after child reviews. The allocated social worker may be able to provide a perspective on the child's vulnerabilities and strengths. The duties owed by children's social services to children who are looked after because they have been remanded to custody are set out in statutory guidance (Department for Education, 2015).<sup>40</sup>

It may be worth talking to placement workers to see if they can provide any additional insight into the child's suitability for a non-custodial sentence. This is especially the case if the child has been placed in a Secure Children's Home ("SCH") with trained social work staff.

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<sup>39</sup> <http://hpc-uk.org/>; <http://www.rcpsych.ac.uk/>

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/441643/Children\\_Act\\_Guidance\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441643/Children_Act_Guidance_2015.pdf)

## Challenging custodial remands and seeking bail to reduce the risk of a custodial sentence

It is important to challenge remand to custody, and seek bail whenever possible unless there is a specific advantage to not seeking bail in terms of reducing the overall length of an inevitable sentence on the basis that time on remand can be taken into account. Where there is no clear advantage, even a short time in custody can have damaging effects, including homelessness, family breakdown, and social stigma (Prison Reform Trust, 2011).<sup>41</sup> A child who appears for sentence having been remanded may be more likely to go on to get a custodial sentence. This is in part because the argument that custody would be detrimental to the child's welfare and should be avoided at all costs where possible will carry less weight if the child is already in prison. Challenging remand is also in line with the principle set out in the Sentencing Council Guideline that custody should be used as a last resort (2017a, p.4, para. 1.3),<sup>42</sup> and particularly before the child has been found guilty of any offence. Further information is available from the National Association of Youth Justice's practice guide on reducing custodial remand (2015).<sup>43</sup>

If you are supporting a child who is from a Black or minority ethnic background, it is worth citing Youth Justice Board analysis which shows that children from all minority groups are more likely to be remanded to custody and that this is especially true for mixed-race and Black children (Youth Justice Board, 2021).<sup>44</sup> Challenge assessments which overstate the risk posed by a child and/or overlook their vulnerabilities.

### Practice Point: Always consider challenging a child's remand to custody and use the law to achieve bail

- Highlight the adverse effects of custodial remand where possible.
- Use the law to support challenging decisions to remand children to prison.
- All children on remand are owed a duty of care by children's social services.
- Make sure all professionals play their part in challenging remands to custody.
- Consider the Covid-19 restrictions in place within the prison regime and the impact of these current conditions on the welfare of the child.

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<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Remand%20Briefing%20FINAL.PDF>

42 [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

43 <http://thenayj.org.uk/wp-content/uploads/2016/02/PRTNAYJ-Reducing-remands-to-the-secure-estate-Jan-16.pdf>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/952483/Ethnic\\_disproportionality\\_in\\_remand\\_and\\_sentencing\\_in\\_the\\_youth\\_justice\\_system.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952483/Ethnic_disproportionality_in_remand_and_sentencing_in_the_youth_justice_system.pdf)

## **Highlight the adverse effects of custodial remand where possible**

To protect the interests of the child, remands to custody should generally be opposed every step of the way, including between conviction and sentence. Being in prison deprives a child of the opportunity to develop deeper prosocial community ties that might help secure a non-custodial sentence. While on remand, a child's education, training and family relationships are likely to be disrupted, all of which are "*crucial stabilising factors to prevent re-offending*" (Sentencing Council, 2017a, p.29, para. 6.47)<sup>45</sup>. The separation of a child from his or her family and friends and the removal from his or her normal routine can have a detrimental impact on a vulnerable child. This may be exacerbated by the unfamiliar and frightening environment of prison and lead to the child behaving in ways which unfavourably impact the pre-sentence report. This in turn may increase his or her likelihood of receiving a custodial sentence or of re-offending.

The Sentencing Council Guideline is clear about the toxic effect custody can have on children:

*"6.49 ...A custodial sentence could have a significant effect on the prospects and opportunities of the child or young person and a child or young person is likely to be more susceptible than an adult to the contaminating influences that can be expected within a custodial setting"* (2017a, p.30).<sup>46</sup>

The conditions during the coronavirus pandemic have been especially dire for children, many of whom have been deprived of education, therapy and visits (Howard League, 2020).<sup>47</sup> The Court of Appeal has made it clear that this is a relevant consideration for sentencing:

*"Judges and magistrates...should keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it otherwise would be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19."* (R v Manning [2020] EWCA Crim 592 §41)

If a child is remanded to custody then their behaviour will be scrutinised and monitored in a way that would not happen if they were in a placement in the community. What in the community would constitute minor infractions could in custody lead to disciplinary hearings (adjudications or 'nickings') and detailed logs on a child's prison records. There is also benefit in a child demonstrating ability to comply with bail conditions, as this will provide evidence of their ability to comply with criminal justice supervision to

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<sup>45</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>46</sup> *Ibid.*

<sup>47</sup> <https://howardleague.org/publications/children-in-prison-during-the-covid-19-pandemic/>

support a community sentence or early release from a prison sentence. During the 2019 pandemic, the proportion of children in custody on remand rose to 40 per cent, with many children spending extensive periods in custody in dire circumstances waiting delayed trials. The Court of Appeal has made it clear that excessive delay is a mitigating factor for sentence (R v Daniel Ivan [2020] EWCA Crim 301).

Once a child is already in custody it becomes more difficult to argue against a custodial sentence as any arguments in respect of disruption will become less relevant. The only time when a remand to custody might not be detrimental is where the child is absolutely certain to get a prison sentence and the time on remand may count towards it.

The majority of children who are remanded are placed in prison service accommodation that is not fit for purpose. Her Majesty's Chief Inspector of Prisons stated in his 2016-17 annual report that in February 2017 that there was not a single establishment in England and Wales they had inspected "*in which it was safe to hold children and young people*" and that "*the current state of affairs is dangerous, counterproductive and will inevitably end in tragedy unless urgent corrective action is taken*" (HM Inspectorate of Prisons, 2017, p.9).<sup>48</sup>

### **Use the law to support achieving bail**

There is a strong legal framework to support applications for bail for children remanded to prison based on their particular needs and vulnerabilities. Key provisions include:

- **The Children Act 1989** which requires local authorities to take reasonable steps to avoid the need for children within their area to be placed in secure accommodation (**Sch.2, s.7**).
- The right to private and family life guaranteed by **Article 8** of the **European Convention of Human Rights ("ECHR")** which may be engaged when a child is subjected to custodial remand.
- **Article 37** of the **United Nations Convention on the Rights of the Child (UNCRC)** which sets out that the arrest, detention or imprisonment of a child should only be used as a last resort and should be for the shortest appropriate period of time.
- **Section 98** of the **Legal Aid, Sentencing and Punishment of Offenders Act 2012** in combination with **s.4** of the **Bail Act 1976** which together mean that there is a presumption that children will be granted bail, and can only be remanded if the court is satisfied that certain criteria are met. Ultimately, if the child can be safely supervised in the community on bail, then they should be granted bail (Youth Justice Board, 2014c).<sup>49</sup>

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<sup>48</sup> [https://www.justiceinspectors.gov.uk/hmiprisons/wp-content/uploads/sites/4/2017/07/HMIP-AR\\_2016-17\\_CONTENT\\_11-07-17-WEB.pdf](https://www.justiceinspectors.gov.uk/hmiprisons/wp-content/uploads/sites/4/2017/07/HMIP-AR_2016-17_CONTENT_11-07-17-WEB.pdf)

<sup>49</sup> <https://www.gov.uk/government/publications/manage-bail-and-remand/manage-bail-and-remands-section-3-case-management-guidance>

The Howard League and Garden Court Chambers published a guide to end the pretrial detention of children during the pandemic (2020).<sup>50</sup>

## ***All children on remand are owed a duty of care by children's social services***

The Howard League has worked with many children who have been remanded to prison simply because they do not have a suitable bail address. This is unacceptable, especially given that any child remanded to custody is owed duties by their local authority as a looked after child. Professionals working with a child who is on remand in Youth Detention Accommodation should actively seek to use the support which a child with 'looked after' status is entitled to receive, to ensure that they do not remain on remand unnecessarily.

There is a clear duty on children's services to consider the welfare and best interests of a child, to ensure that custody is an absolute last resort, and to try to make sure that a child spends the shortest period of time in custody as possible. In addition, there is a duty to ensure that there is accommodation available for a child in the community to avoid them being in custody in circumstances where their risk could be adequately managed in the community.

If a suitable package is not made available, a community care or public law lawyer can be approached to challenge the failure of children's services to provide such a package. Provided the child is eligible for legal aid, he or she can instruct a lawyer to help with this.

## ***Make sure all professionals play their part in challenging remands to custody***

Children's services should work closely with YOT and the child's criminal solicitors in order to come up with an appropriate package of support to allow a child to apply for bail.

Lawyers will need to make bail applications but carers will need to ensure suitable accommodation is available and YOT will need to prepare a bail package including an approved address. The Youth Justice Board website contains more detailed guidance on applications for and the granting of bail.

## **Pre-Sentence Reports**

### **Practice Point: Make sure the Pre-Sentence Report ("PSR") happens**

- If the court has not ordered a PSR, consider asking for one.

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<sup>50</sup> <https://howardleague.org/publications/ending-the-detention-of-unsentenced-children-during-the-covid-19-pandemic/>

## *If the court has not ordered a PSR, consider asking for one*

A PSR is a report made or submitted by a social worker, provider of probation services or, where the person is under the age of 18, a YOT worker. Section 30 of the Sentencing Act 2020 (formerly Section 156 of the Criminal Justice Act 2003) states that a written report is required whenever a defendant is under the age of 18 and whenever a court is considering imposing a custodial sentence or a community sentence. The report should be prepared with a view to assisting the court in determining the most appropriate way of dealing with the child. Although PSRs do not have to be written, it is good practice to encourage written reports where children are concerned.

A PSR is a significant opportunity for a child to give the court some understanding as to why they committed the offence, how they feel about it now, and what their personal circumstances are (including details about their family and education). Children and young people who spoke to the Howard League told us that they felt “*young people should be given more of a voice in court*”. The PSR is a chance for the voice of the child to reach the court and it should not just be a report *about* them.

Government guidance provides that where the court is considering imposing a custodial sentence, they should note the likely impact of this on the child or young person in respect of education, training and employment, family, mental health and safety and wellbeing. Consideration should be given to the extent to which a custodial sentence could potentially increase offending behaviour (Youth Justice Board, 2014b).<sup>51</sup>

A good quality PSR may be particularly important for children who come from BAME backgrounds in order to counteract any bias they are facing. However, the quality of PSRs prepared on BAME defendants is significantly lower than those written on white offenders (49% satisfactory for BAME defendants compared to 60% for white offenders; HM Inspectorate of Probation, 2000), and PSRs prepared for BAME defendants are more likely to recommend a suspended sentence than for white offenders (21-22% compared with 18%), and less likely to recommend community sentences (67-69% compared with 73%; Ministry of Justice, 2015b).<sup>52</sup> A recent inspection found that PSRs routinely failed to address Black and minority ethnic service users’ experiences of racism or trauma (HM Inspectorate of Probation, 2021).<sup>53</sup>

Practitioners should ensure that any such bias is addressed in the preparation and presentation of PSRs.

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<sup>51</sup> <https://www.gov.uk/government/publications/use-reports/use-reports-section-5-case-management-guidance>

<sup>52</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/480250/bulletin.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480250/bulletin.pdf)

<sup>53</sup> <https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2021/03/Race-Equality-in-Probation-thematic-inspection-report-v1.0.pdf>

## Practice Point: Ensure the PSR is effective

- Make sure the child and supporting adults know how important PSRs are.
- Ensure that the child and their legal representative have a chance to see the PSR before it is submitted so that any points can be clarified.
- Provide appropriate support to children where there is a Victim Impact Statement and consider this in the PSR.

### *Make sure the child and supporting adults know how important PSRs are*

Make sure children understand the importance of PSRs and are supported to engage in the process. A PSR meeting might seem very similar to any other meeting from the child's perspective but it can change a child's life.

It should not be assumed that children understand the function and standing of a PSR, even if they have been through the process before. Many children will also be experiencing the process for the very first time and will be unaware of the significance of the report.

Professionals therefore need to be very clear about what the child should expect and what is expected from them during the interview from the outset. This will include explaining as much in advance as possible about what a PSR is, including:

- the purpose and significance of the report, including that it can influence the sentence that the child gets;
- what information will be used to inform it;
- who will read it;
- when the child will be interviewed for it;
- that the interview may be a chance for the child to provide the court with information to achieve a better outcome for them; and
- that the child and his or her family have the right to draw to the attention of their legal representative any aspect of the report with which they disagree, consider unfair or inaccurate.

Case management guidance from the Government states that *"to achieve the most thorough and fair assessment, it is vital that you treat the young person with respect, from the first contact"* (Youth Justice Board, 2014b, para. 2.2).<sup>54</sup> Professionals should support the child to feel prepared and to utilise the interview to get their views across. One young person told the Howard League *"It's not explained properly. I never know it could have such a big effect"*.

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<sup>54</sup> <https://www.gov.uk/government/publications/use-reports/use-reports-section-5-case-management-guidance>

## ***Ensure that the child and their legal representative see the PSR***

It is good practice for the PSR author to go through the report with the child before it is finalised so that any errors can be corrected and they can be confident the child has had their say. Many of the young people who have asked for the Howard League's support after they have received a custodial sentence do not recall ever seeing, let alone commenting on, their PSR. It is also good practice for the PSR to be disclosed to the child's legal representative before the hearing.

The Court is required to ensure that the child's parent or guardian or the legal representative has a copy of the PSR to enable representations to be made prior to sentence (s.32 Sentencing Act 2020, formerly s.159 of the Criminal Justice Act 2003).

Time must be taken to go through the report with the child before the day of a court appearance to ensure they understand what information is being submitted to the court. Particular attention should be paid to ensuring that the child understands what the PSR is proposing, the expectations of that proposal and the implications of any failure to comply. In most cases it may make sense for the report to be read aloud to the child, while also keeping in mind that some of the information may be distressing. When lawyers at the Howard League go through PSRs in preparation for parole hearings, it is notable that this document, often presented on the morning of the sentencing hearing, is quite unlike any other a child will have seen before as it contains a potted life history and a proposed future pathway. It is striking how often children comment that information in it is not true or has been misunderstood by professionals.

If in doubt when preparing a PSR, YOTs should consider seeking feedback through quality assurance mechanisms to ensure the appropriate standard is met. Features of PSRs to which quality assurance procedures should be addressed might include:

- compliance with national standards and any local policy or practice guidelines;
- gaps in relevant information or the inclusion of irrelevant information and the use of appropriate language;
- whether the report contains any discriminatory language, stereotypes, negative images of women or BAME individuals or improper inferences; and
- whether the conclusion is logically argued and the proposal contained in the report is realistic, appropriate and linked to reducing the risk of the child reoffending as well as the promotion of the child's welfare.

Supporting adults and defence lawyers should consider checking the accuracy of the report and challenging any points that they think are wrong or based on false information before sentencing.

### **Case Study**

Leon's YOT worker attended to meet him one afternoon when he was due to play football. This was an activity he looked forward to all week at the unit.

The YOT worker didn't explain why she was there to see Leon, she just said she had some questions for him in relation to his court case. He answered the questions

swiftly so he could make his way out to the football game as he had not wanted to miss kick-off.

Leon was not told what a PSR was. He also wasn't informed that the answers he gave to the YOT worker's questions could shape how the court decide to sentence him. He got an indeterminate sentence.

## **Victim Impact Statements**

Important developments in the rights of victims to have a meaningful voice in the criminal justice system mean that there will usually be a Victim Impact Statement available to the court before sentence is handed down (Ministry of Justice, 2015a). Guidance to YOT practitioners says that the offence analysis part of a PSR should include the impact on any victim(s) and the child or young person's response to this (Youth Justice Board, 2014b).<sup>55</sup>

Children should be appropriately supported when Victim Impact Statements are disclosed or when children are interviewed about their views on the impact of the offence on the victim.

Research suggests that children in the criminal justice system are also likely to be victims of crime themselves (see for example Victim Support, 2007; Howard League, 2007).<sup>56</sup> Children may find it difficult to reconcile the remorse they are expected to display when caught if they have also been victimised in the same or similar circumstances without any remorse being demonstrated to them as victims. Young people have told the Howard League that they have sometimes struggled to understand why they are being punished when the same thing was previously done to them but the aggressor was not punished. It will be important to factor this context into a child's feelings about the offence.

Children may also find it distressing to be confronted with the impact on the victim, or to hear or see information about the harm they have caused. Children's immediate reactions may not be representative of their thoughts or feelings - they may need time and space to digest the information given and to reflect upon the impact of the crime. A child simply may not display the same levels of empathy that an adult might show. Particular care should therefore be taken before concluding that a child is not remorseful. Assessment that deal with the child's remorse, should have regard to difficulties children may have in expressing remorse, so as not to result in an unduly harsh sentence.

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<sup>55</sup> <https://www.gov.uk/government/publications/use-reports/use-reports-section-5-case-management-guidance>

<sup>56</sup> <https://www.victimsupport.org.uk/sites/default/files/Hoodie%20or%20goodie%20report.pdf>; <http://howardleague.org/wp-content/uploads/2016/05/HL-Children-as-Victims.pdf>

## Sorting out other aspects of a child's life

For a list of resources which may be useful in assisting a child, see the Resources section towards the end of this guide and the separate List of Useful Resources published on the Howard League website.

## Practice Point: Make a difference to the child's life to facilitate the least restrictive sentence

- Take the time to identify and understand the child's needs.
- Consider how you can support a child with other aspects of their life, including:
  - education;
  - accommodation and support;
  - immigration and asylum status;
  - age assessment;
  - modern slavery, trafficking and other pressures on children; and
  - parenthood.

## Understanding a child's needs

Children want to be given the opportunity to be supported in improving their own lives, with professionals taking careful account of their distinct needs and vulnerabilities.

The more invested and integrated into a community they are, the better chance a child has of turning their life around. Conversely, the less integrated and settled a child is, the more likely that a sentence will disrupt and interfere with their life and their opportunities. It is important to take a holistic approach to identify all aspects of a child's life where they may require additional support.

## Education

Children facing sentencing have often lived chaotic lives. Education or training provides stability and can inspire ambition and hope for the future.

If the child is in the community and it seems that they have been unfairly (or informally) excluded or aren't getting the support they need for any Special Educational Needs then you can contact Coram Children's Legal Centre's dedicated education law advice line.<sup>57</sup> They provide free legal advice on all aspects of education law and this can help professionals ensure that a child's educational needs are being met. You could also contact IPSEA's advice line service which specialises in tailored advice for children with Special Educational Needs and/or disabilities.<sup>58</sup>

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<sup>57</sup> [www.childlawadvice.org.uk](http://www.childlawadvice.org.uk)

<sup>58</sup> <https://www.ipsea.org.uk/>

Since 2015, contractual arrangements have been in place requiring that children in custody and on remand get 30 hours of education per week. For children in YOIs, the rules require that they get a minimum of 15 hours a week plus two hours of Physical Education (YOI Rules 38(2), 41(2)). For children in Secure Training Centres (“STCs”), they must get 25 hours a week (STC Rule 28(2)). Despite this, in 2017 the Youth Justice Board reported that of all admissions to youth custody, 61% of young people were not engaging in education (2017, p.5).<sup>59</sup> If the child is not receiving the correct amount of education professionals should support the children to get legal advice from a prison law solicitor in order to challenge the prison’s failure to provide education. Top-up provision can be arranged to meet a remanded child’s educational needs. This could take the form of supporting children to access distance learning by providing materials and arranging for them to be marked. It could also involve contacting and making arrangements with a child’s previous school or college to set work for them to be completed remotely. It is possible for children to do GCSEs and A-levels in custody and this is something that the prison should be able to facilitate.

### Accommodation and support

Children who do not have appropriate accommodation should never be told to go to the housing department. Case law makes it clear that children should be first considered by children’s services to see whether they are “children in need” without suitable accommodation. If this is the case, a child should be accommodated **and** supported by children’s services. Only if the child is not on a full care order, is aged 16 or 17 and refuses (whilst fully informed) to become “looked after” should a child be considered by the housing authority. This was established in *R (on the application of G) (FC) (Appellant) v London Borough of Southwark (Respondents)* [2009] UKHL 26 and has been reinforced by subsequent guidance. Anybody can initiate a child in need assessment by notifying the local authority of a child’s needs (see the template letter in [Annex E](#)). A community care solicitor can help challenge a refusal by children’s services to assess or provide a child with support and accommodation.

Children who have been looked after by children’s services for 13 weeks after the age of 14, including a day on or after their 16th birthday, are entitled to leaving care rights when aged 18 – 21 (or 25 if they are in education or training) (s.20 Children Act 1989). Professionals working with children who are looked after and are facing sentencing should be alert to the impact a sentence may have on a child’s leaving care status and also to the benefits of a child being released before leaving care duties expire.

If a child aged 16 or 17 exceptionally does not meet the criteria for being accommodated as a looked after child, they may be accommodated under housing legislation. Children of this age will be a priority need (Department for Local Governments and Communities, 2006).<sup>60</sup> However, they should be warned of the risks of this type of accommodation, including that it is rarely suitable and that, should the

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<sup>59</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/585991/key-characteristics-of-admissions-april-2014-to-march-2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/585991/key-characteristics-of-admissions-april-2014-to-march-2016.pdf)

<sup>60</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/7841/152056.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7841/152056.pdf)

arrangement break down, they may be deemed intentionally homeless. As Baroness Hale said in the case of *R (on the application of M) (FC) (Appellant) v London Borough of Hammersmith and Fulham (Respondents)* [2008] UKHL 14, “there is all the difference in the world between the services which an eligible, relevant or former relevant child can expect from her local children’s services authority, to make up for the lack of proper parental support and guidance within the family, and the sort of help which a young homeless person, even in priority need, can expect from her local housing authority” (para. 24).

The Howard League has produced a separate guide on resettlement rights for children and young people (Howard League, 2012a), which includes accommodation issues and is available on our website.<sup>61</sup>

## **Immigration or asylum issues**

Children facing sentencing who have immigration or asylum issues should get legal advice. It should be borne in mind that sentencing could have a dramatic impact on immigration matters and that a sentence over 12 months may affect the likelihood of deportation. Although almost all immigration matters were removed from the ordinary scope for legal aid following the Legal Aid and Punishment of Offenders Act 2012, legal aid is still available for asylum claims and in circumstances where a child has been trafficked.

Coram Children’s Legal Centre runs a dedicated Migrant Children’s Project advice line (see the Resources section later in this guide).<sup>62</sup>

If a child needs legal advice and there is no legal aid available then alternative sources of funding should be explored. Exceptional Case Funding is available in circumstances where the state’s failure to provide civil legal aid may amount to breach of an individual’s right to a fair trial under the European Convention on Human Rights. If the child is looked after, then children’s services may have a duty to fund legal advice which directly impacts on a child’s current or future needs. A referral to a community care solicitor should be considered in circumstances where social services refuse to do so.

## **Age assessment**

Age assessment is a process whereby children with no documentary evidence of their age are assessed by social services for the purposes of determining the care and welfare benefits they can access. In circumstances where an age dispute arises in criminal law, it is the responsibility of the court to make due enquiry as to the child’s age. This may be informed by an age assessment carried out by a social worker. When carrying out assessments, social workers are required to follow certain rules,

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<sup>61</sup> <http://howardleague.org/wp-content/uploads/2016/04/Resettlement-law-guide.pdf>

<sup>62</sup> <http://www.childrenslegalcentre.com/get-legal-advice/immigration-asylum-nationality/advice-line/>

following the case of *R (on the application of B) v The Mayor and Burgesses of the London Borough of Merton* [2003] EWHC 1689 (Admin). The Association of Directors of Children's Services (2015)<sup>63</sup> and the Youth Justice Legal Centre (2015)<sup>64</sup> have also issued guidance which set out the expectations on social workers.

The criminal court's declaration of age is then regarded as the true age of the child. Age has a profound impact on sentencing, in respect of both sentence duration and where a child will be placed if given a custodial sentence. It is therefore disastrous if a child is incorrectly deemed by the court to be an adult and also highly problematic if a child is deemed to be a child, but declared to be older than they are. Incorrect age assessments should not go unchallenged, and it is often the professionals working with a child who are best placed to recognise discrepancies between a child's developmental age and their assessed age. Legal aid is available for age assessment disputes. If you are concerned that a child's age has been wrongly assessed then you should refer the child to a community care solicitor. Note that any challenge would be by way of judicial review, so there is a strict three month time limit.

### **Modern slavery, trafficking and other pressures on children**

Adults involved with the child should be particularly sensitive to any factors that might indicate that the child has been subjected to trafficking or has been involved in, or targeted by, gangs in the past. In the case of any child whom you suspect may have been trafficked, it is important to check that the child has been referred to the National Referral Mechanism ("NRM") or to initiate the referral process if a referral has not yet been made. Every Child Protected Against Trafficking is an organisation designed to provide assistance to professionals in child trafficking cases.<sup>65</sup>

Where a child commits an offence as a result of being trafficked or subjected to modern slavery, then they may have a defence in court or it may not be in the public interest to prosecute the child at all. Some examples of offences committed by children trafficked to the UK are child sexual exploitation, street begging or pick-pocketing, and working in cannabis factories. Trafficking can include travel within the UK, and children exploited by gangs within the UK may satisfy the requirements for the defence. There is a growing acknowledgement that children and vulnerable young people are commonly exploited in the supply of Class A drugs from cities to rural areas (often referred to as "county lines" cases) (National Crime Agency, 2017).<sup>66</sup> The Youth Justice Legal Centre has produced a comprehensive practical guide addressing this issue titled '*Child Criminal Exploitation: county lines gangs, child trafficking & modern slavery defences for children*' (2018a).<sup>67</sup>

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<sup>63</sup> [http://adcs.org.uk/assets/documentation/Age\\_Assessment\\_Guidance\\_2015\\_Final.pdf](http://adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf)

<sup>64</sup> <http://www.yjlc.uk/wp-content/uploads/2015/01/Age-Assessment-Legal-summary.pdf>; [www.adcs.org.uk/assets/documentation/Age\\_Assessment\\_Guidance\\_2015\\_Final.pdf](http://www.adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf)

<sup>65</sup> <https://www.ecpat.org.uk/Pages/Category/who-we-are>

<sup>66</sup> <http://www.nationalcrimeagency.gov.uk/publications/832-county-lines-violence-exploitation-and-drug-supply-2017/file>

<sup>67</sup> <https://yjlc.uk/wp-content/uploads/2018/02/Modern-Slavery-Guide-2018.pdf>

There is also a developing understanding of the impact of child sexual exploitation on children's behaviour and the need to avoid criminalising children who are victims of sexual exploitation (Howard League, 2012b).<sup>68</sup>

Children who have been exploited by adults may not perceive themselves as victims. The adults who have exploited them may still be exerting coercive influences so they will need to be approached with great care.

Even where these kinds of pressures on children do not result in the prosecution being dropped or are not considered to amount to a defence, their presence as part of the offence will clearly affect the child's blameworthiness or culpability. Therefore information about these issues needs to be made available to the court as part of the mitigation considerations (see below).

### **Parenthood**

Some children facing sentencing have children of their own. Becoming a parent is a difficult time in anyone's life and particular attention should be paid to ensuring a young parent is supported to develop and maintain close bonds with their child. Family Lives is an organisation which provides information and operates a helpline that offers support to young parents.<sup>69</sup> Professionals should consider contacting them to get an understanding of the financial and emotional support available for young parents.

Children with whom the Howard League have worked talk about the life-changing impact of parenthood and it is clear that becoming a mum or dad can instil a young person with a great sense of responsibility. However, if there are concerns about a young parent's ability to care for their child then it may be that care proceedings are initiated. Young parents facing having their child taken into care should be encouraged to get legal advice from a family law solicitor. If care proceedings are issued by social services then legal aid is available for the parents.

If a young parent is a primary caregiver for their child then this is relevant to sentencing and should be taken into account as mitigation.

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<sup>68</sup> <https://howardleague.org/publications/out-of-place/>

<sup>69</sup> <http://www.familylives.org.uk/advice/your-family/parenting/where-can-young-parents-go-for-support/>

## Section 2. Making sure the court is able to impose the least restrictive sentence

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### The sentencing process and how to influence sentencing

Young people have told the Howard League that they are often disappointed that practitioners do not raise relevant information on their behalf at sentencing. One young person told the Howard League that “[p]rofessionals don’t get involved enough in influencing sentencing”. Adults working with a child in the lead-up to their sentence are the most familiar with their needs, vulnerabilities and circumstances. The Judicial College makes clear that when sentencing a child in the Crown Court, the focus “shifts from the offence to the offender” (Judicial College, 2021, p.107)<sup>70</sup> so it is crucial that the child's advocate is able to highlight the mitigating aspects of the child's life in the clearest way. Be creative and think outside the box to consider which available option is best for the child, and advocate for other professionals to do the same.

Remember that there are wide options for sentence in most cases. Children often associate sentencing with prison. One young person told the Howard League that “[There] should be more options – not just custody.” The vast majority of sentences are however community sentences. In the year ending March 2020, according to the Youth Justice Board, only seven per cent of all sentences resulted in an immediate custodial sentence (Ministry of Justice, 2021d, table 5.3).<sup>71</sup> Even when a custodial sentence seems to be the most likely option it can sometimes be avoided. Where a mandatory custodial sentence exists, such as in the case of murder, the court will require evidence and representations to ensure that the minimum term is for the shortest appropriate period.

Children need to be made aware that work can be done to achieve the least restrictive outcome and that as a matter of law the court must impose the least restrictive sentence possible on a child (see [Annex A](#) in this guide). The Sentencing Council Guideline notes that a child should be dealt with less severely than an adult (Sentencing Council, 2017a, p.15, para. 4.5), and emphasises that:

*“1.3 ...[d]omestic and international laws dictate that a custodial sentence should be a measure of last resort for children and young people... a custodial sentence may only be imposed when the offence is so serious that no other sanction is appropriate.” (2017a, p.4).<sup>72</sup>*

This is the case even where the child or young person has committed multiple previous offences:

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<sup>70</sup> <https://www.judiciary.uk/wp-content/uploads/2021/03/Youth-Defendants-in-the-Crown-Court-March-2021.pdf>

<sup>71</sup> [www.gov.uk/government/collections/youth-justice-statistics](http://www.gov.uk/government/collections/youth-justice-statistics)

<sup>72</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

“6.10 [e]ven where a child or young person is found to be a persistent offender, a court is not obliged to impose one of the optional sentences. The approach should still be individualistic and all other considerations still apply. **Custodial sentences must be a last resort for all children and young people** and there is an expectation that they will be particularly rare for children and young people aged 14 or under.” (Sentencing Council, 2017a, pp.22-23, their emphasis).<sup>73</sup>

The importance of avoiding custody where possible in favour of a more community-focussed sentence ties in with the Sentencing Council’s advice that:

“1.4 [i]t is important to avoid “criminalising” children and young people unnecessarily; the primary purpose of the youth justice system is to encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish” (2017a, p.4).<sup>74</sup>

The Sentencing Council Guideline highlights how the least restrictive sentence can be achieved.

The process that the court must follow when arriving at a final sentence is set out in the Sentencing Council Guideline (2017a, pp.36-46) (see box).<sup>75</sup>

## The steps the court must follow when sentencing a child

**Step 1: Make an initial determination of the sentence, based on the nature of the offence.** This involves thinking about the culpability of the offender, and the harm caused.

**Step 2: Consider mitigating and aggravating factors which affect the seriousness of the offence.** The court will take into account information that is either “mitigating” (justifying a lesser sentence) or “aggravating” (justifying a harsher sentence). The Sentencing Council Guideline highlights the importance of mitigating factors that “*may diminish the culpability of a child or young person*” (Sentencing Council, 2017a, p.4, para 1.5), and the court will first consider factors that are considered to reduce (or increase) the seriousness of the offence, often based on the child’s history with respect to involvement in the criminal justice system and the circumstances of the specific offence.

**Step 3: Consider personal mitigating factors.** These are features of the child or their background which also act to reduce the sentence.

**Step 4: Determine the level of reduction for a guilty plea (if applicable) and applying it.** Once the court has considered all the mitigation, it should then consider making the appropriate reduction if there has been a guilty plea. The

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

amount of reduction awarded here will depend on when in the process a guilty plea is made.

**Step 5: Review the sentence.** Ensure that it is the most appropriate one for the child.

At each stage of the process, the court will need to consider the overarching principles of preventing offending and protecting the child's welfare. As part of its consideration of personal mitigation, the court must fully weigh up the impact of any potential sentence they may make on the child's welfare and future. Terminology is also important when it comes to sentencing. Professionals should stress the child's status as a child in court to ensure that a truly welfare based approach is taken.

Professionals should also flag up to the court any risk of bias against the child (as discussed in Section 1 above) on grounds of race and care status to ensure that this does not unfairly affect the sentence deliberations. This can be done tactfully by highlighting the reference to it in the Sentencing Council Guideline.

The Sentencing Council Guideline explicitly provides that the court is to consider a range of relevant information about young people when determining sentence in order to make the most informed choice (see the section 'Gathering relevant background information' in Section 1 of this guide). It is essential that the child's lawyer is fully aware of all the evidence that can be used to argue for the least severe sentence.

**Practice Point: Make sure the court is aware of factors mitigating the seriousness of the offence**

- Make sure you have considered all the factors that mitigate the seriousness of the offence.

- Use the information you have gathered to make sure the Court is made aware of relevant factors.

## ***Make sure you have considered all the factors that mitigate the seriousness of the offence***

The Sentencing Council Guideline (2017a, p.16)<sup>76</sup> provides that the following (non-exhaustive) list of factors includes the kind of thing which will be considered to mitigate the seriousness of an offence:

- no previous findings of guilt (or at least no recent/relevant findings of guilt);
- good character and/or exemplary conduct;
- the child participated in the offence due to bullying, peer pressure, coercion or manipulation;
- remorse, particularly where evidenced by voluntary reparation if anything was damaged/stolen;
- little or no planning; and
- a genuine belief on the part of the child that the activity was lawful.

If the child has been through a trial, many of these factors may have been considered. Where a child has pleaded guilty it will usually be on the facts as alleged by the prosecution unless there is a written documents setting out the basis for the plea that has been accepted by the prosecution (basis of plea).

However, there may be some factors that have not been fully brought out such as exemplary conduct, remorse and peer pressure.

## ***Use the information you have gathered to make sure the Court is made aware of relevant factors***

If any of the mitigating factors are applicable, they should be brought to the court's attention, together with supporting evidence. It may be that the evidence is included in the PSR or expert reports but other forms of evidence can also be put forward from the information gathered in section one. Character references can be especially important to illustrate these mitigating factors (see [Annex D](#) for a template). It is essential that this information is provided to the child's defence lawyer so he or she can present all relevant evidence to the court.

## **Practice Point: Ensure the court is aware of mitigating personal background information**

- Make sure you have considered all the background mitigating factors.
- Bring any personal mitigating factors relating to the child or their background to the court's attention.

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<sup>76</sup> *Ibid.*

## ***Make sure you have considered all the background mitigating factors***

The Sentencing Council Guideline directs that the court should next consider mitigating factors relating to the personal circumstances of the child:

*“1.21 ...[t]he vulnerability factors that are often present in the background of children and young people should also be considered... any response to criminal activity amongst children and young people will need to recognize the presence of such factors in order to be effective” (2017a, p.7).<sup>77</sup>*

These factors could be anything which should properly be seen to reduce the culpability of a child, in recognition that children and young people are not fully developed and have not attained full maturity (Sentencing Council, 2017a, p.4, para. 1.5).<sup>78</sup>

The Sentencing Council Guideline (2017a, p.16)<sup>79</sup> suggests the following non-exhaustive list of personal mitigating factors:

- youth or immaturity, where this affects their responsibility;
- communication of learning disabilities or mental health concerns;
- unstable upbringing, including but not limited to:
  - time spent looked after;
  - lack of familial presence or support;
  - disrupted experiences in accommodation or education;
  - exposure to drug/alcohol abuse, familial criminal behavior, domestic abuse, pornography or sexually explicit materials; and
  - victim of neglect or abuse or exposure to the neglect/abuse of others;
- determination and/or demonstration of steps taken to address the offending behavior;
- strong prospect of rehabilitation; and
- being in education, training or employment.

## ***Bring any personal mitigating factors relating to the child or their background to the court’s attention.***

Again, any relevant factors should be brought to the court’s attention, together with supporting evidence. In particular, the Sentencing Council Guideline flags up the importance of considering the developmental and emotional age of children when considering their personal mitigating factors, emphasising that this *“is of at least equal importance as their chronological age”* (2017a, p.17, para. 4.10).<sup>80</sup>

This accords with the Howard League’s own research, which found that in almost half of all cases reviewed involving young adults aged 18-25 neither age nor maturity were considered by the court, but where these were, it was more likely to lead to a reduction

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

of the sentence on appeal. Further, the inclusion of age or maturity in a sentencing guideline did not make a significant difference as to whether maturity was actually considered by the court, leading the Howard League to conclude that it is vital for practitioners to take the initiative in raising these factors and pushing the court to consider them (Howard League, 2017b, p.5).<sup>81</sup> As explained by the Equal Treatment Bench Book "*flawed interventions that do not recognise young adults' maturity can slow desistance and extend the period of involvement in the system*" so it is critical that practitioners bring these factors to the court's attention (Judicial College, 2018, p.62)<sup>82</sup>. The law on young adults aged 18 to 25 has developed significantly in the last decade (Emanuel, D. et al, 2021).<sup>83</sup>

As part of the consideration of personal mitigating factors, the potential impact of any proposed sentence on the child's future prospects should also be considered, including engagement with education, employment and the community, and the short and long term effects a particular sentence might have on that individual child's chances of successful rehabilitation.

## Practice Point: Draw the court's attention to the future impact of the sentence

- Consider and raise the short term impact of a sentence on the welfare of the child.
- Consider and raise the long term impact of a sentence on the welfare and prospects of the child.
- Consider the Covid-19 restrictions in place within the prison regime and the impact of these current conditions on the welfare of the child.

## Consider the short term impact of a sentence on the welfare of the child

Sentences should be **individualistic and child focussed**, not offence focussed. The Sentencing Council Guideline emphasises that the court must consider the welfare of the child:

*"1.8 The impact of punishment is likely to be felt more heavily by a child or young person in comparison to an adult as any sentence will seem longer due to their young age. In addition penal interventions may interfere with a child or young person's education and this should be considered by a court at sentencing"* (2017a, p.4).<sup>84</sup>

The Sentencing Council Guideline further warns that:

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<sup>81</sup> <https://howardleague.org/wp-content/uploads/2017/07/Judging-maturity.pdf>

<sup>82</sup> <https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>

<sup>83</sup> [https://howardleague.org/wp-content/uploads/2021/03/CLR\\_Sentencing\\_young\\_adults.pdf](https://howardleague.org/wp-content/uploads/2021/03/CLR_Sentencing_young_adults.pdf)

<sup>84</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

“1.20 When considering a child or young person who may be particularly vulnerable, sentencers should consider which available disposal is best able to support the child or young person and which disposals could potentially exacerbate any underlying issues. This is particularly important when considering custodial sentences as there are concerns about the effect on vulnerable children and young people of being in closed conditions, with significant risks of self harm, including suicide” (2017a, p.7).<sup>85</sup>

The idea that the sentencing court needs to understand the child resonates with what young people have said they want. Young people have told the Howard League that it can feel as though the Court is too focused on the crime to see the impact the sentence will have on the child’s life: *“They are playing with someone’s life and don’t know enough about you. They need to treat people as individuals, some just see the crime.”*

It will be important to consider:

- whether the child has an appropriate placement and support for a community sentence;
- how a tag/curfew affect a child’s sense of self, access to education or ability to leave a harmful situation; and
- whether the sentence will have an adverse effect on the child’s:
  - health, wellbeing and safety;
  - education;
  - access to interventions/mental health support; and
  - family contact.

## Case Study

A 15 year old boy has been charged with malicious wounding. He had no previous convictions and was on remand at an SCH. His YOT took a detailed case history and discovered that the boy had been sexually abused over a period of time, had been known to self-harm and had in the past threatened to commit suicide. Considering that this was the child’s first experience with the criminal justice system and given his extreme vulnerability, a long prison sentence would have been the worst possible outcome for the child. In his pre-sentence report, his YOT carefully considered his welfare and future needs and proactively looked for – and was able to find – a specialist placement for him. The placement offered a high level of support where he could receive focused, specialist help which would suit his emotional needs. When the court eventually sentenced him, he was given a youth rehabilitation order.

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<sup>85</sup> *Ibid.*

## **Consider the long term impact of a sentence on the welfare of the child**

It is essential to think through what would happen to a child as a consequence of any given sentence before it is passed. The Sentencing Council Guideline notes that “[s]entences can also have varying impacts on the future of children and young people” (2017a, p.23, para. 6.11).<sup>86</sup>

Think about how a sentence will impact the child’s long term future:

- Will the sentence span landmark birthdays (16, 18 and 21), depriving the child of age appropriate opportunities or causing the child to have to move between services? For example, children in care are often dealt with by the leaving care team from their 16<sup>th</sup> birthday and the statutory duties to children in care weaken when the child turns 18 and then again when the young person turns 21. If the child is to turn 18 during the course of the sentence, he or she may have to move from children’s services to adult services. Education and health services are often age specific.
- If a child is going to receive a custodial sentence, the length of placement will affect:
  - the placement itself – a longer sentence may require the child to move from the children’s secure estate to the ‘corrosive’ adult estate;
  - a child’s entitlement to social services support;
  - whether a child becomes managed under the adult Transforming Rehabilitation scheme;
  - the amount of time it will take before a conviction is spent; and
  - for those children convicted of sexual offences, the period of time which they will be subject to notification requirements.

All of these factors should be considered in the context of that individual child’s situation, and any likely detriment to their rehabilitation should be flagged to the court.

## **Consider the Covid-19 restrictions in place within the prison regime and the impact of these current conditions on the welfare of the child**

It is important to consider the impact of the Covid-19 pandemic on the prison regime, in particular the impact that the current restrictive conditions may have on a child in the event a custodial sentence is passed. During the pandemic prisons across England and Wales faced strict limitations on face-to-face visits, education and support services and children were held in conditions that “*profoundly impacted on mental health*” (Howard League, 2020, p.20)<sup>87</sup>. Children faced prolonged periods of solitary confinement, sometimes spending up to 23 hours a day in their cells.

In R v Manning [2020] EWCA Crim 592, the Lord Chief Justice made it clear that:

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<sup>86</sup> *Ibid.*

<sup>87</sup> <https://howardleague.org/wp-content/uploads/2020/06/YA-Covid-19-Briefing-FINAL.pdf>

*"The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19." [41]*

### How to work out if a custodial sentence will affect the child's opportunity to gain leaving care rights

Children gain leaving care rights if they have been looked after by children's services:

- for 13 weeks after the age of 14 but before the child turns 18,
  - including a day on or after their 16th birthday (if the child has the 13 weeks before the age of 16 and is in prison or hospital on his or her 16<sup>th</sup> birthday, leaving care rights still apply).
- (Children Act 1989, section 23 and The Care Leavers (England) Regulations 2010)

Acquiring leaving care rights entitles a child to support from social services until 21 (or 25 if they wish to pursue education or training). The support available includes an allocated worker in the form of a personal advisor, a pathway assessment, a plan setting out the child's needs and how they will be met, and financial support.

The Sentencing Council Guideline advises that:

*"1.17 For looked after children and young people who have committed an offence that crosses the custody threshold sentencers will need to consider any impact a custodial sentence may have on their leaving care rights and whether this impact is proportionate to the seriousness of the offence. For other young people who are in the process of leaving care or have recently left care then sentencers should bear in mind any effect this often difficult transition may have had on the young person's behaviour" (2017a, p.6).<sup>88</sup>*

Although all children on remand are "looked after", a child cannot be "looked after" once given a custodial sentence. Therefore, if a custodial sentence will mean that a child cannot be spending time that would count towards the leaving care entitlement in the community, then this should be raised before the court prior to any sentence being imposed.

The Howard League successfully challenged the imposition of extra days as punishment on a child already serving this sentence on this basis. The extra days

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<sup>88</sup> *Ibid.*

meant that the child would no longer be released in time to accrue rights as a care leaver in the case of *M v Chief Magistrate* [2010] EWHC 433 (Admin). The court held that denying the child this opportunity to get additional support from social services until he was 21 years old (at least) contravened the welfare principle and set aside the extra days so M could be released and become a care leaver.

Consider the following scenario:

*A 15 year old child with no previous care history is remanded for eight weeks at a secure children's unit awaiting his sentence. On his 16th birthday, the Judge sentences him to a four year custodial sentence. He will be released just after his 18th birthday and will have no entitlement as a care leaver because of his age. He will come out as an adult, transfer to probation services and have no entitlement to social care support unless he has become so vulnerable that he meets the high threshold for adult social care.*

Consider the following alternative scenario for the same child:

*If the sentence is no more than three years, release will be no later than the half way point in 18 months' time. This will allow for his release prior to his 18th birthday. This ensures that the child is eligible for care entitlement upon release if he becomes "looked after" at that point.*

### How might a sentence affect when the conviction is spent?

The length of sentence determines how long it will be until the conviction becomes "spent" and does not need to be disclosed for the purpose of employment (unless the enhanced disclosure provisions apply). This is governed by the Rehabilitation of Offenders Act 1974.

The Sentencing Council Guideline states at paragraph 6.11 that "*the length of the rehabilitation periods and any likely effects on the child or young person's future prospects should be taken into account when considering if the sentence is commensurate to the seriousness of the offence*" (2017a, p.23).<sup>89</sup>

Prison sentences of over four years and all public protection sentences are excepted from this. Once a conviction is spent, the person is treated as if they had never committed, been charged for, been convicted of or been sentenced for the offence, i.e. they do not need to declare the conviction when applying for most jobs, insurance, some education courses and housing applications. As the Ministry of Justice has noted "*having a criminal record can severely hamper the efforts of adults (or children) who offended in the past to gain employment, which in turn can drive reoffending*" (Ministry of Justice, 2020, p.84)<sup>90</sup>. Therefore, in the scenario above, the difference between the

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<sup>89</sup> *Ibid.*

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/918187/a-smarter-approach-to-sentencing.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918187/a-smarter-approach-to-sentencing.pdf)

sentence of three or four years is also the difference between a lifelong duty to disclose the conviction or a limited time of three and a half years.

The table below sets out the relevant periods in which a conviction becomes spent, as determined by sentence type/length:

## Table of rehabilitation periods (when a conviction will be “spent”)

Sentence/disposal	Buffer period for young people (under 18 at the time of conviction or the time the disposal is administered). This applies from the <u>end</u> date of the sentence (including the licence period).
Custodial sentence of over 30 months (2½ years) and up to and including 48 months (4 years)	3½ years
Custodial sentence of over 6 months and up to and including 30 months (2½ years)	2 years
Custodial sentence of 6 months or less	18 months
Community order or youth rehabilitation order	6 months
Fine	6 months
Conditional discharge	Period of the order
Absolute discharge	None
Conditional caution and youth conditional caution	3 months
Simple caution, youth caution	Spent immediately
Compensation order	On the discharge of the order (i.e. when it is paid in full)
Binding over order	Period of the order
Attendance centre order	Period of the order
Hospital order (with or without a restriction order)	Period of the order

Referral order	Period of the order
Reparation order	None

It is well known that obtaining stable employment is key to preventing reoffending (a key aim of the youth justice system) and therefore arguments about the impact of the length of sentence on when a conviction will be spent can be persuasive.

**How might a sentence affect time on the sex offender register (notification requirements)?**

There is a similar requirement to make notifications for specified periods where an individual has been convicted of certain sexual offences, under s.80 Sexual Offences Act 2003 – this is colloquially known as being put on the sex offenders’ register.

The offences that trigger notification requirements are set out in Schedule 3 of the Act and it is important to check if it applies to the offence for which the child has been convicted. For example, certain offences which are considered “sexting” (sending sexual messages or sexual/naked images) will only attract notification requirements in certain circumstances (Youth Justice Legal Centre, 2018b).<sup>91</sup> Notifications are required to be made to the police (annually or whenever details change) of address and other specified information (see further the guidance from the Home Office, 2016).<sup>92</sup> The periods for which the person remains on the register and must make notifications are as follows:

<b>Table of sex offender registration periods</b>	
<b>Sentence/disposal</b>	<b>Notification period where the offender is under 18 on the relevant date*</b>
Prison sentence of 30 months or more (including life)	Indefinite
Admission to a hospital subject to a restriction order	Indefinite
Prison sentence of more than 6 months but less than 30 months	5 years

<sup>91</sup> <https://yjlc.uk/wp-content/uploads/2018/02/Sexting-Step-by-Step-Guide-Final.pdf>

<sup>92</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/576226/Guidance\\_on\\_part\\_2\\_of\\_the\\_sexual\\_offences\\_act\\_2003\\_2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/576226/Guidance_on_part_2_of_the_sexual_offences_act_2003_2.pdf)

Prison sentence of 6 months or less	3½ years
Admission to a hospital without a restriction order	3½ years
Caution	1 year
Conditional discharge	Duration of sentence
Any other disposal (e.g. a community punishment or fine)	2½ years

\* The “relevant date” will usually be the date of conviction or, for Schedule 3 offences that have sentencing thresholds (i.e. certain conditions have to be met), the date on which that threshold is met (i.e. the date of sentencing) (Beard, 2017, p.6).<sup>93</sup>

Following the case of *R (JF (by his litigation friend OF)) & Anor v SSHD* [2010] UKSC 17 anyone who was under 18 at the relevant date and subject to an indefinite notification period may apply to the police to come off the register eight years after release from custody (Home Office, 2012).<sup>94</sup>

### Will the child turn 18 on or before the mid-point of a sentence that is under two years?

As part of the ‘Transforming Rehabilitation’ policy all adults sentenced to under two years in prison were provided with additional “top up” supervision to ensure a total of 12 months supervision on release from prison. This also applies to young adults who:

- are sentenced as children to a term of less than two years; **and**
- turn 18 on or before the midpoint of their sentence.

In these cases s.247 Sentencing Act 2020 (formerly, s.106B of the Criminal Courts (Sentencing) Act 2000 (as inserted by s.6 of the Offender Rehabilitation Act 2014)) applies: the extended supervision period will begin at the end of the sentence, and end on the expiry of twelve months from the midpoint of the sentence.

This extends the young person’s compulsory contact with the criminal justice system considerably. It also creates a much longer period where the young person is at risk of breach and/or recall to prison. As the extensive research by McAra and McVie (2007) shows, system contact is the single greatest factor in determining reoffending. If this will apply to a child being sentenced, it may be relevant to point out the risk of further reoffending that will flow as a consequence of the sentence given that the key aim of the sentencing principles for children is to prevent reoffending (Sentencing Council, 2017a, p.4, para. 1.1).<sup>95</sup>

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<sup>93</sup> <http://researchbriefings.files.parliament.uk/documents/SN05267/SN05267.pdf>

<sup>94</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/98378/review-notification-requirements.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98378/review-notification-requirements.pdf)

<sup>95</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

## Case Study

Elisa was sentenced to a four month DTO when she was 17. She was released from jail just after her 18<sup>th</sup> birthday. On release, she was told that she would be transferred to probation and remain on licence for a further 12 months. Elisa was surprised as she thought she would only serve a four month sentence and then have no more contact with the criminal justice system. While on licence, the placement arranged for her by social services broke down when she was attacked and had to leave the area for her own safety. She was then informed that she was at risk of recall by probation.

This would not have been the case if she had been released before her 18<sup>th</sup> birthday, as in that case she would not still have been on licence when she was attacked.

## Practice Point: Ensure the correct credit is given for a guilty plea

- Make sure the court gives sufficient credit to the child for a guilty plea.

## Make sure the court gives sufficient credit for a guilty plea

The general rule is that guilty pleas are rewarded with a sentence reduction. The idea is to encourage those who are guilty to say so at the earliest opportunity, reducing the need to expend financial resources on securing a conviction and reducing the stress on the victim. In 2017 guidance for both children and adults by the Sentencing Council introduced a detailed regime to grade the benefit of a guilty plea in accordance with when it was made. The guidance for children is contained within the Sentencing Council Guideline (which only deals with children and young people) (2017a, pp. 17-21),<sup>96</sup> and the guidance for adults is in a separate document; 'Reduction in Sentence for a Guilty plea, Definitive Guideline' (Sentencing Council, 2017b).<sup>97</sup>

The key levels of reduction for children are as follows (although note that the time frames and discounts for children and adults are the same):

Maximum level of reduction	Timing of guilty plea
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One-third	In the first stage of proceedings (usually the first hearing in the magistrates' or youth court).
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<sup>96</sup> *Ibid.*

<sup>97</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf)

**One-quarter**  
**One-tenth**  
**Zero**

(This reduction may also be available at a later time where the child has not understood what is happening or was unable to make a guilty plea at this time – see below.)  
After the first stage.  
The first day of the trial.  
At a certain point after the start of the trial.

There is some flexibility within this system for children compared with adults. For example, where an adult is convicted of possession of a knife or offensive weapon, there can be no reduction below 80 per cent of the appropriate custodial sentence (Sentencing Council, 2017b, p.7).<sup>98</sup> In addition, the Sentencing Council Guideline for children allows flexibility to account for the relative immaturity of some children:

*“5.16 Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the child or young person’s ability to understand what was alleged, or otherwise made it unreasonable to expect the child or young person to indicate a guilty plea **sooner than was done**, a reduction of one-third should still be made” (2017a, p.19).*<sup>99</sup>

It is essential to consider whether this paragraph applies to any child who has made a guilty plea later than the first opportunity. Children may not plead guilty straight away for a number of reasons including being overcome with fear or being unable to understand their predicament due to a learning disability or other mental health problems. In particular, BAME children are less likely to have confidence in the justice system and to see it in terms of ‘them and us’, and this means reduced cooperation with the process and less chance of pleading guilty at the earliest opportunity (Ministry of Justice, 2017c, p.6).<sup>100</sup> While the Sentencing Council Guideline is clear that flexibility will not be available if the child is merely delaying a guilty plea in order to assess the strength of prosecution evidence, it will be important to explore the extent to which a child is overly reliant on professional advice compared to adults (Sentencing Council, 2017a, pp.19-20, para. 5.17).<sup>101</sup>

Of particular relevance to children, for whom custody should as a matter of law be avoided at all costs, the reduction in sentence awarded for a guilty plea may also be effected by imposing a more lenient sentence, e.g. a community sentence instead of a custodial sentence. Where a more lenient sentence is already justified by virtue of the mitigating factors, it will then be appropriate to further reduce that sentence if there is a guilty plea (Sentencing Council, 2017a, p.19, paras. 5.10-5.12).<sup>102</sup>

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<sup>98</sup> *Ibid.*

<sup>99</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>100</sup> <https://www.gov.uk/government/organisations/lammy-review>

<sup>101</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>102</sup> *Ibid.*

Be alert to the need to ensure that all of the child's mitigating factors and the effect of any guilty plea are considered **separately and cumulatively** by the court, to ensure that the child's sentence is reduced to the maximum extent possible.

## Practice Point: Draw the court's attention to any risk of bias

- Counter any bias, for example against BAME or looked after children.

### **Counter any bias against Black and ethnic minority and looked after children**

The Sentencing Council Guideline explicitly urges courts to recognise the overrepresentation of Black and ethnic minority children in the criminal justice system and the particular difficulties these children face:

*"1.18 There is also evidence to suggest that black and minority ethnic children and young people are over-represented in the youth justice system. The factors contributing to this are complex. One factor is that a significant proportion of looked after children and young people are from a black and minority ethnic background. A further factor may be the experience of such children and young people in terms of discrimination and negative experiences of authority. When having regard to the welfare of the child or young person to be sentenced, the particular factors which arise in the case of black and minority ethnic children and young people need to be taken into account" (2017a, p.6-7).<sup>103</sup>*

The Sentencing Council Guideline also directs the courts to consider the particular vulnerabilities of looked after children when making sentencing decisions:

*"1.16 When dealing with a child or young person who is looked after the court should also bear in mind the additional complex vulnerabilities that are likely to be present in their background" (2017a, p.6).<sup>104</sup>*

These sections of the Sentencing Council Guideline can be drawn to the court's attention in relevant cases to counter the risk bias. This should be done in an appropriate and tactful manner. Being able to refer to the Sentencing Council Guideline should assist with this.

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<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

## Section 3. Supporting children through sentencing in court

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### Attendance at court

#### Practice point: Prepare a child for attendance at court

- Considerations on the day.
- Plan how the child and parents/carers will get to court on time.
- Ensure attendance of professionals and other adults who the child trusts and who are best placed to have a positive influence on sentencing.
- Remember court can be an intimidating and overwhelming experience.
- Talk the child through what to expect during the hearing, including who is who, what the room is like and how long it will take.
- Prepare the child for the possibility of being asked questions in court.
- Talk to the child about being appropriately dressed and behaved in court.
- Familiarise yourself with the Criminal Practice Directions: consider what adjustments need to be made including where the child will sit, whether a supporting adult or intermediary is required and whether breaks are required.
- Legal requirements to keep children safe at court.
- Managing the child's expectations and explaining possible outcomes.

#### *Considerations on the day*

Children have unique needs and vulnerabilities. Be aware of any relevant risk factors in order to ensure the safety and wellbeing of a child going through the sentencing process.

Children may arrive late, tired and frustrated if they have had a long journey, which is particularly likely in respect of looked after children who are often accommodated long distances from the courts they are due to appear at, or if they have been distressed by being kept in inappropriate cells. This may make such a child reluctant to engage, and this may have a detrimental effect on both their wellbeing and the outcome of their case.

#### *Plan how the child will get to court on time*

It is important to be very clear with the child and their family or carers about where they will need to be and when. Explain the importance of being on time and check in to make sure they have thought about their transport and route and identify at this stage if support may be required. If appropriate, parents and carers should accompany the child. As above, parents of children can be required to attend court.

## ***Ensure attendance of professionals and other adults who the child trusts and who are best placed to have a positive influence on sentencing***

Sentencing hearings are often arranged at short notice and can feel somewhat rushed. Everyone should be made aware of the date of the sentencing hearing, and it is important that an adult attends who is able to encourage the court to slow down sufficiently to enable the child to understand and feel comfortable with what is going on, and to whom the child can talk. It is further important that the child knows who is attending with whom they will be able to consult – if nobody will be attending, then the child should be made aware that they can talk to social services or a mentor about the process and the outcome. The Howard League has been told by a number of children that their key support at court was from transport or security staff, including explaining the child's sentence to them.

## ***Remember court can be an intimidating and overwhelming experience***

It is well documented that children can find court traumatic. Children have told the Howard League that they feel nervous, anxious, scared and frightened at court. Preparing them for attending court is important and may help to allay these fears.

A contributing factor to the anxiety felt by children is the complicated legal terminology and often confusing formal court practices. When at court, children can feel disoriented, often not having basic touchstones to refer to. For example, one young person said, “[you] don't even know what time it is”. Children need to be supported to understand what is being said and done in an environment that feels unfamiliar to them.

Terminology and formal court practices can be complicated and confusing, causing children to feel detached and belittled: “*I still remember thinking about not really understanding what they were saying*”. Children told the Howard League that it would be helpful if lawyers could explain things that are said to them.

Children from Black and minority ethnic backgrounds may find the court especially alienating, given the lack of diversity among the judiciary (compared to the over-representation of children from Black and minority ethnic backgrounds in court). Twenty-two per cent of children sentenced in 2019/20 were Black, compared to only one per cent of judges and four per cent of magistrates (Youth Justice Board, 2021; Ministry of Justice, 2020).<sup>105</sup>

The Criminal Justice Alliance conducted a study based on the Crown Court experiences of nearly 150 lawyers, victims, witnesses and defendants. The findings were that the environment is “*chaotic*” and formalities such as court wigs and gowns

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<sup>105</sup> <https://www.gov.uk/government/statistics/youth-justice-statistics-2019-to-2020> ; [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/918529/diversity-of-the-judiciary-2020-statistics-web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918529/diversity-of-the-judiciary-2020-statistics-web.pdf)

create a "sense of other-worldliness" (2015, p.2).<sup>106</sup> Proceedings and much of the interaction and language of the courtroom are elaborate, ritualised and - in many respects - archaic. Sensible recommendations were made such as defendants being seated next to their legal representative, with the dock only being utilised for safety reasons. In addition, training in "plain English" should be put in place for prosecutors and judges in order to avoid "incomprehensible" jargon (Criminal Justice Alliance, 2015, p.23).<sup>107</sup>

It is therefore important to let the child know ahead of time that the language used will be complicated, and to tell them who they can speak to if they do not understand or cannot hear.

Another way to help prepare a child for court is to arrange for a pre-trial visit to the court. This can allow the child to familiarise him/herself with the courtroom and make the ultimate hearing less intimidating (Criminal Practice Direction I 3G.2.) Although it is usually best for the child to appear in person, if the court experience will be too intimidating for the child, the defendant's advocate may request that a live link direction is given to enable the child to participate more effectively in the proceedings. This means that the court will give a direction that any oral evidence will be given by the child through a live link (Youth Justice and Criminal Evidence Act 1999 s.33A(2), (3)). However, this should be used very carefully as a video link could have the opposite effect and make it harder for the child to engage.

### **Talk the child through what to expect during the hearing**

It is important to be very clear about what is expected of the child and what the child should expect from being at court. Prepare the child for waiting around: consider what the child can do while waiting. It is also helpful to let the child know what the court room will look like and where they will sit. If possible, consider taking the child on a familiarisation visit to help them feel more comfortable in their surroundings. Alternatively, the website You&Co offers child-friendly information on appearing at court, including a virtual courtroom to explore.<sup>108</sup>

Explain to the child that court might feel very fast-moving as there are lots of cases happening at once over the course of the day. Let the child know that sometimes the judge will talk about them to other professionals, rather than addressing them directly, when gathering information. This is important as children feel that judges and other professionals lose sight of how tough the experience is for them. Additionally explain to the child that they may be referred to as a child in court in order to ensure a welfare approach is taken. Tell them **what** is likely to be said court, including why terms like "immaturity" and "vulnerability" might be used. Children can be made to feel like just one of a long line of cases on any given day, rather than being seen as an individual contending with a very frightening life experience: "*Judges do this over and over again all day long. So it's just routine for them. You just feel like another number*". Children can also feel that there is no mutual respect when they receive little eye contact and

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<sup>106</sup> <http://criminaljusticealliance.org/wp-content/uploads/2015/11/Structured-Mayhem1.pdf>

<sup>107</sup> *Ibid.*

<sup>108</sup> <https://www.youandco.org.uk>

are spoken about, not to: *“The Judge don’t talk to you directly. He don’t even look you in the eye”*. Children see many of their interactions with professionals as a process of one-way communication: professionals speak and children listen.

*“Judge never spoke to me, just spoke to the Barrister. It’s not respectful. They talk about you like you’re not there”*.

Children are also often concerned that judges and other professionals have already made decisions about them before they step into court, and have a preconception of what a child touched by the criminal justice system is like:

*“Judges look at you and stereotype”*.

*“[Judges] already have an opinion from what they have read in the case papers. It is too late by the time they meet the young person”*

If a child will be seen via video link, it will need to be explained that they will be seen on a TV screen in court and they will see the court on another TV screen from the room they sit in. It is worth noting that communication via video link or through glass screens can hinder understanding if audibility is inconsistent.

*“You see, on video link, [the Judge] said 40 [months] but I didn’t know he actually said 14 [months]. I asked him to repeat but the video link cut out. I was told to speak to my Solicitor afterwards but I didn’t get a chance. The two officers hadn’t heard either. I found out my actual sentence a couple of weeks later.”*

*“My PSR was good but [the Judge] didn’t believe that. If he had known me, it might have been different. He saw me on video link – can’t see how you’re holding yourself, your body language or see you as a real person.”*

Video links may be used for child defendants. However the Criminal Practice Directions state that *“in the youth court or when a youth is appearing in the magistrates’ court or the Crown Court, it will usually be appropriate for the youth to be produced in person at court.”*(s.3N.13). The amended Youth Justice Board position statement on children appearing in court via video link states that the use of digital technology for trial, sentencing or appeal hearings involving children and young people is not appropriate since it increases the risk of young people not understanding the gravity of their situation and failing to take the court seriously (2016).<sup>109</sup> This is supported by research conducted by Transform Justice, whose report concludes that the use of video link video hearings reduces defendants’ understanding of, and respect for, the process, and may compromise human rights and confidence in our justice system. The report notes that the use of video link may lead to a breakdown in rapport between lawyer and client, breach confidentiality rules, inhibit the joint consideration of

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<http://youthjusticeboard.newsweaver.co.uk/icfiles/1/1861/11612/5475544/1edb16998b2fd5187bfea092/yjb%20position%20statement%20on%20video%20link%20hearings.pdf>

documents, remove opportunities for defendants to consult their lawyer during court, make defendants feel disconnected from proceedings, encourage bad behaviour and poor attitude, and render defendants less persuasive in presenting their case. In particular, the use of video links for children exacerbates children's disengagement from and confusion with the court process (Gibbs, 2017).<sup>110</sup>

The Transform Justice report notes that it is unclear how exactly decisions are made to use a live link, and while the defendant may express a preference, the ultimate decision lies with the court/judge, who are expected to decide "in the interests of justice". However, in practice the court is often not consulted and the justice test not referred to, with all defendants automatically booked to appear via video link (Gibbs, 2017).<sup>111</sup>

## Hearings during Covid-19

The corona virus pandemic had a severe impact on the operation of courts in England and Wales with many courts closed and limits on the number of cases heard. Temporary modifications were made to a number of pieces of legislation related to extending powers for the use of live audio and live video links as part of criminal proceedings. These modifications are due to expire after two years. The Children's Rights Alliance for England has raised the concern that "*the increase in video link hearings for child defendants, both during the coronavirus and subsequently, severely compromises a child's rights to a fair trial and their ability to effectively participate.*" They argue that "*the default position should be that children should never appear via video link for non-administrative hearings*" (Children's Rights Alliance, 2020)<sup>112</sup>. However, if the trial is going ahead using a video link, steps to minimise the impact on the child could include (Judicial College, 2018, p.88)<sup>113</sup>:

- Giving the child a coloured signal card to help them indicate if there is a problem or if they need a break;
- Telling the child that the judge can always see them even if they cannot see the judge. This is helpful as some children fail to tell the judge about a problem because they cannot see the judge and think the judge cannot see them; and
- Scheduling in regular breaks and ensuring that these are stuck to.

For hearings that are held in the courtroom, a number of safety controls are in place to ensure compliance with government guidance. These include (HM Courts and Tribunals Service, 2020)<sup>114</sup>:

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<sup>110</sup> <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>

<sup>111</sup> *Ibid.*

<sup>112</sup> <https://committees.parliament.uk/publications/1413/documents/12909/default/>

<sup>113</sup> <https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>

<sup>114</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/917837/HMCTS\\_COVID-19\\_additional\\_safety\\_guidance\\_14\\_September\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/917837/HMCTS_COVID-19_additional_safety_guidance_14_September_2020.pdf)

- A designated number of detainees and visitors that can be safely accommodated in the cell area while maintaining social distancing (this will likely vary between courts)
- Potential changes in how a child can communicate with their counsel in the custody suite – secure phone or other secure device may be used to allow for communication as counsel may not be allowed to be physically present.
- The Courts & Tribunals Service have provided some examples of how social distancing arrangements may be complied with at court, which include:
  - Space in public gallery may be limited to observe social-distancing arrangements;
  - Providing a second courtroom linked by close circuit tv to enable others to watch proceedings
  - Increased building and touchpoint cleaning.

These controls may have an impact on how the child is positioned within the courtroom, the ability to communicate within the court room as well as the child's perception of the proceedings and time should be taken to explain to the child what to expect when entering a courtroom during the pandemic.

### ***Prepare the child for the possibility of being asked questions in court***

Children should be given the opportunity to speak for themselves in court as required by Article 12 of the UN Convention on the Rights of the Child. This is often the case – particularly in the Youth Court. However, as Charlie Taylor notes in his review, even in the Youth Court children are being encouraged to speak up in an environment that is completely alien to any other situation in which they might find themselves asked to speak – and this is exacerbated in the Crown Court or the adult magistrates' court where fewer adjustments can be made for children (2016, para. 91).<sup>115</sup> Children need to be supported by professionals and prepared for speaking up in court. This will include helping them to overcome their distrust of the court, managing their expectations about what can be achieved, and ensuring they are aware of the importance of using polite and respectful language.

Practitioners such as the defence lawyer should talk to children about the types of questions that might come up so that they have some time to prepare answers. Commonly asked questions might be:

- Why they did the crime;
- What does the child think about their behaviour now;
- Whether the child feels remorse for the offence;
- How they would feel if that was done to them;
- How they think the victim feels; and
- What their plans are for the future.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/577103/youth-justice-review-final-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577103/youth-justice-review-final-report.pdf)

## **Talk to the child about being appropriately dressed in court**

Some young people told the Howard League that they felt appearance carried too much weight in court. In the words of one young person: *“It shouldn’t matter if a young person wears a tracksuit. They might not even own a suit, and the clothes a young person wears doesn’t state what kind of character the young person has.”* Others simply felt that looking smart showed respect.

It is worth talking to children in advance about their appearance in court and why it might make a difference. Explain that court is quite a formal place, so people at court will generally be dressed in smart clothes. As a general rule, it is usually in the child’s interests to wear smart clothes if possible. Not all children have smart clothes. One young person told us: *“They sent me home to put on a suit. I don’t have a suit! It makes no sense - if I go inside I’ll be back in my tracksuit anyway!”* If a child does not have smart clothes, it may be possible for them to get some, including through social services if the child is in care.

It is important to highlight that dressing smartly for court is different from dressing smartly for social occasions with peers: designer trainers that look expensive are unlikely to impress the court.

Even if a child cannot get smart clothes, they may be able to tuck their shirt in and ensure their body language is respectful. These may not be comfortable things to address with children but several young people told us that they wished they had had this sort of advice at the time.

## **Talk to the child about being appropriately behaved in court**

Let the child know that it is important to try and speak clearly and loudly so that everyone in court can hear you when you are asked a question. Being polite is a good way of showing the court that the child is taking the process seriously. Shyness or embarrassment and nervousness can cause body language which might be interpreted by the court as disrespectful.

However, the Sentencing Council Guideline acknowledges that *“[t]he court should consider the reasons why, on some occasions, a child or young person may conduct themselves inappropriately in court (e.g. due to nervousness, a lack of understanding of the system, a belief that they will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc) and take this into account”* (2017a, p.6, para. 1.15).<sup>116</sup> Where the child is struggling with their behaviour, it is important to remind the court of this guidance.

## **Familiarise yourself with the Criminal Practice Directions**

Ahead of the sentencing hearing, you should familiarise yourself with the provisions of the Criminal Practice Directions which relate to the sentencing process. The Criminal Practice Directions generally focus on the trial process, with sentencing as something

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<sup>116</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

of an afterthought, but it is important to look through it to identify which aspects will be relevant to the child's experience at the sentencing hearing. In particular, the provisions in section 3G "Vulnerable defendants" may be pertinent.

For example, thought should be given to where the child will be sitting (Criminal Practice Directions ss.36.7 and 3G.8). Sitting in the dock may be a frightening and alienating experience for children, and arguments should be advanced to the court to permit the child to sit with supporting adults, family or professionals as is recommended in the Criminal Practice Directions.

Consideration should also be given to whether a supporting adult or intermediary might be required (see Criminal Practice Directions s.3G.3 and the relevant Section earlier in this guide). If an intermediary was provided for the trial then an argument may be made that one should also be provided for the sentencing hearing. It is unlikely that an intermediary would be ordered for a sentencing hearing where one was not permitted at trial unless the child was particularly vulnerable. Supporting adults are generally regarded as required for trial, but they are also able to attend sentencing hearings and can be a vital resource for a confused child.

Certain children may also require breaks in the proceedings in order to absorb and digest information and regulate their emotions, and any adjustments to allow for this should be recommended to the court (Criminal Practice Directions s.3G.10).

## **Legal requirements to keep children safe at court**

At all times children at court need to be kept safe.

### **The court must have regard to the welfare of the child**

The best interests of the child shall be a primary consideration (Children and Young Persons Act 1933). This includes taking steps to remove the child from undesirable surroundings.

### **Detention is a last resort and for the shortest appropriate time**

Detention of children is a measure of last resort and must be for the shortest appropriate period of time (Article 37, UN Convention on the Rights of the Child 1990). This applies to children being placed in court cells, whether it is over the lunch break, while a jury is out or while a child is waiting for a secure escort. It may be possible for the child to be bailed to the precincts of the court or to remain in the company of a professional.

## **Case Study**

### **'Noah': court transport**

Noah was 13 years old when he was remanded to court for a breach of his community YRO. Noah was remanded at the Magistrates' Court at 3:15pm and did not leave the court until 8:30pm that night due to a delay in the arrival of his transport. Upon eventually leaving court he had a 4-5 hour journey to his

accommodation ahead of him. During his time at court he was not allowed to call his mum. Noah was frightened and remembers curling up on the floor of his empty cell in a blanket in tears. A duty YOT officer agreed to stay with Noah while he waited to ensure he was OK. If the YOT officer had not stayed, Noah would have been in custody completely alone with only court staff outside the cell should he have needed to request anything.

### Children must be detained separately from adults

If a child is kept in the cells at court, arrangements must be made to prevent a child from associating with detained adults. 'Association' can be broadly interpreted. It can include transitory contact such as an adult detainee passing by or adult voices being heard in neighbouring cells that could cause a child distress (Children and Young Persons Act 1933; *R (on the application of T) v the Secretary of State for Justice and Birmingham Magistrates Court* [2013] EWHC 1119).

### Care for children in court cells

Court custody staff must recognise and understand the distinct needs of children. Opportunities should be provided for the most vulnerable to receive support, including visits from family. Appropriate reading material should be provided and access to drinking water at all times. There should not be routine handcuffing in the movement of children through secure areas. Those transferred to court should not experience unnecessarily long escort journeys (HM Inspectorate of Prisons, 2014).<sup>117</sup> There is a lot for children to take in: there should be regular breaks so that things can be explained before the hearing is over.

## Case Study

### 'Isla': court custody

Isla was 14 when she was arrested and charged with murder. During her trial, Isla was held in a tiny, cold cell intended for adults. She was offered no fresh air breaks. All the other defendants in the case attended court on bail. From the outset it was immediately apparent that no consideration had been undertaken by either her YOT or the Local Authority in terms of the conditions that Isla would be subject to whilst she was at court. The Senior Custody Manager refused to make any special provision for Isla's needs as a child and stated Isla would be treated the same as an adult held at the court. Isla's father was also denied access to the custody area to provide her with emotional support. During the first week of the trial, neither Isla, nor her legal team, had any contact with the YOT or Social Worker. No risk or needs assessment or care plan had been put in place.

Despite her barrister's best efforts, Isla was held in these inappropriate conditions for the first four weeks of her trial. Finally, following the challenge of the key legal

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<sup>117</sup> <http://www.justiceinspectors.gov.uk/prisons/wp-content/uploads/sites/4/2014/02/expectations-court-custody.pdf>

principles in this case, Isla's barrister got Isla moved to a more suitable room for the final week of the trial. Isla was subsequently acquitted.

### ***Managing the child's expectations and explaining possible outcomes***

It is important to make sure that the child is aware of the range of possible sentencing outcomes, including whether the YOT worker is recommending a custodial or non-custodial sentence. However, try to avoid making predictions about the precise outcome. In particular, the Howard League has frequently heard from young people that they were told they would get a certain custodial sentence length but instead received a longer one.

Now that it is possible to get an indication about the sentence being contemplated by the court at an earlier stage of the process under the "Goodyear" principle (as established in *R v Goodyear* [2005] EWCA Crim 88), it is possible to manage a child's expectations.

If there is a real risk of the child going to custody, it is very important to make sure they have thought about some of the practical decisions that will need to be made. Children have often expressed concern about what happened to their possessions when they were brought into custody. That concern at least can be avoided with careful preparation. Other children have expressed concerns about responsibilities they currently have which someone else will have to take on (e.g. if they are a carer) and how their relatives and/or dependents may cope: "*I think about my family because it ain't just me going through the hard times, it is my family as well*". Other children might want to engage with school and education providers to see if it will be possible to continue education or sit exams while in prison. Information about contact with family, visiting arrangements, regime, early release arrangements and who can support a child in custody may be useful to provide at this stage.

The final section of this guide contains some information about how sentences work and may be useful for preparing children for their sentence. It also provides the contact details for the Howard League legal advice line, which provides advice to children in and at risk of prison.

## Section 4. Outcomes and moving forward after court

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### Understanding the sentence

Young people told the Howard League that they frequently feel abandoned at point of sentence. In the words of one young person:

*“Straight after being sentenced I felt forgotten”.*

Many children do not understand their sentence, either at the moment it is given to them or afterwards. It is essential to ensure that children understand their sentence and that help is available to navigate the sentence, whether it is in the community or custody.

### Practice Point: Explain the sentence given

- Make sure the child knows help is available to get through the sentence
- Make sure the child and supporting adults understand the sentence.
- Ensure that the child and supporting adults receive or know how to seek advice on appeal.

### ***Make sure the child knows help is available to get through the sentence***

Whatever the sentence, there will be help available to children from start to finish. Every person serving a sentence of any kind will have a supervising officer. For children this will be an allocated Youth Offending Team worker based in the community (if the child turns 18 during the sentence, he or she may be transferred to adult probation services).

If a child is sentenced to custody, he or she will have at the very least an allocated caseworker based at the establishment who is responsible for the sentence plan and convening regular professional meetings throughout the sentence. In some establishments the child will also have a key worker or a personal officer.

Children who were previously “looked after” by social services are entitled to visits as “former looked after children”. Government guidance sets out what a child in this situation can expect – this includes regular visits by a representative (usually a social worker or personal advisor) appointed by the local authority (Department for Education, 2010).<sup>118</sup>

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288512/Former\\_looked\\_after\\_children\\_in\\_custody.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288512/Former_looked_after_children_in_custody.pdf)

Children on a full care order should continue to receive support from social services and children who are “care leavers” aged 16 and 17 should continue to receive support.

## ***Make sure the child and supporting adults understand the sentence***

Children may need some time to process what has been said and for someone to explain it to them before they leave court. Taking time to explain and give further information can support children in coming to terms with their sentence and their long term rehabilitation and progression.

*“We often do not understand our sentence, either when it is given to us or afterwards. Often we cannot fully consider what has happened in court until afterwards when we look back or talk to other people. Even then we rarely get support to deal with the shock or understand what our sentence means for us.”*

Young people told the Howard League that it would help if young people were given a piece of paper with the details of their sentence at court, and for this to be explained to them verbally one-to-one. Many young people told us that the official sentence calculation is either never seen by them or takes weeks to come through.

It is essential that children and their supporting adults fully understand the sentence including:

- What the child has to do when
- Who is the named person with overall responsibility for the sentence and their contact details (and who should be contacted if they are not available)
- What might happen if you do not do what is expected of you
- What to do if the child is struggling to comply with the sentence
- What to do if the child feels they cannot trust their supervising officer
- If a custodial sentence, the earliest possible release date and opportunities for release on licence or under escort.
- If a custodial sentence, what the child has to do on release from prison and the risk of a return to custody after release

Some brief information is available about each type of sentence to assist adults in supporting children to ask the right questions. Practitioners need to be able to explain to children what each of the sentences involve, what the child is expected to do to successfully complete the order and what will happen if they fail.

## **Sentences in the community**

Children can get either referral orders or youth rehabilitation orders. For both orders, the child will need to know the things they have to do or not do as part of the order.

In the case of referral orders the child will be expected to attend a panel meeting where the terms of the order are decided. The purpose of the meeting is to enable the child and parents to give input in respect of the plan. Statutory guidance requires the child

to do a set amount of reparation work according to the length of the order (Ministry of Justice, 2015c, p.38).<sup>119</sup>

In the case of all community based orders, explain that they will be working with their YOT worker as part of their community sentence and there will be a set number of meetings that the child has to attend with their YOT worker in line with the scaled approach set by the National Standards for Youth Justice Services (Youth Justice Board, 2013, p.29).<sup>120</sup> Be clear that if they do not comply they could go back to court and the court can extend the sentence, vary the requirements of the order or in some cases impose a custodial sentence instead. The supervising YOT worker needs to be clear about what the child should do if he or she is struggling to comply with a community sentence or a supervision/licence period.

It is therefore critical that the adults closest to the child (parents, carers and supporting adults) know crucial information which will enable the child to comply with their community order such as when and where their first appointment is to be held and who they should call if they have a problem. It will be important to have back up contact names and numbers in case the supervising officer is not available. Every Youth Offending Team has a duty manager in working hours who can be contacted through the main office number.

The child should also know what they can do if they are unable to build a good relationship with their YOT worker to the point where they feel they cannot trust them sufficiently to be effectively supervised. It is always a good idea to talk to the person about any issues if possible. If this does not solve the problem, the YOT is required have its own complaints process, which should be used.

### Custodial sentences

If a child gets sentenced to a custodial sentence, the child may need to know the answer to a number of questions:

- Does time on remand count?
- Will I be released automatically? If not, when can I apply for release?
- Can I apply for early release? When should this happen?
- How can I apply to reduce my sentence? (E.g. appeal against sentence and minimum term reviews)
- What will happen when I get out of secure?

In the case of all custodial sentences, it is important to make it clear that the child is at risk of return to prison for the whole period.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/418443/revise-d-referral-order-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418443/revise-d-referral-order-guidance.pdf)

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/296274/national-standards-youth-justice-services.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296274/national-standards-youth-justice-services.pdf)

Children can get five types of sentence. The arrangements differ for each one and the child's lawyer should always explain the situation that applies to the child. Additionally, organisations such as the Howard League can also explain the sentence. Further information is available on the Youth Justice Board's website.<sup>121</sup>

## Detention and Training Order (DTO)

If a child gets a **Detention and Training Order ("DTO")**, they will be automatically released at the halfway point under supervision at the latest. But the order is not over at the point of release. The child is released under supervision of the YOT (or if the child turns 18 in the course of the order, probation). If the child breaks the terms of their supervision they can be returned to court and either receive an additional three months or be directed to remain in custody until the end of their original sentence.

Early release for good behaviour is available for longer DTOs:

- up to one month before the halfway point for sentences of eight months, and
- up to two months before the halfway point for sentences of eighteen months or more.

For most offence types, there is a presumption of early release. The exception is for certain serious offences. Suitable accommodation will need to be in place for early release to take place, although it should not be rejected on that ground alone.

However, even where a child has been sentenced for one of these offences and early release is therefore not presumed, it can still be achieved by making exceptional progress on the sentence plan. All early release is electronically monitored (Youth Justice Board, 2014d).<sup>122</sup>

Release may also be delayed up to one or two months after the midpoint (for a sentence of eight / eighteen months or more, respectively) on grounds of bad behaviour.

## Fixed determinate sentence for a grave crime (s.249-252 Sentencing Act 2020) (formerly, s.91, Power of Criminal Courts (Sentencing) Act 2000)

Where a child has been convicted of a grave crime (one that could result in a sentence of 14 years or more in the case of an adult), they should be informed that they will always be released at the midpoint. Between the midpoint and the sentence end date the child will be on licence. It is critical to ensure the child is aware that they can be recalled (without the agreement of the court) at any point for breaking the conditions of the licence. Recall can either be for a fixed term of 28 days or until the Parole Board or Secretary of State authorises release again. Legal aid is available for parole board reviews.

A child may be eligible for Home Detention Curfew ("HDC") on an electronic tag up to 135 days before the midpoint where they are serving a sentence of under four years.

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<sup>121</sup> <https://www.gov.uk/government/organisations/youth-justice-board-for-england-and-wales>

<sup>122</sup> <https://www.gov.uk/government/publications/custody-and-resettlement/custody-and-resettlement-section-7-case-management-guidance>

Prison Service guidance governs the process. As with early release on DTOs some offences are presumed unsuitable but can still be considered.

### Extended determinate sentence (s.254-256 Sentencing Act 2020) (formerly, s.226B, Criminal Justice Act 2003)

An **extended determinate sentence**, comprising a custodial term and an extended licence period, will have an automatic release date which should be calculated and explained to the child. Also, depending on the length of the sentence and the nature of the offence there may be the option to apply for parole before that time (at the two-thirds point). Whether released early or at the automatic conditional release date, they will remain eligible for recall to custody (without the agreement of the court) until the end of their full term (original custodial term and extended licence period). Once recalled, release will be at the discretion of the parole board who will review the case annually. Legal aid is available for parole board reviews.

### Discretionary and mandatory life sentences (s.259 Sentencing Act 2020, formerly s.90, Power of Criminal Courts (Sentencing) Act 2000)

**Discretionary and mandatory life sentences** include a minimum term set by the court after which the parole board has the discretion to direct release on parole under life licence.

The child is entitled to be considered for the possibility of a pre-tariff review three years before the end of the minimum term or, where the term is of five years or less, at the halfway through the minimum term. A pre-tariff review is a parole board review where the board can recommend whether or not the person should progress from closed to open conditions. It is not an automatic process. The Secretary of State decides who should get a pre-tariff review by considering reports prepared by the prison and professionals.

Anyone serving a mandatory life sentence for murder committed and convicted as a child (called an '**HMP sentence**') is entitled to a review of their minimum punishment period – as a matter of policy this falls at the halfway point of the minimum term, but a case could be made to bring this forward where the person is serving a very short term. The minimum term review is conducted by the High Court, and those eligible will be invited to apply by the Ministry of Justice.

Children are entitled to representation at a minimum term review, and legal aid is available through specialist prison law solicitors. The Court is provided with a dossier of information about the progress the child has made and has to determine whether or not the child has made 'exceptional and unforeseen' progress. If the Court reduces the minimum term this will allow the child to be considered for open conditions earlier and increase the chance of being released at the earliest possible release date. The usual reduction is one year but the Court is not restricted and there are instances where longer reductions have been made.

Children are rarely made aware of the minimum term review or pre-tariff review process at point of sentence so it is important to make sure that they understand that their behaviour in prison can make a big difference.

It is important that the child and anyone supporting them obtains documentary evidence of progress as in most cases these reviews will take place once the child is in an adult establishment and there is always a risk that evidence of progress will not be available to the new prison.

### Release on Temporary Licence (“ROTL”) or escorted absences

ROTL and escorted absences enable a child to leave the prison for a short period of time. There are rules governing when applications can be made and the basis for granting them. Prison governors must ensure that there are systems in place to assess the eligibility of all children for ROTL (Prison Service Instruction 08/2012, para. 5.29). They must utilise the opportunities under ROTL arrangements to explore work and accommodation opportunities, promote rebuilding of family relationships and where possible, run pre-release courses to assist in the resettlement of children (Prison Service Instruction 08/2012, para. 5.27).

Children should be made aware of the availability of ROTL and encouraged to apply for it where appropriate, although it may also be necessary to manage their expectations about when it will be granted. As a general rule of thumb the better behaved child is in custody, the greater the chance of getting a temporary release.

### Ensure that the child and supporting adults receive or know how to seek advice on appeal

Practitioners must make time to explain the sentence that has been imposed to the child: how does this impact them now and in the future? What appeal rights do they potentially have? What is the distinction between appeal of conviction and appeal of sentence? Children told the Howard League that they often feel “*forgotten*” after being sentenced: “*Better when you’re there [at Court] – you can at least talk about [the sentence]*”.

Children are entitled to written advice about appeal from their solicitor, but the Howard League has encountered many examples of children not being advised in writing on appeal. There is a sense that very rarely do children feel able to appeal sentence as they run out of time and have a fear that it will “*make things worse*”. Children should always be told their options for appeal, and encouraged by their YOT or social worker to seek legal advice from a solicitor where appropriate. When writing to children about the appeals process, practitioners should make it clear what the letter concerns (e.g. by using very clear headings) and should set out their advice on appeal – including funding arrangements – in as straightforward a manner as possible. Provided that the child consents and it will not be detrimental to the child’s interests, it may be appropriate for the advice to be shared with a trusted adult who can help explain the advice to the child.

If the child is unhappy with the advice on appeal, it is possible to get a second opinion. However, there are tight restrictions on getting legal aid for this.

If a child appeals and is unsuccessful, it may be possible to apply to the Criminal Cases Review Commission (“CCRC”). The CCRC was set up to investigate suspected miscarriages of justice from the courts, principally to investigate cases where people

believe they have been wrongly convicted of a criminal offence or wrongly sentenced. The CCRC website sets out the criteria and process for making an application.<sup>123</sup> Applications can be made by lawyers or by individuals.

## Practice Point: Getting help in prison and preparation for release

- The Howard League's work with children and young people in and at risk of prison

### *The Howard League's work with children and young people*

The Howard League is a registered charity and the legal department provides legal services for young people in prison. The Howard League is the only national legal service for children in prison. Since 2002 the Howard League has provided free advice and representation to children in prison in respect of their needs both in prison and preparing for release. If the Howard League is unable to take on a case, for example because the legal advice the young person requires is outside our expertise, the team will help to find another solicitor for the young person.

The Howard League's free and confidential legal advice line should automatically be on the PIN of all people in custody. The number is: **0808 801 0308** and is open Mondays to Fridays from 9am till 12pm and from 2pm till 4pm.

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<sup>123</sup> <https://ccrc.gov.uk/>

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## Statute, regulations and codes of practice

Care Act 2014

The Children Act 1989

The Children Act 1989 Representations Procedure (England) Regulations 2006

Children Act 2004

Children and Young Persons Act 1933

Criminal Justice Act 2003

Criminal Practice Directions [2015] EWCA Crim 1567

Criminal Practice Directions (Amendment no. 2 (2016)) EWCA Crim 17

Criminal Practice Directions 2015 (Amendment no. 3 (2017)) EWCA Crim 30

Criminal Procedure Rules 2015

Data Protection Act 2018

European Convention on Human Rights

Freedom of Information Act 2000

Legal Aid and Sentencing and Punishment of Offenders Act 2012

Local Authorities Social Services Act 1970

Modern Slavery Act 2015.

The Police and Criminal Evidence Act 1984

Prison Service Instruction 08/2012

Prison Service Order 6700

Secure Training Centre (STC) Rules 1998

Sentencing Act 2020

United Nations Convention on the Rights of the Child (UNCRC) (1989)

Young Offender Institution (YOI) Rules 2000

Youth Justice and Criminal Evidence Act 1999

## Resources

<b>Advocates' Gateway</b>	Advocates' Toolkits at: <a href="http://www.theadvocatesgateway.org/toolkits">http://www.theadvocatesgateway.org/toolkits</a>
<b>Criminal Cases Review Commission Communications Passports</b>	<a href="https://ccrc.gov.uk/">https://ccrc.gov.uk/</a> Personal Communication Passports at: <a href="http://www.communicationpassports.org.uk/Creating-Passports/Templates/">http://www.communicationpassports.org.uk/Creating-Passports/Templates/</a>
<b>Coram Children's Legal Centre</b>	Education law advice line: <a href="http://www.childlawadvice.org.uk">www.childlawadvice.org.uk</a>  Migrant Children's Project advice line: <a href="http://www.childrenslegalcentre.com/get-legal-advice/immigration-asylum-nationality/advice-line/">http://www.childrenslegalcentre.com/get-legal-advice/immigration-asylum-nationality/advice-line/</a>
<b>Every Child Protected Against Trafficking</b>	<a href="https://www.ecpat.org.uk/">https://www.ecpat.org.uk/</a>
<b>Family Lives</b>	<a href="http://www.familylives.org.uk/advice/your-family/parenting/where-can-young-parents-go-for-support/">http://www.familylives.org.uk/advice/your-family/parenting/where-can-young-parents-go-for-support/</a>
<b>Health and Care Professions Council</b>	<a href="http://hpc-uk.org/">http://hpc-uk.org/</a>
<b>I CAN</b>	<a href="http://www.ican.org.uk/">http://www.ican.org.uk/</a>
<b>Independent Parental Special Education Advice (IPSEA)</b>	<a href="http://www.ipsea.org.uk">http://www.ipsea.org.uk</a>
<b>Information Commissioner's Office</b>	<a href="https://ico.org.uk/">https://ico.org.uk/</a>
<b>National Appropriate Adult Network</b>	<a href="http://www.appropriateadult.org.uk/">http://www.appropriateadult.org.uk/</a>
<b>Royal College of Psychiatrists</b>	<a href="http://www.rcpsych.ac.uk/">http://www.rcpsych.ac.uk/</a>
<b>You&amp;Co</b>	<a href="https://www.youandco.org.uk">https://www.youandco.org.uk</a>
<b>Young Minds</b>	<a href="https://youngminds.org.uk/">https://youngminds.org.uk/</a>
<b>Youth Justice Board</b>	<a href="https://www.gov.uk/government/organisations/youth-justice-board-for-england-and-wales">https://www.gov.uk/government/organisations/youth-justice-board-for-england-and-wales</a>
<b>Youth Justice Legal Centre</b>	<a href="http://www.yjlc.uk/">http://www.yjlc.uk/</a>

## Annex A - Guiding Legal Principles

The guiding legal principles surrounding the sentencing of children differ significantly from the sentencing of adults. These guiding principles should underpin all decisions made about children and young people in the criminal justice system.

- The overall aim of the youth justice system is to **prevent offending**
- The law recognises that children should be **treated differently from adults**
- Any sanction should be the **least restrictive** possible. Detention should be a last resort and, where children are detained, it should be for the shortest possible period of time
- In all decisions about children, their **welfare** should be a **primary consideration**
- Children should have access to **legal advice** and **representation**
- Children have a **right to be heard** and the **right to be consulted** on a fully informed basis about decisions that affect them

Many of the principles set out below are also outlined in the Sentencing Council's publication '*Sentencing children and young people: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery*' (2017a).<sup>124</sup> The Guidelines provide specific guidance that courts must have regard to when sentencing children and young people, and also provides a very useful summary of the key principles and indicates the extent to which the courts now recognise their importance.

### **The overall aim of the youth justice system is to prevent offending**

Section 37 of the Crime and Disorder Act 1998 provides that the purpose of the criminal justice system for children and young people is to prevent reoffending. The Supreme Court has commented that a key aim "*of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity*" (*R v Secretary of State, Ex parte Maria Smith* [2005] UKHL 51, Baroness Hale at para. 25).

### **Children should be treated differently from adults**

This is reflected by the development of specific laws, international instruments, policy and guidance applicable to children. The introduction of the Children Act 1989 provided a comprehensive framework promoting the best interests of the child, a principle enshrined in the United Nations Convention on the Rights of the Child. In addition, the Sentencing Council Guideline provides that:

*"1.5 It is important to bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking behaviour... They may not fully appreciate the effect their actions can have on other people"* (2017a, p.4).<sup>125</sup>

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<sup>124</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide\\_FINAL\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf)

<sup>125</sup> *Ibid.*

Case law has acknowledged that “*within a shorter time than adults, young offenders might change and develop*” (*R v Lang & 12 others* [2005] EWCA Crim 2864, para. 17(vi)). Children change as they mature and problematic circumstances apparent at the time of the offence may no longer be present. Therefore, the lack of maturity of a child must be considered of prime importance (*R (F and Thompson) v Secretary of State for the Home Department* [2008] EWHC 3170, para. 19).

## ***The least restrictive sanction and detention as a last resort***

Detention should always be the very last option, especially where children and young people are concerned. The restriction of liberty is recognised by the law to be a very serious step. All other less serious measures must be considered, and deemed insufficient to safeguard the child or the public, before the decision to detain is made (*Saadi v United Kingdom* (Application no. 13229/03, para. 70)).

It is also a general principle, expressed in the Sentencing Act 2020 s.230(2), formerly the Criminal Justice Act 2003 s.152(2), that judicial discretion to impose a custodial sentence must only be exercised as a last resort if a fine or community sentence can be justified for the offence(s).

In the event that a custodial sentence is imposed, it should be for the shortest term that is in the opinion of the court commensurate with the seriousness of the offence (Sentencing Act 2020 s.230(2), formerly the Criminal Justice Act 2003 s.152(2)). Rules 10 and 9 of the European Rules for Juvenile Offenders Subject to Sanctions and Measures (2008) reiterates that detention is a measure of last resort and custodial sanctions should only be to the extent and for the period strictly necessary.

The principle that custody should be a last resort is reinforced by Article 37 of the UNCRC:

*States Parties shall ensure that:*

*(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;*

*(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*

## ***Welfare should be a primary consideration in all decisions affecting children***

The overarching protection is the principle reflected in s.44(1) of the Children and Young Persons Act 1933 (the ‘Welfare Principle’):

*(1) Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.*

Case law has clarified that the welfare principle is an important and fundamental consideration in determining how children within the criminal justice system be dealt with (*R (M) v The Chief Magistrate* [2010] EWHC 433 (Admin) at para. 7), and the Sentencing Council Guideline provides that when sentencing children and young people, a court must have regard to their welfare (2017a, p.4, para.1.1).<sup>126</sup>

The welfare principle is also reflected in Article 3(1) of the UNCRC:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The Supreme Court has held that the best interests' principle has been translated into national law by the Children Act 2004 in the case of *ZH (Tanzania) v. SSHD* [2011] 2 AC 166.

### **Children are entitled to access to justice**

Children are entitled to access to justice. This includes access to **legal advice** and **representation**, a **right to be heard** and the **right to be consulted** on a fully informed basis about decisions that affect them.

Article 12 of the UNCRC provides that:

- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

The Council of Europe produced *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* in November 2010. It aims to ensure that the rights of the child (including: right to information, representation, participation and protection) in any proceedings are fully respected. Furthermore, that the child's maturity and understanding of the circumstances of the case are duly considered. Paragraph IV D 2 sets out a number of more specific descriptions of the rights of a child including:

- Children should have the right to their own legal counsel and representation (para. 37)
- Children should have access to free legal aid (para. 38)

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<sup>126</sup> *Ibid.*

- Children should be considered as fully fledged clients with their own rights and lawyers representing them should bring forward the opinion of the child (para. 40)

The guidelines provide detailed guidance on how children involved in the criminal justice system should be consulted and assisted.

## **Children's rights are human rights**

The UNCRC provides a comprehensive checklist of children's rights. They complement many of the rights found in the European Convention on Human Rights ("ECHR") which apply to all humans, both adults and children.

Key Articles of the ECHR applicable to children worth noting include:

- Freedom from torture (Article 3)
- The right to liberty (Article 5)
- The right to a private and family life, as well as personal and social development (Article 8).

The courts have held that when interpreting the rights contained in the ECHR, it is legitimate to rely on UNCRC to interpret and inform the extent to which the human right has been breached. For instance, in the Howard League's Children Act case (*R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin)), the court noted that the UNCRC, as well as other equivalent, non-binding international law, can be relevant to '*proclaim, reaffirm or elucidate*' the scope of other fundamental rights.

## **Key legislation and guidance**

- European Convention on Human Rights (ECHR)
- United Nations Convention on the Rights of the Child (UNCRC) (1989)
- Council of Europe (2010) *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*
- European Rules for Juvenile Offenders
- Sentencing Guideline Council (2009) *Overarching Principles - Sentencing Youths*
- Sentencing Council (2017) *Sentencing children and young people: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery - Definitive guideline*
- The Judicial College (2018) *Equal Treatment Bench Book*
- The Judicial College (2020) *Youth Court Bench Book*
- The Judicial College (2021) *Youth Defendants in the Crown Court*
- Crime and Disorder Act 1998
- Children Act 1989

**Annex B – Request for documents template**

FAO: Name  
Address 1  
Address 2  
City  
Postcode

**Contact: xx**  
**Email: xx**  
**Our Ref: xx**

**date**

Dear Sir or Madam,

**Re: Client name (DOB)**  
**Request for Documents**

We write in relation [name].

He/she provided us with your details as we require important background information regarding [name's] involvement with your service in order to support his/her case. Please find attached [name's] consent form for disclosure of the below documents.

Please could you send us at your earliest convenience:

- [insert requested documents]
  - Eg mental health/care/education assessment/plans;

Please could you confirm receipt of this letter.

If you are unable to provide any of the above documents immediately, please provide the reasons for this and advise when you will be in a position to send them to us.

Yours faithfully

Name  
Position

**Annex C – Subject access request template**

[Your full address]  
[Phone number]  
[The date]

[Name and address of the organisation]

Dear Sir or Madam

**Subject access request**

[Your full name and address and any other details to help identify you and the information you want.]

Please supply the information about me I am entitled to under the Data Protection Act 2018 relating to: [give specific details of the information you want, for example

- your personal file;
- emails between 'A' and 'B' (between [date] and [date]);
- medical records (between [date] and [date]); held by Dr 'C' at 'D' [named] hospital ;
- CCTV camera situated at ('E' location) on [date] between [time] and [time];
- copies of statements (between [date] and [date])

If you need any more information from me please let me know as soon as possible.

It may be helpful for you to know that a request for information under the Data Protection Act 2018 should be responded to as soon as possible and within no later than one month.

If you do not normally deal with these requests, please pass this letter to your Data Protection Officer. If you need advice on dealing with this request, the Information Commissioner's Office can assist you and can be contacted on 0303 123 1113 or at [ico.org.uk](http://ico.org.uk)

Yours faithfully

[Signature]

## Annex D – Character reference template

[Full name]  
[Full address]  
[Telephone number]  
[Date]

[Name of child's solicitor]  
[Solicitor's address]

Dear Sir/Madam

### Character reference for [insert child's name]

I write to provide a character reference on behalf of [child].

#### Background

- Introduce yourself, including (if applicable) that you have no previous convictions and are not known to the police, your DOB, your occupation and qualifications.
- Confirm the capacity in which you know the child.
- Confirm how long you have known the child.

#### Describe in detail the capacity in which you know the young person.

(For example: *X has been a player on my football team since he was 12 years old. He comes to practice twice a week and plays in matches every Saturday. His responsibilities include...*)

- Describe the child's positive attributes, including any contributions they have made to society, their achievements and any impressive characteristics they have. Use examples where appropriate. Small details can be helpful, for example: *X is always respectful towards his fellow teammates.*
- Consider describing any particular difficulties that the child faced around the time of the offence.
- If appropriate, outline that you are aware of the conviction and, if you are able, state that it was out of character. Comment on any remorse shown by the child since the offence and potentially on any change in their circumstances or outlook since the offence. Please do not comment on the particular circumstances or facts of the offence.
- Outline positive future contributions that the child is able and willing to make and, if applicable, what impact a sentence would have on that.

Should you need any further information, please contact me on [telephone number/email address]. I am willing to attend court in order to give this evidence in person.

Yours sincerely

[Signature]

[Name]

[Position if applicable]

**Annex E – Child in need referral template**

Children’s Social Care  
[address]

[Date]

Dear Sir / Madam

**Re: Urgent referral for support under section 17 of the Children Act 1989**

**Name:**

**DOB:**

**Location:**

I am writing to request an urgent Child in Need assessment for .....

[name] lives/lived at [insert full address or last known full address].

The reason I am making this request is.....

**Key Vulnerabilities:**

**Urgency**

[name] will be leaving prison on or around [insert date] but has [nowhere to live and/or insufficient support]

**Action requested:**

Please assess the above named child for support under section 17 of the Children Act 1989 as a matter of urgency.

Please ensure the assessment covers accommodation and section 20 support on release as required by the leading case of *R (on the application of G) (FC) (Appellant) v London Borough of Southwark (Respondents)* [2009] UKHL 26.

Please confirm your proposed course of action by contacting me.

Yours faithfully,

[Your name]  
Job Title

---

## Howard League for Penal Reform

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