

#05 Trauma Informed Lawyering

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This guide explains what trauma informed lawyering in the youth justice system is and why it matters.

Going through the criminal justice system can, in and of itself, be a traumatic event for a child. Traumatic events can have a lifelong impact on a child's health and wellbeing. Lawyers working with children in the criminal justice system need to be aware of trauma and its effects, to be able to identify the impact of trauma and, if necessary, to draw it to the attention of decision-makers.

Introduction

‘... if one set out intentionally to design a system for provoking symptoms of traumatic stress disorder, it might look very much like a court of law.’¹

Being in the criminal justice system can cause or exacerbate trauma for a child. For example:

- A child may be asked to recall and recount events that caused trauma, resulting in ‘reliving’ the traumatic experience.
- A child may be exposed to an alleged abuser, or person who has caused or is associated with trauma.
- The court experience, including delays to the process, can reinforce disempowered feelings associated with trauma, which can trigger trauma-related stress or cause re-traumatisation.
- There can be difficulty for a child in disclosing material associated with shame – this is likely to be a particular issue for children with a history of experiencing sexual violence.²
- There is an overlap between the ways in which we think people act when they are lying and the presentation of post-traumatic stress

disorder (PTSD) which can lead to incorrect judgments about the credibility of children with PTSD.³

- Whilst the traumatic event may be what brings the child into contact with the legal system, the child’s reaction to trauma can make them appear a risk, or be viewed as an aggravating rather than a mitigating factor.

The impact of trauma on an individual is psychological, but can also be physiological: children’s brains develop in response to trauma in ways that allow the child to survive traumatic stress and manage its effects. Trauma has been shown to adversely affect many of the neurobiological systems responsible for cognitive development and the regulation of emotions and behaviour. As a result, children who have experienced trauma often display a range of social, developmental and physical impairments.⁴

‘Trauma can play out powerfully within a court environment. Emotions are heightened and although steps are taken to minimise discomfort, attending court can in itself be a traumatic event.’⁵

- 1 Herman, ‘Justice from the victim’s perspective’, June 2005, Violence Against Women 11(5):571-602
- 2 Van Velsen, Gorst-Unsworth & Turner, ‘Survivors of Torture and organized violence: Demography and diagnosis’, Journal of Traumatic Stress’ 1996
- 3 Herlihy & Turner, ‘Untested assumptions: psychological research and credibility assessment in legal decision-making’, European Journal of Psychotraumatology, 2015
- 4 ‘Understanding traumatic stress in adolescents: a primer for substance abuse professionals’, National Child Traumatic Stress Network, 2008, bit.ly/3wDbEp4
- 5 Martin, Woodhouse & Burke, ‘Being trauma-informed – in practice’, Journal of The Law Society of Scotland, October 2019

Trauma informed basics

To be effective as a child lawyer, you need to be 'trauma informed'.

Being a trauma informed lawyer, in part, requires developing and demonstrating characteristics that are intrinsic to positive human relationships – for example: empathy; responsive

listening; restraint from judgment; and demonstration of authentic care and concern.⁶

Child clients who have experienced trauma may find it harder to trust their lawyer, so you must think of ways of countering this and engaging with a traumatised child.

'... Dr Susan Bailey gave evidence during the trial in November 1993 that on each occasion when she had seen the applicant prior to the trial he had cried inconsolably and had not been able to talk about the circumstances of the offence in any useful way ... the applicant was suffering from post-traumatic effects and found it very difficult and distressing to think or talk about the events in question, making it impossible to ascertain many aspects ... [I]n view of V's immaturity, it was "very doubtful" that he understood the situation and was able to give informed instruction to his lawyers ... In conclusion, the Court considers that the applicant was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6 § 1 [of the European Convention on Human Rights (ECHR)].'
(V v UK [1999] ECHR 171 paras 89 and 91, emphasis added)

Practical advice: techniques for building good relationships with traumatised child clients

- **Building trust**
Traumatised children may believe that adults will not keep them safe and may harm them. Clients may engage in behaviours to 'test' whether you will ultimately disappoint and reject them, as other adults have done. Be reliable and consistent to show the child that you can be trusted.
- **Model positive relationships**
Children who have experienced trauma, particularly in the context of interpersonal relationships, often expect new relationships to reinforce negative beliefs they have developed about themselves and others. You need to maintain appropriate boundaries, while being compassionate.
- **Transparency**
Transparency promotes trust and minimises the child's feelings of powerlessness – a common trauma 'trigger'. It also helps distinguish your relationship from past traumatic or dysfunctional relationships.
 - Be transparent with your child client about the legal proceedings, in age-appropriate terms.
 - Explain your role clearly, and be honest about what you can and cannot do for your client. It is important not to create a false sense that you can rescue your client from their situation.
 - Have a candid conversation with the client about the purposes of note-taking. Explain confidentiality to your child client, and tell them they can see your notes any time, and invite them to take their own notes if they wish.
- **Predictability**
Predictability and routine can help a traumatised client feel safe. Repeatedly preview for the client what is to come. For example, explain decisions the client will have to make; upcoming appointments; and court hearings or meetings. Create routines with the client. Where court procedures cause uncertainty (eg listing delays), be clear with the client about what you know and when a decision might be made.

⁶ 'Establishing a trauma-informed lawyer-client relationship', American Bar Association, 2014, bit.ly/3myWk88

- **Client control**
Give the client's voice an opportunity to be heard in decisions that affect them. Actively empower the client by making them a part of their legal team. These efforts counteract feelings of powerlessness. Explain to your client how, unlike other adults in their life, their relationship with their lawyer is one in which they have decision-making power. This can be as simple as letting a child know they can 'fire' you.
- **Ensure understanding**
Regularly check with the client on their understanding of the issue at hand by asking them to explain back what you have told them.
- **Respect**
Respect your client's choices about how much information they share with you. Explain to the client why you are seeking particular information, and how it will help with your representation.
- **Support**
Anticipate issues that may arise during the process that may be distressing or de-stabilising for your client. You can ask for your client's consent to engage additional support, such as a trusted adult, to help you gather information you need. If consent is given, you should consult mental health professionals and other appropriate adults in the client's life to identify situations that may be stressful or even 'triggering', as well as clarifying what support will be available to your client when needed. Be aware that the process of giving instructions or giving evidence can itself be very difficult for the client, and where possible make sure that the client has support from a trusted adult after a conference or hearing.
- **Patience**
Building connections takes time. The traumatised child client may blow up at you, or push you away. Remain patient, present and available to the client.
- **Environment**
Where possible, adjust your environment to promote safety. Sit at a 45-degree angle to the client so you are not sitting directly in their line of sight; allow them to sit near the door without you blocking the exit; minimise noise and adjust lighting so it is not too harsh or dark. You may also want to provide pens and paper or age-appropriate toys for them to play with whilst talking.

Different kinds of trauma

- Simple trauma 'results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being' (Substance Abuse and Mental Health Services Administration's definition of 'trauma'⁷).
- Complex trauma 'describes both children's exposure to multiple traumatic events – often of an invasive, interpersonal nature – and the wide-ranging, long-term effects of this exposure. These events are severe and pervasive ... [and] usually occur early in life' (National Child Traumatic Stress Network's definition of 'complex trauma'⁸).
- Post-traumatic stress disorder (PTSD) is a mental health diagnosis where a set of symptoms are present and are caused by a traumatic experience. The symptoms of PTSD include involuntary intrusions of the event (eg flashbacks, nightmares); hyperarousal; and avoidance of reminders of the event. People with PTSD may experience negative changes in cognition and mood (eg inability to recall aspects of the event; belief they are a bad person or deserved the event; feelings of responsibility or guilt).

7 'SAMHSA's concept of trauma and guidance for a trauma-informed approach', HHS Publication No. (SMA) 14-4884, 2014, bit.ly/3wFcTnG

8 bit.ly/3muYzJV

Particular vocabulary related to trauma

Autobiographical memory	The recall of personal events, specific to time and place, which includes sensory, perceptual and emotional aspects of the memory.
Dissociation	One way in which the mind copes with too much stress, so that a person no longer feels connected to their body or thinks that they are in a different place to where they actually are. The person may appear 'blank' or withdrawn, or may appear to have stopped listening or to be focusing on objects around them. It can last for a short time (minutes or hours) or a longer time (up to weeks).
Hyperarousal	A symptom of PTSD. It occurs when someone enters high alert as a result of a reminder of their trauma, so that even though there may be no real danger their body acts as if there is. This causes lasting stress after a traumatic event. Children exposed to persistent trauma early in life may become permanently on high alert, which in turn can cause problems with concentration and/or affect their ability to participate in legal proceedings.
Resilience	The process of adapting well in the face of adversity, trauma or tragedy. The ability to 'bounce back' from difficult experiences.
Re-traumatisation	Feeling as disturbed as during the original trauma.
Trigger	A reminder of a past trauma. It can be something external or internal, and can make a person feel anxiety, sadness or panic, or cause flashbacks.

Trauma in criminal proceedings – a double-edged sword

It is important to remember that evidence of trauma has the ability to damage as well help your client. Remember:

- Children are fragile. Adult decision-makers need to be conscious of this when making decisions that are critical of a child's actions or which could appear to be a 'character assassination' of the child. If there is the need to explain certain poor decision-making in mitigation, explain to your client beforehand why you are describing it in a particular way; and if the judge is considering critical remarks in sentencing, draw to the court's attention beforehand the impact this may have on the child.
- Although trauma can be submitted as a mitigating factor, judges and prosecutors may see trauma as an aggravator and an indicator of dangerousness. If the child's reaction to the traumatic event led them into the criminal justice system this may be concerning to decision-makers and give the child the appearance of being a risk. Decision-makers may also interpret a child's trauma history to mean that the child is too damaged to be safe in the community.
- The decision to remand or give a child a custodial sentence might be based upon a belief by the youth offending team (YOT) that the home environment is the cause of a child defendant's trauma. Be careful to take full instructions from your client as to where they wish to reside and why,⁹ should you need to counter this view. Remember also that, if the home environment is the cause of the child's trauma, a child without suitable accommodation has a right to be accommodated by children's services.¹⁰
- Trauma symptoms can go unnoticed or be misdiagnosed as other mental health problems.

Systemic issues

Relevant systemic problems within the criminal justice system may not be recognised when trauma is raised on behalf of a client – for example:

- Racial bias. Highlighting trauma without addressing the racial biases that already exist in the legal system can create an incorrect implication that Black, Asian and minority ethnic (BAME) young people are involved in legal proceedings because of background trauma rather than because of those biases. There is evidence that perceived systemic racial bias can be a barrier for BAME young people trusting their lawyer¹¹ – and trust is an important element in a trauma informed lawyer–client relationship.
- Adolescent brain development. Adolescent brain development is an evolving neurological, physiological and psychological situation in all neurotypical children. Trauma does not impact all children in contact with the law, and responses to trauma vary among those who have experienced it. It is important that decision-makers are aware of the distinction. Unlike adolescent brain development, evidence of trauma relies on distinct responses to it. Advocacy around adolescent development relies on similarities among young people – however, trauma-informed advocacy is distinct from issues relating to youth. This means that expert support is all the more important when referring to trauma.

9 Feierman & Fine, 'Trauma and resilience', *Juvenile Law Center*, May 2014, bit.ly/3d4LZhr

10 Children Act 1989, section 20

11 Lammy Review, 2017, bit.ly/3t9KhRy

Identifying a traumatised client

You need to be able to identify whether the child you represent is affected by trauma. Identify likely sources of trauma, such as:

- historic trauma
- re-traumatisation connected with the allegations or the criminal proceedings themselves or
- trauma caused in response to indirect events – for example, learning of trauma to close family.

There can also be other trauma-related disorders that are particular to children, such as adjustment disorder or attachment disorder. The latter

can occur through neglect and deprivation in the child's early years.

Identifying when a child is likely to be experiencing trauma is essential in order for you to be able to:

- develop a positive working relationship with a traumatised child client
- know when to instruct an expert with knowledge of trauma and
- know how to navigate the legal process so a client can effectively participate¹² in the proceedings and engage with their case without being traumatised or re-traumatised.

Practical advice: identifying a traumatised client

Some factors to look out for include:

- Impaired sense of safety: A child may be living in 'survival mode' even when in non-threatening situations. They may express distrust for you or others around them.
- Uncontrolled emotions: A child may be 'triggered' by a memory of trauma which makes it harder for them to control their emotions.
- Hyperarousal: A child may be in a state of heightened energy and alertness to threat. Clients who are hyperaroused might appear jumpy, have frequent outbursts, or become confrontational or aggressive.
- Dissociation: Mentally shutting down, becoming numb or mentally going elsewhere. Clients who dissociate can appear to withdraw, lose focus or stop listening to those around them.

Autobiographical memory

Autobiographical memory is the recall of personal events, specific to time and place, and includes sensory, perceptual and emotional aspects of the memory. Throughout the criminal justice process, inconsistencies in memory can undermine credibility. Decision-makers may reject the credibility of an account due to assumptions resulting from inconsistencies. A failure to remain consistent or give enough detail about an experience is often perceived as an unreliable and fabricated account.¹³

Key facts:

- Autobiographical memory emerges at 2–3 years old – at this age it is limited, and individuals can recall isolated events.

- The length, volume and proficiency of autobiographical memory increases throughout childhood and adolescence.¹⁴
- Adolescents' accuracy is similar to adults, although they tend to provide less detail and information, especially if they are not prompted.

Trauma is often linked with over-generalised memory. Earlier exposure to trauma, increased severity of trauma and/or number of trauma events are all associated with less specificity of memories.¹⁵ Ongoing trauma further limits recall length, and increases the number of omissions.

¹² A child client must be able to effectively participate to make their trial compliant with Article 6(1) of the ECHR – see *V v UK* [1999] ECHR 171

¹³ Given-Wilson, Herlihy & Hodes, 'Telling the story: a psychological review on assessing adolescents' asylum claims', *Canadian Psychology*, 2016;

Spinhoven, Bean, & Eurelings-Bontekoe, 'Course and predictors of mental health of unaccompanied refugee minors in the Netherlands: one year follow-up', *Social Science & Medicine*, Volume 64, Issue 6, March 2007

¹⁴ Habermas & de Silveira, 'The development of global coherence in life narratives across adolescence: Temporal, causal, and thematic aspects' *Developmental Psychology* 44(3) 707-721, 2008

¹⁵ de Decker et al, 'Autobiographical memory specificity and affect regulation: an experimental approach', *American Psychological Association*, 2003

Practical advice: autobiographical memory

1. Consider asking a trauma expert (see more on page 9) to give an opinion on a child's autobiographical memory and how this impacts on a child's consistency. This can be used:
 - as evidence to counter the potential adverse impact of trauma on a child's account of events and
 - as the basis for an argument to exclude evidence or against an adverse inference for failing to give evidence and
 - should be served on a decision-maker such as the police or Crown Prosecution Service (CPS) who may be considering a diversion out of the formal criminal justice system.
2. Familiarise your client with the language used by the court and the criminal justice system by explaining hearings in advance.
3. Make the court environment less intimidating by enabling a court familiarisation visit or showing diagrams of who sits where (Criminal Practice Direction (CrimPD) 3G.2).
4. The criminal justice system has acknowledged, for instance, the impact of trauma on the ability of victims of sexual violence to report their experiences.¹⁶ Evidence should be extended and drawn to the attention of decision-makers with regards to child defendants.

Gathering evidence

Trauma can have a significant impact on various aspects of the evidence gathering process. For example:

- Information processing. Children impacted by trauma may have trouble with information processing and receptive language. They may miss much of what is said to them, either because they are on the lookout for threat or because they dissociate.
- Disclosing information. A traumatised child may have grown up in a home where secrets are common and disclosure is discouraged. This is likely to inhibit the child's ability to speak openly about experiences. There are many reasons why children may not want to share their trauma.
- Recalling information. The way memories of traumatic events are stored is different to how other events a person has experienced are stored. If a child has to recall events connected with traumatic events, they may struggle to recall them accurately or may not at times be able to access the memories. It may be particularly difficult for them to recall a temporal sequence of events, or to remember precisely when events happened.
- Guilt. A child may feel shame, that they bear responsibility, that they 'deserved it'; or, they may feel a sense of loyalty to family or others involved in creating their trauma. A trauma informed lawyer needs to ensure that a decision-maker is aware that it is normal not to disclose a traumatic incident until, at the very least, the system is trusted by the traumatised person.

¹⁶ R v D [2008] EWCA Crim 2557

Evidence of trauma to support legal strategies

Presenting a decision-maker with evidence of a child's trauma can be used to:

- support legal arguments that may stop re-traumatisation practices
- support an individual child's effective participation in the youth justice system
- support an argument to divert a child out of the criminal justice system
- argue against delays in the system – for example, where a child has been released by the police under investigation, is awaiting for trial or is at risk of having custody time limits extended
- support an application for bail by highlighting the negative impact of removing a child from their community
- ensure effective case management by raising judicial awareness on how the case should be managed and supporting applications for special measures or modifications
- support a defence, for example, self-defence where the act was in response to abuse or where the act was the result of child criminal exploitation
- explain difficulties with autobiographical memory and their giving evidence
- establish mitigation at sentence
- explain particular behaviour
- justify a recommendation for a particular outcome or treatment.

Practical advice: instructing an expert

Consider obtaining expert evidence relating to a child's experience of trauma. Expert evidence on behalf of a traumatised child defendant is likely to come from a child and adolescent forensic psychologist or psychiatrist, some of whom will also have a specialisation in trauma. Review the expert's biography or ask any potential expert for their experience of providing reports for children living with trauma.

Ask your expert to carry out a trauma assessment, including:

- addressing any potential mental health diagnosis
- identifying how trauma may affect the child's evidence or ability to participate in the proceedings and
- making recommendations on identifying, avoiding, reducing and/or managing potential trauma reactions and any triggers that the legal process may activate.¹⁷

The expert may also be asked to comment on the potential for legal proceedings to re-traumatise the child, and the consequent effect on the child's health, wellbeing and development.

Where a medical report is commissioned by a party, then that party is responsible for arranging payment of the fees incurred, even though the report is intended for the court's use.¹⁸ For a child defendant who has legal aid funding, the solicitor will need to obtain 'prior authority' from the Legal Aid Agency (LAA). It may be easier to obtain funding if you have written legal advice from counsel as to why it is required. Once you have the written advice from counsel, submit that and relevant supporting evidence with a CRM4 form to the LAA.¹⁹

Further guidance on instructing experts can be found in the CrimPD:

- CrimPD Part 3P²⁰ 'Commissioning medical reports' sets out the procedures to be followed in magistrates' courts and in the Crown Court where there is doubt about a defendant's mental health and, in the Crown Court, the defendant's capacity to participate in a trial
- CrimPD 3P.2 states that there must be 'prompt commissioning of a report' by a party's representatives where expert medical opinion is material to that party's case, recognising that those representing the defendant may wish to obtain a report wholly independent of the court
- CrimPD 3P.4 acknowledges that 'in some circumstances a second such assessment, by another medical practitioner, may be required'.

The Ministry of Justice and HM Courts and Tribunals Service have published 'Good practice guidance: commissioning, administering and producing psychiatric reports for sentencing'.²¹ The guidance includes standard forms of letters of instruction and other documents.

17 The Advocate's Gateway, Toolkit 18: 'Working with traumatised witnesses, defendants and parties', available at: bit.ly/3s7orwu

18 CrimPD 3P.15

19 'Submitting a CRM4', eForms Quick Guide, LAA, available at: bit.ly/3uuUjLA

20 CrimPD 2015 Amendment No 7 [2018] EWCA Crim 1760

21 Ministry of Justice, prepared for: Her Majesty's Court Service, September 2010

Introducing evidence of trauma: the stages of a criminal case

This section will explain introducing evidence of trauma at the different stages of a criminal case, including:

- police
- court proceedings
- hearing evidence
- giving evidence
- defences where evidence of trauma can help
- mitigation/sentencing.

Overarching welfare principle

In addition to the protections that are available to all defendants and witnesses, children in the criminal justice system are entitled to an additional consideration – the ‘welfare principle’ contained in the Children and Young Person Act 1933. Every court²² in which a child²³ appears must uphold this principle, which states:

‘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.’²⁴

The ‘welfare principle’ extends beyond the courts to certain authorities who must ensure their functions are discharged having regard to the need to safeguard and promote the welfare of children.²⁵

The specific statutory bodies named in the legislation that apply to the youth justice system, include:

- the local authority²⁶
- the police²⁷
- the YOT²⁸ and
- the governor or director of a secure training centre or youth offending institution.²⁹

22 Youth court, magistrates’ court and Crown Court

23 This includes child defendants, child witnesses and child victims

24 s44(1) Children and Young Person Act 1933

25 s11(1) Children Act (CA) 2004; and s55 Borders, Citizenship and Immigration Act 2009 imposes a similar duty on the Home Office in the exercise of its functions including identifying victims of trafficking

26 s11(1)(a)–(b) CA 2004

27 s11(1)(h)–(i) CA 2004

28 s11(1)(k) CA 2004

29 s11(1)(l) CA 2004

30 ‘Child centred policing: National strategy for the policing of children and young people’, National Police Chiefs’ Council, 2015, bit.ly/31ZV2Kg

31 Childs, Given-Wilson, Butler, Memon & Gudjonsson, ‘Vulnerability to interrogative suggestibility from negative life events. A comparison of separated asylum-seeking youth and age-matched peers’, *Personality and Individual Differences*, Vol 173, 2021

32 Childs, Given-Wilson, Butler, Memon & Gudjonsson, 2021 (above)

The police

Policing policies, processes and interactions can impact children significantly, particularly when a child is traumatised and/or lacks emotional maturity.³⁰

Police interviews

Be mindful that a child’s experience of trauma may affect their position in interview. For example:

- An interview under caution is likely to create distrust for a traumatised child. A traumatised child will need a degree of trust in the process and interviewer in order to give a full account in interview.
- A child who has been exposed to trauma is more likely to be suggestible.³¹ Suggestibility

can affect a child’s evidence or responses in interview by making the child more likely to give the answer that they perceive the questioner wants.³² Evidence of suggestibility might be used to exclude a police interview in court.

- The experience of trauma can cause incoherencies and inconsistencies in a child’s recollection of an event, and/or dissociation from it.

Practical advice: an expert at the police station

If possible before interview, consider obtaining evidence relating to a child's trauma and suggestibility.

This evidence could be used to:

- justify a request for delaying an interview, or not conducting one at all
- justify adaptations to the interview designed to avoid re-traumatising or triggering a child, including:
 - the presence of an intermediary
 - a change of venue for the interview
- make an application to exclude an interview under caution at a later date
- resist the making of an adverse inference, at court, in the event of a child's failure to mention certain facts during a police interview.

When deciding whether a child should answer questions in police interview, take into account the effect trauma may have on the child giving an accurate or full account (see 'Autobiographical memory' above). By introducing trauma onto the

record, you could help to preserve the child's position if they do not give a full account or do not admit an offence – however, be aware that this could be a double-edged sword (see page 6) if the case proceeds to trial.

Practical advice: representing a traumatised child in police interview

If you believe it will be harmful for a child to answer police questions because of the impact of historic or current trauma, you can put that on record at the beginning of the interview, along with whatever evidence you may have to support this belief.

Strip searches

It is recognised that a strip search can re-traumatise or trigger a child who has been a victim of sexual abuse³³ and may not be appropriate for children who are agitated through fear or mental distress.³⁴

When a decision as to the necessity for a strip search is considered, officers should have regard to the College of Policing's Authorised Professional Practice (APP) for detention and custody, which states:

'If a detainee is believed to be at risk of suicide or self-harm, seizing and exchanging clothing may not remove the risk but may increase the distress caused to the detainee and, therefore, increase the risk of them self-harming. Leaving a detainee in their own clothing can help to normalise their situation. Constant observation or observation within close proximity (level 3 or 4) may be a more appropriate control measure in these circumstances.'³⁵

33 PD v Merseyside Police [2015] EWCA Civ 114 para 44

34 The HM Inspectorate of Constabulary report 'The welfare of vulnerable people in police custody' (March 2015) found that whilst strip searches were mostly undertaken appropriately, some detainees felt strongly that strip searches were not only 'undignified and degrading', but that they were not always justifiable (p19, bit.ly/39YmSe3)

35 'Detainee care', para5.1 Clothing

Court proceedings

Decision to prosecute

The public interest considerations of the Code for Crown Prosecutors Full Code Test place an obligation on prosecutors to consider whether a prosecution is 'likely to have an adverse impact on [the child's] future prospects that is disproportionate to the seriousness of the offending'.³⁶

Where there is evidence of a child suffering with trauma, consider making written representations to the CPS, arguing that it is not in the public

interest to proceed with a prosecution against a traumatised child.

These representations should address topics such as:

- the facts of the particular case
- any documented history of trauma and
- any evidence of the likelihood that criminal proceedings will re-traumatise a child.

Expert evidence is likely to be necessary to support representations.

Safeguarding at court and modifications to the process

Legal proceedings can prevent a child from moving on from trauma. The criminal courts have duties under their 'inherent powers' and the Criminal Procedure Rules (CrimPR) 'to take such steps as

are necessary to ensure that [the child] has a fair trial, not just during the proceedings, but beforehand as he and his lawyers prepare for trial'.³⁷

Special measures

Child witnesses

A child witness (other than a defendant), whether for the prosecution or the defence, is a 'vulnerable witness' for the purposes of s16 Youth Justice and Criminal Evidence Act (YJCEA) 1999 and is eligible for special measures under ss16–33 of the Act.

Section 28 of the YJCEA 1999 enables a child witness's cross-examination to be recorded prior

to trial, subject to judicial discretion. In order for s28 to be available, the child witness must have given an ABE recording of their evidence in chief. If this has not taken place, it may take place upon judicial direction.

Practical advice: child defence witnesses

Where a young child may be a relevant defence witness, for example in a case where self-defence is being raised in response to a domestic violence allegation, the courts have been known to allow a child to give evidence in chief in a pre-recorded interview in the presence of a psychologist with

another appropriate adult who can ask the child questions.

³⁶ para4.14(d) Code for Crown Prosecutors 2018, Full Code Test, bit.ly/2OwSpfC

³⁷ C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin) para17

Child defendants

A child defendant's access to special measures is limited to the giving of evidence via a live link³⁸ and/or with the assistance of an intermediary.³⁹ However, the best practice principle for vulnerable witnesses applies equally to child defendants.⁴⁰

Consider instructing a child psychologist or intermediary with relevant expertise to assess the child and comment on the special measures and/or adaptations to the trial process that may be appropriate to ensure that re-traumatisation and/or triggering is avoided and to enable the child to give best evidence. The adaptations that should be put in place to assist a child defendant in giving

evidence should be discussed and formalised at a ground rules hearing (GRH) (see page 14).

Ensure that the child:

- is well prepared for the kinds of questions that might be asked by others during the legal proceedings
- understands the roles of people who may be asking questions and why the questions are being asked
- has tools at their disposal to communicate distress or mitigate it – for instance, simple relaxation techniques such as squeezing a stress ball or counting colours in the room.

Practical advice: modifications identified in the Criminal Practice Direction for vulnerable defendants

Consider an application for the modifications that are contained in CrimPD Part 3G 'Vulnerable defendants' to ensure the effective participation of vulnerable child defendants. These include:

Before the trial, sentencing or appeal

- Severance from other defendants (3G.1)
- Court familiarisation before hearing (3G.2)
- If an intermediary is being used, intermediary attendance at a pre-trial visit (3G.3)
- A practice session if live link is being considered (3G.4)
- Police protection from 'intimidation, vilification or abuse' from public or media (3G.5)
- A direction to the media about prohibition of photographing on court premises (3G.5)
- A reporting restriction under s39 or s49 of the Children and Young Persons Act 1933 (3G.5)

The trial, sentencing or appeal hearing

- Courtroom where everyone sits at the same or almost the same level – subject to appropriate security arrangements (3G.7)
- A defendant, especially one who is young and vulnerable, should normally be free to sit with members of their family or others in a like relationship and, and with another supporting adult in a place which permits easy, informal communication with their lawyers. A supporting adult should be available throughout proceedings (3G.8)
- Courts should ensure proceedings are explained in a way that the vulnerable defendant can understand, particularly the role of the jury. The court should remind the lawyers and supporting adult of their responsibility to explain each step of the process (3G.9)
- Court hearings should be according to a timetable that takes full account of a vulnerable defendant's ability to concentrate, with frequent and regular breaks if appropriate (3G.10)
- The court should ensure clear language is used that the defendant can understand, and that questioning is short and clear, ground rules followed, and toolkits referred to (3G.10)
- A vulnerable defendant can give evidence via live link if it is in the interests of justice to do so and the procedure in CrimPR 18.14–18.17 is followed (3G.11)
- The judge should consider whether robes and wigs should be worn, taking account of the wishes of vulnerable defendant and vulnerable witness (3G.12)
- Security staff for young vulnerable defendant in custody should not be in uniform (3G.12)
- The court should restrict the attendance of members of the public to those with immediate and direct interest in the outcome (3G.13)
- The court may restrict the number of reporters attending to a number that is practicable and desirable, although the public has a right to be informed about the administration of justice (3G.13)
- If proceedings are to be restricted, arrangements should be made for the proceedings to be relayed either audibly or visually (3G.14)

38 s33A YJCEA 1999; R (S) v Waltham Forest Youth Court & others [2004] EWHC 715 (Admin)

39 s109(1) Coroners and Justice Act 2003; C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin); R (OP) v Secretary of State for Justice & others [2014] EWHC 1944 (Admin)

40 In R v Grant-Murray [2017] EWCA Crim 1228 the Court of Appeal confirmed 'if confirmation is needed, that the principles in [R v Lubemba [2014] EWCA Crim 2064 (in which the court highlighted best practice for vulnerable witnesses)] apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness' (para226)

Ground rules hearings

GRHs are:

- mandatory in all trials using intermediaries and/or which engage the s28 YJCEA 1999 procedure
- good practice in all cases where there is a young witness or a vulnerable defendant with communication needs.⁴¹

At a GRH, the judge should:

- consider any applications for special measures for any witness (prosecution, defence) or child defendant, including use of an intermediary
- approve pre-submitted cross-examination
- consider any adaptations to questioning and/or the conduct of the hearing that may be necessary to facilitate the evidence of a vulnerable person.⁴²

Intermediaries

Consider applying for an intermediary to support a traumatised child defendant through the court process. This application can be made for the whole of trial, or for the giving of evidence only, depending upon the needs of the child.

Depending upon the different needs of the child, an intermediary report may recommend adapting language and using writing, diagrams,

drawing and pointing to figurines, body maps, body part pictures and models, which may help to externalise events.

For further information, see Youth Justice Legal Centre (YJLC) 'Intermediary guide';⁴³ and The Advocate's Gateway, Toolkit 16: 'Intermediaries: step by step'.⁴⁴

Practical tips on how to promote client resilience

A traumatised child will need to develop resilience to be able to go through legal proceedings. Some tools that can help with your client's resilience include:

- Social support.
Ask your client about who supports them currently: family, community, religious community, school staff, counsellors, therapists etc. Leverage that support. Get additional community support if needed – connect your client with services.
- Empowering a child to increase their sense of autonomy.
For example, giving them decisions to make during the preparation of their case.
- Coping skills.
Discuss how your client responds to stress with their psychologist or family. Develop a strategy for your client to cope with stress when it arises.
- Therapeutic support.
There may be opportunities for you to advocate for your client to receive therapeutic support. For example, if your client is remanded, and therefore 'looked after', but isn't receiving this support.

The CPS, Department of Health and the Home Office have provided guidance 'Therapy: Provision of therapy for child witnesses prior to a criminal trial'.⁴⁵ You can argue that traumatised defendants should be entitled to the same protection under the 'equality of arms' doctrine under Article 6 of the ECHR. Furthermore, in *R v Grant-Murray*⁴⁶ the Court of Appeal confirmed that the principles in *R v Lubemba*⁴⁷ – in which the court highlighted best practice for vulnerable witnesses – apply to child defendants.

Arguments from the CPS guidance to consider include:

- whether a child should receive therapy before a criminal trial is not a decision for the police or the CPS
- the best interests of the child are paramount
- if there is a demonstrable need for the provision of therapy and it is possible that the therapy will prejudice the criminal proceedings, consideration may need to be given to abandoning those proceedings in the interests of the child's wellbeing.

41 CrimPD 3E.3

42 Equal Treatment Bench Book, 2021, Chapter 2, bit.ly/2Q9yUu2

43 bit.ly/3tbXl3j

44 bit.ly/3s7orwu

45 bit.ly/3rXzp7K

46 [2017] EWCA Crim 1228 para226

47 [2014] EWCA Crim 2064

Sharing evidence

You are required to share all of the evidence in the case with your client, despite the fact that they are a child. If you feel that some evidence may trigger or re-traumatise the child, you should discuss this with them. Ultimately it is the client's decision whether or not they look at or comment on the evidence.

If parts of the evidence will be particularly difficult for the child to hear, discuss potential strategies for managing this with the judge. This will usually be in the form of increased breaks or potentially dealing with a particular issue in writing.

Giving evidence

When deciding whether to call the child defendant to give evidence, consider the following factors:

- the child's need or desire to give evidence
- any repercussions that could arise from giving or not giving evidence
- the value of the child's direct evidence
- protecting a child defendant from giving evidence – when a child is being cross-examined by another party, trauma informed lawyers

should be vigilant about the questions asked in cross-examination; this can be established at the GRH (see page 14)

- continuity of representation will be particularly important for traumatised child – if, unavoidably, their advocate is not available for certain hearings, this should be explained to the child.

Adverse inferences

Trauma may have a bearing on a child's decision to remain silent and/or on not mentioning facts when initially investigated.

Evidence of trauma will be relevant to:

- (a) whether an adverse inference direction should be given at all and
- (b) if such a direction is given, whether the tribunal of fact should draw an adverse inference.

CPS legal guidance requires prosecutors to take 'special care' when addressing failure to mention facts/silence from vulnerable defendants such as youths or those with mental health issues.⁴⁸

An inference under s35 of the Criminal Justice and Public Order Act 1994 (silence at trial) should not be drawn when it appears to the court that

'the physical or mental condition of the accused makes it undesirable for him to give evidence'.

In determining whether an adverse inference should be drawn in relation to silence, the Court of Appeal has found that circumstances which may justify silence include:

- a youth advised to answer no comment in interview⁴⁹
- ill-health, in particular mental disability, confusion, intoxication, shock etc⁵⁰

48 'Adverse inferences', CPS legal guidance, updated August 2018, bit.ly/3d2qXQt

49 T v DPP [2007] EWHC 1793 (Admin)

50 R v Howell [2003] EWCA Crim 1; R v D [2013] EWCA Crim 465

Practical advice: arguing against an adverse inference

- Obtain expert medical and/or psychiatric evidence (for example, a report from a child psychologist), relating to any causal connection between the experience of issues such as trauma, developmental problems or a lack maturity on a child's failure to mention facts and/or silence at trial.
- It is likely that a voir dire will be required for the judge to hear that evidence and decide whether the making of a direction under s34 or s35 of the Criminal Justice and Public Order Act 1994 is undesirable.
- The onus is on the defence representatives to take the point.
- If an adverse inference direction is considered to be appropriate, invite the judge to ensure that the terms of it are tailored to the individual circumstances of the case and that the jury is directed to consider the issue in the light of what they know about the child.
(Distilled from paras 17-1 to 17-5 of the Crown Court Compendium 2020⁵¹)

Defences where evidence of trauma can help

Trafficking/exploitation

See YJLC's 'Legal guide to child criminal exploitation' regarding the defence under s45 Modern Slavery Act 2015.⁵²

Self-defence

In exceptional circumstances, evidence of a child defendant suffering with a recognised psychiatric condition connected with the experience of trauma may be considered relevant to the issues that a jury or fact finder will have to consider, such as honest belief in the need for force to be used.⁵³

Practitioners should be aware, however, that the circumstances in which such evidence is admissible are fact-specific and extremely limited, particularly in relation to the reasonableness of the force used.⁵⁴

Duress

A child defendant's youth and experience of a recognised mental illness or psychiatric condition may be relevant to a defence of duress.⁵⁵

Diminished responsibility and loss of control

Where a child defendant seeks to advance either or both of the partial defences to murder, evidence that they suffer with a recognised psychiatric con-

dition (including a condition caused by the experience of trauma) may be admissible and relevant to a matter(s) in issue.⁵⁶

51 bit.ly/31WP5xl

52 Updated March 2021, bit.ly/3t5yYcP

53 Press and Thompson v R [2013] EWCA Crim 1849

54 R v Canns [2005] EWCA Crim 2264

55 R v Bowen [1996] 2 Cr App R 157, CA

56 For loss of control, see R v Holley [2005] 2AC 580

Mitigation/sentencing

Evidence of trauma can make the difference between custody or remaining in the community. Presenting this evidence at mitigation is not, however, a straightforward task, and practitioners should be alive to the following issues:

- A child defendant may not want their trauma brought into the public realm. Be mindful of the child's autonomy and, if necessary, ask for additional time and try to develop a good trauma informed lawyer–client relationship.
- Consider carefully how you present the evidence so as to mitigate, rather than aggravate (see 'Trauma in criminal proceedings – a double-edged sword' above).

Practical advice: presenting evidence of trauma as mitigation

Do:

- Put the client's needs above the process as usual.
- Ask to mitigate in the absence of co-defendants, where appropriate– and be ready to justify why. Consider canvassing the issue in advance with YOT or the court.
- Where mitigation has to be advanced in the presence of co-defendants, considering asking the court to read the sensitive evidence (eg psychological report, pre-sentence report), simply referring them to the relevant paragraphs and asking for the sensitive issues not to be mentioned.
- Identify the client's strengths and behaviours that have helped them to cope in the past and draw these to your client's attention so they become conscious of their strengths.⁵⁷

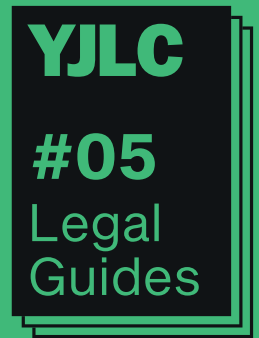
Don't:

- Underestimate or undermine the child's need for privacy about their trauma.

⁵⁷ 'Trauma-informed legal advocacy: a resource for juvenile defense attorneys', National Child Traumatic Stress Network, 2018, bit.ly/3s5o59H

#05
Trauma Informed Lawyering

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Youth Justice Legal Centre
yjlc.uk

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

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

Doughty Street Chambers
doughtystreet.co.uk

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

Just for Kids Law
justforkidslaw.org

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

The Dawes Trust

The Dawes Trust is a charity set up from funds of the estate of the late Christopher Dawes. The Trust's object is to fight crime, including organised crime, by the protection of people and property, the preservation of public order and the prevention and detection of crime for the public benefit.

The Trust provides funding to various organisations and projects in furtherance of its object.