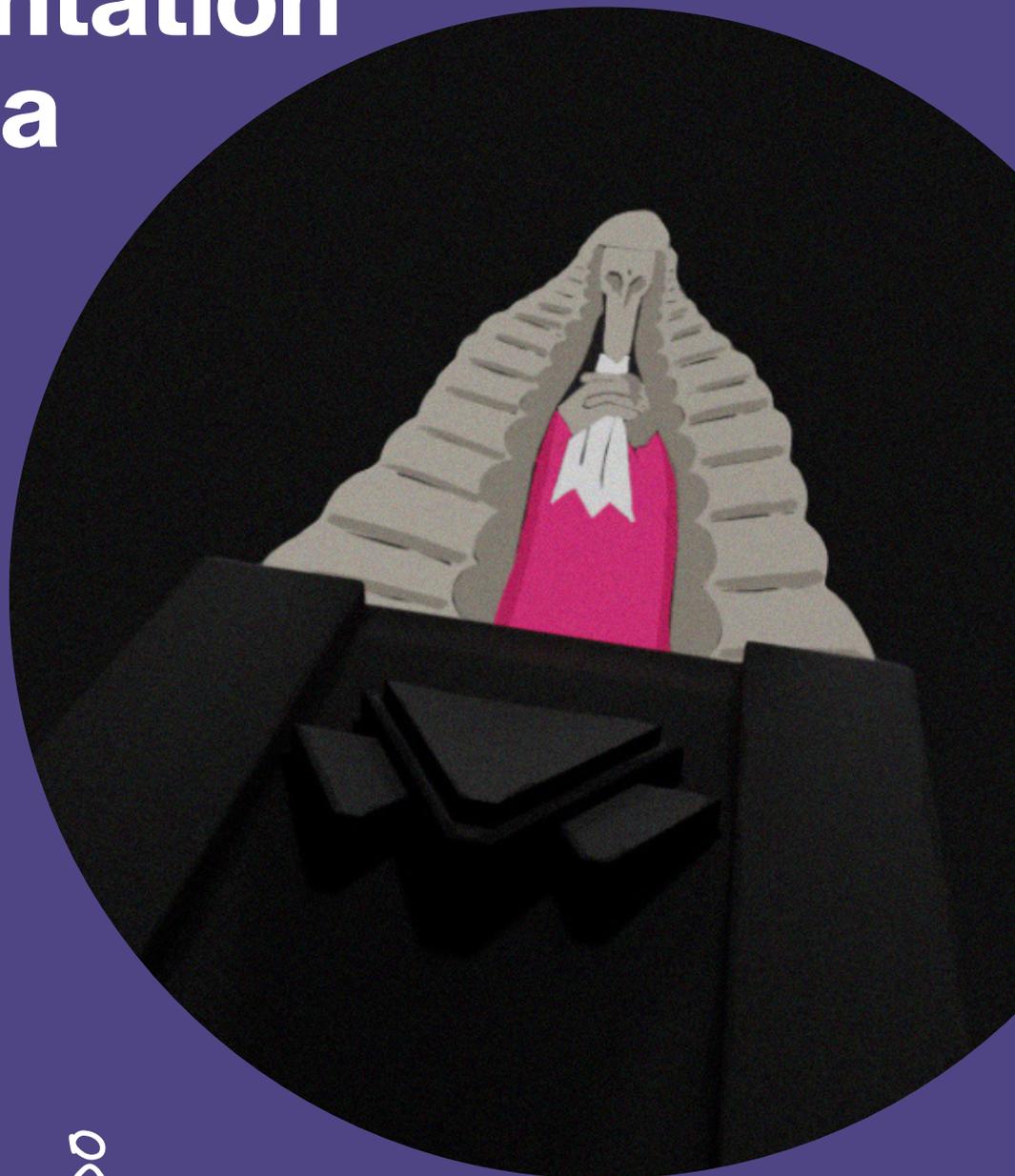


#1 Fighting Racial Injustice

Background, childhood, legal representation & trauma

YJLC

Racial
Injustice
Series



This guide is the first in a three-part series designed to equip practitioners with knowledge and strategies for identifying and challenging racism facing Black, Brown and Racialised children and young adults in the criminal justice system. Developmental maturity is more helpful than chronological age in deciding on the best response to young adults.

Part 1 of this series introduces the overarching principles. Part 2 looks at how to apply the principles in a criminal practice. Part 3 looks specifically at cases involving evidence of gang affiliation in rap and drill music.

This work has been developed in consultation with Black, Brown and Racialised children and young adults, as well as an Advisory Board constituted of predominantly Black, Brown and Racialised expert practitioners.

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by Keir Monteith QC	
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Foreword

I have been working in the criminal courts since the last century. Sometimes it feels like we are still there. Almost 30 years on, rather than celebrating a diverse profession that delivers justice, I am writing a foreword to a series of guides to help combat institutional racism in the courts. Over 20 years after the Macpherson Report concluded that ‘institutional racism ... exists both in the Metropolitan Police Service and in other Police Services and other institutions countrywide’,¹ the state of the justice system should have improved dramatically. During the summer of 2021, the House of Commons Home Affairs Committee published their review on the implementation of the 70 recommendations that came out of the Stephen Lawrence Inquiry.² At the beginning of the introduction there is a quote from Baroness Lawrence: ‘When I was looking to come here, I tried to find information that sets out, around the 70 recommendations, where we have moved on, how many recommendations have been implemented, be it in the police, be it in schools, and I found it really difficult to find anything. It seems as if things have become really stagnant and nothing seems to have moved.’³

Unbelievably, things have got worse. Under the heading ‘Stop and search’, the Committee found: ‘In the year to 31 March 2020, Black people were over nine and a half times more likely to be stopped and searched than White people. Despite the serious concerns raised and recommendations made in the Macpherson Report and other reports since, the disproportionality is greater now than it was twenty-two years ago.’⁴ Shocking, but all too familiar, disparities are cited time and time again – for example, ‘[b]ased on 2019/20 data, it stated that Black people were about 5.7 times more likely to have force used on them than White people’, with concern expressed about the lack of ethnicity data being kept by certain police forces.⁵

Meanwhile, the figures on incarceration are scandalous – in 2020/21, more than half of children in custody were from Black, Brown or Racialised backgrounds, with 29 per cent being Black.⁶

Part of the explanation for these horrendous figures might be that prosecutors are still relying on rap and drill music as evidence in serious criminal prosecutions. This approach is quite often combined with the Crown’s best friend: the doctrine of joint enterprise. The Court of Appeal in their latest judgment on rap and gangs⁷ endorsed the lower courts’ approach in admitting rap music that helped plug gaps in a murder case where there was no forensic evidence against the appellants. Even in 2022, the prosecution and Court of Appeal take a literal approach to rap and drill – a practice that, in reality, is only used against young black defendants. Across the pond, there is an enlightened, active and high-profile campaign to ban rap from the court room.⁸ We are so behind the curve.

These three guides provide excellent legal advice, resources and encouragement to practitioners on how to recognise and combat institutional racism in the justice system. We all need to be anti-racists, and we all need to speak up in court. Easier said than done – but recognising the inbuilt unfairness and prejudice and challenging it is a prerequisite to any decent legal submission, cross-examination or speech. As one of the young adults in the working group that helped mould these guides from the bottom up said: ‘They have a choice to be stereotypical or racist. We don’t have a choice to be Black.’ The old establishment structure and approach will not be dismantled by lawyers just making eloquent submissions. As in the US, the struggle for true equality has to take place in and out of the courtroom.

- Keir Monteith QC

1 Sir William MacPherson, ‘The Stephen Lawrence Inquiry’, February 1999, para 6.39, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf

2 ‘The Macpherson Report: Twenty-two years on: Third Report of Session 2021–22’, House of Commons Home Affairs Committee, HC 139, 30 July 2021, <https://committees.parliament.uk/work/347/the-macpherson-report-twentyone-years-on/publications/>

3 ‘The Macpherson Report: Twenty-two years on’ p13; source: Baroness Lawrence, Evidence to the Home Affairs Select Committee, 5 February 2019

4 ‘The Macpherson Report: Twenty-two years on’ p8

5 ‘The Macpherson Report: Twenty-two years on’ p124, para 415: ‘As part of its 2021 report, HMICFRS [HM Inspectorate of Constabulary and Fire and Rescue Services] examined whether there was disproportionality in the use of force and concluded that despite limitations in the way police forces record “use of force”, and incomplete data (some forces are not recording the ethnicity of individuals subjected to force), “the data suggests a disproportionate use of force”.’⁷⁰¹ Based on 2019/20 data, it stated that Black people were about 5.7 times more likely to have force used on them than White people’

6 ‘Youth Justice Statistics, 2020/21, England and Wales’, YJB and MOJ, 27 January 2022, Figure 7.6, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

7 *Abdi v R* [2022] EWCA Crim 315

8 K Samuelson, ‘Rap on Trial: the battle to keep lyrics out of courtrooms’, *The Week*, 25 January 2022, www.theweek.co.uk/news/crime/955521/rap-on-trial-battle-stop-lyrics-courtrooms

Introduction

Statement of intent

Systemic and institutional racism impacts Black, Brown and Racialised children and young adults at every stage of the criminal justice system (CJS) – from arrest, to charging and bail decisions, conviction rates and sentencing outcomes.

In the youth custodial estate, 53 per cent of children detained are from Black, Brown and Racialised communities, despite making up just 18 per cent of the 10–17-year-old population.⁹

As lawyers, we are required to work within the system. The Youth Justice Legal Centre do not endorse the CJS, and salute those who take a more radical stance on its many injustices. However, we believe that children within the system deserve the highest quality support, care and representation, to navigate their way through and, ultimately, out of it.

We want to equip lawyers with the tools to represent Black, Brown and Racialised children and young adults most effectively, with the aim of improving the outcomes and experiences of our clients. These tools must always be rooted in what Black, Brown and Racialised children and young adults want from us as lawyers, their lived experiences and through adopting a child-centred approach to practice.

Lawyers must be critical and self-reflective of direct racism and classism, as well as ‘unconscious bias’, across the system, including within

the lawyer–client dynamic itself. All lawyers should be capable of developing strategies to call out racism in the CJS while ensuring that we do not perpetuate those same harms. We must we strive towards a representational model that counters and challenges the immense power imbalance currently facing Black, Brown and Racialised children.

In order to properly understand the communities we work with, we must understand the history of distrust and discrimination that Black, Brown and Racialised people have perpetually faced in society and the cumulative impact that occurs even before encountering the CJS. For instance, recent analysis shows that more than half of Black children in the UK live in poverty¹⁰ and that the school exclusion rate is five times higher for Black Caribbean pupils in some parts of England.¹¹ Given that 60 per cent of those who had received a court sentence had been excluded from school,¹² this experience of social exclusion and discrimination prior to contact with the CJS must be understood by lawyers. Racism in society, in policing, in the courts, and in prisons, means that Black, Brown and Racialised children and young adults remain at the sharp end of racial injustice. As their legal representatives, we must work with them to resist this oppression every step of the way.

‘They have a choice to be stereotypical. We don’t have a choice to be Black.’

The voices of Black, Brown and Racialised children and young adults

We facilitated sessions with Black, Brown and Racialised children and young adults who had experience of the CJS. This guide is led by the voices, views and experiences of those young people. The sessions were co-facilitated by a young Black woman who had been imprisoned as a child.

We are incredibly grateful to everyone who shared very difficult experiences with us, and who used their deeply personal insights to outline how lawyers can better represent them.

⁹ ‘Youth Justice Statistics, 2020/21, England and Wales’, Youth Justice Board (YJB) and Ministry of Justice (MOJ), 27 January 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

¹⁰ ‘More than half of UK’s black children live in poverty, analysis shows’, The Guardian, 2 January 2022, www.theguardian.com/world/2022/jan/02/more-than-half-of-uks-black-children-live-in-poverty-analysis-shows

¹¹ ‘Exclusion rates five times higher for black Caribbean pupils in parts of England’, The Guardian, 24 March 2021, www.theguardian.com/education/2021/mar/24/exclusion-rates-black-caribbean-pupils-england

¹² ‘“School-to-prison pipeline”’: youth justice services failing black boys’, The Guardian, 21 October 2021, www.theguardian.com/society/2021/oct/21/youth-justice-services-still-failing-black-and-mixed-heritage-boys-finds-report

Terminology

There is no perfect language to adopt when referring to people from a range of cultural and racial backgrounds. If, in the future, improved terminology is suggested or created, we welcome the opportunity to improve with it.

Our focus is on children and young adults in the CJS who identify as male and Black, Brown or Racialised. There will be differences in the way the boys and young men within these racial groups experience the CJS. Therefore, different parts of the guide will be relevant to different people depending on how they identify and what their

circumstances are. Where possible, specific language will be used to illuminate these differences.

We have chosen to capitalise Black, Brown and Racialised to denote that these are distinct racial groups, with an essential and shared sense of history, identity and community.¹³ We do not capitalise white in this guide in the light of the connotations this has with white supremacist groups (although we acknowledge the arguments for capitalising white that are rooted in anti-racist struggles).

'All children define themselves differently and are entitled to that individuality'

Background

There has been widespread acknowledgement that the CJS is racist. In recent times, the 1999 MacPherson Report confirmed that the police are institutionally racist,¹⁴ Theresa May accepted when she was Home Secretary in 2014 that stop and search was unfair especially to young Black men,¹⁵ and the Lammy Review in 2017 unequivocally high-

lighted the causes and symptoms of this systemic inequality.¹⁶

This guide is not going to repeat the wealth of evidence of racism within the CJS. What follows are the key statistics which illustrate the current situation.

'The law is the problem ... [The police] can make it malleable to suit what they want to do and however they want to paint you on that day'

The current situation: key statistics

1. Criminalisation: The proportion of children cautioned or sentenced who are Black has been increasing over the last ten years and is five percentage points higher than it was in the year ending March 2011 (12 per cent compared to seven per cent).¹⁷
2. Disposal: Black children (17.9 per cent) are least likely to receive an out-of-court disposal, followed by children of 'Other ethnicity' (21 per cent), children with a 'Mixed ethnicity' (21.9 per cent) and 'Asian' (27.6 per cent) children.
White children (32.8 per cent) are most likely to receive an out-of-court disposal. This means white children are less likely to end up in the court system than Black, Brown or Racialised children.¹⁸
3. Remand: The proportion of children on remand who were Black has increased from 25 per cent to 34 per cent in the last ten years. The proportion of children on remand from an Asian or other Racialised background increased from nine per cent to 12 per cent, while the proportion of children who were white decreased from 59 per cent to 40 per cent.¹⁹
4. Sentence requirements. The average number of requirements in a community sentence is higher for all Racialised children compared to white children, with the most prominent difference being between white and Black children.²⁰

'Even the criminals are victims of something. No one wants to commit crime ... How could you have supported them better to stop them from going down that road?'

¹³ See by analogy, the Associated Press style guide on capitalising 'Black' – namely emphasising that 'lowercase black is a color, not a person': <https://apnews.com/article/archive-race-and-ethnicity-9105661462>

¹⁴ Sir William MacPherson, 'The Stephen Lawrence Inquiry', February 1999, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf

¹⁵ 'Oral statement to Parliament: Stop and search: Comprehensive package of reform for police stop and search powers', Home Office and Theresa May, 30 April 2014, www.gov.uk/government/speeches/stop-and-search-comprehensive-package-of-reform-for-police-stop-and-search-powers

¹⁶ 'The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System', 2017, www.gov.uk/government/publications/lammy-review-final-report

¹⁷ 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, para 3, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

¹⁸ 'Ethnic disproportionality in remand and sentencing in the youth justice system: Analysis of administrative data', YJB, 2021, para 44, p16

¹⁹ 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, Figure 6.3, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

²⁰ 'Ethnic disproportionality in remand and sentencing in the youth justice system: Analysis of administrative data', YJB, 2021, p52, 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

5. Custodial sentences: Black children accounted for 29 per cent of the youth custody population last year, which is an increase from 28 per cent the year before and an increase from 18 per cent from ten years ago. Asian and other Racialised children in the youth custody population increased from seven to ten per cent in the past ten years. By stark contrast, the proportion of children who are white has fallen from 68 per cent to 47 per cent.²¹

6. Sentence length: The number of custodial periods ending between three and six months was four percentage points higher for children from Racialised backgrounds than for white children.²²

7. Today: In 2017, Black, Brown and Racialised children made up 45 per cent of children in custody. As of March 2021, this had increased to 53 per cent.²³

Procedural justice

Procedural justice seeks to improve the perceived fairness of procedures and personal treatment within the justice system. The experience of the justice system is as important as the outcome.

Lawyers should consider how their clients are treated and guided through the process, instead of being solely focused on results.

Ensure that your client can answer these questions satisfactorily:

- 'Did I have a chance to tell my side of the story?'
- 'Was I treated with dignity?'
- 'Did I understand how and why the decisions were made in my case – whether I agreed with them or not?'
- 'Were the decision-makers biased against me in any way?'

Think about:

- **Neutrality:** The absence of bias and prejudice in actions, conduct and decisions
- **Voice:** Providing young people the opportunity to have a meaningful say in the decision-making process, to amplify their voices where appropriate and to listen to them attentively
- **Respect:** Behaving in a way that protects clients' rights, treats young people with dignity and values their input

- **Trustworthiness:** Showing care and concern for the safety and wellbeing of young adults and acting on their behalf to provide reassurance and remain solution-focused

Children must be helped to understand and participate in the legal processes that affect them. The elements of procedural justice are, to some degree, codified within Article 12 of the United Nations Convention on the Rights of the Child, which provides that children should be heard in judicial proceedings either directly or indirectly and should have the ability to express their views.

Young people value fairness in procedures.²⁴

There is a link between children's and young adults' views on the legitimacy of our legal systems and their subsequent behaviours.²⁵

Children and young adults want to participate in legal proceedings so that their voices are heard and so that they understand the proceedings and their outcomes.²⁶

Even if a negative case outcome is unavoidable, the experience of being prosecuted shouldn't be one which is so frightening and confusing that the young person is left unable to participate and traumatised.

'You are basically invisible in the courtroom.

Everyone's talking about you like you're not a human, like you're not a person, just your actions as opposed to why ...

First and foremost you are a human, and I think that's what needs to come across to judges.'

21 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, Figure 7.6, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

22 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, para 7.9, p45, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

23 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, Figure 7.6, p36, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

24 V Weisz, T Wingrove and A Faith-Slaker, 'Children and procedural justice', Court Review, Vol 44, p38, www.proceduralfairness.org/_data/assets/pdf_file/0019/5770/weisz.pdf

25 V Weisz, T Wingrove and A Faith-Slaker, 'Children and procedural justice', Court Review, Vol 44, p38, www.proceduralfairness.org/_data/assets/pdf_file/0019/5770/weisz.pdf

26 V Weisz, T Wingrove and A Faith-Slaker, 'Children and procedural justice', Court Review, Vol 44, p41, www.proceduralfairness.org/_data/assets/pdf_file/0019/5770/weisz.pdf

Recognising racism and cultural competence

Cultural competence is the ability to understand, appreciate and interact with people from cultures different from one's own.

Cultural competence may come more naturally to Black, Brown and Racialised lawyers, and they may recognise racism more instinctively. This will be particularly prevalent when their own backgrounds mean they have certain lived or community experiences that are similar to the children and young adults they represent.

However, this does not mean that Black, Brown and Racialised lawyers are always able to directly relate to young people, particularly where there are class differences between them. There are also inherent power dynamics in the lawyer–client / adult–child relationships within this framework. Cultural competence cannot be taken for granted – it must be positively practised by all lawyers, regardless of their own lived experiences.

Cultural incompetence – or the chasm between the experiences of Black, Brown and Racialised children and their lawyers – is compounded by differences in race and/or class. White lawyers, and especially those who are not from working class backgrounds, have far more to do to

bridge socio-cultural gaps. This operates in two ways:

- first, in recognising and navigating their own racial bias, prejudices and assumptions, and
- second, in traversing 'white saviourism' in their interactions with Black, Brown and Racialised children and young adults.

Teju Cole, at Harvard University, describes white saviourism as follows:

'White Saviour Industrial Complex is not about justice, it's about having a big emotional experience that validates privilege ... There is much more to doing good work than "making a difference". There is the principle of first do no harm. There is the idea that those who are being helped ought to be consulted over the matters that concern them.'

Lawyers representing Black, Brown and Racialised children and young adults need to adopt, learn and apply cultural competencies. This will ensure they are not perpetuating the same harms of the CJS itself, and are meaningfully representing children without becoming patronising, insensitive or centring themselves in the process.

'... a lot of white old men find it difficult to sympathise for us because of the fact that they don't understand us. They didn't ever have to understand Black people growing up because they were never around them, their communities were segregated.'

Examples

'Cultural incompetence'

Where a white lawyer ...

- thinks they know better than the Black, Brown or Racialised child they are representing
- fails to listen to the child or engage them in the process
- fails to consider the culturally specific aspects of the child's lived experience which has led to their criminalisation and
- misadvises or ineffectively represents the child as a result.

'Cultural competence'

Where a lawyer ...

- is acutely aware of the racial and cultural dynamics at play within the lawyer–client relationship
- navigates these to take careful instructions which take into account systemic racism the Black, Brown or Racialised child they are representing has faced
- ensures that the child's voice is heard and informs their representation
- highlights aspects relevant to racism or discrimination in court and at the police station and
- provides sensitive and culturally-aware support to the child and their family where necessary.

Practical advice: practising cultural competence

Dr Darla K Deardorff defined (inter)cultural competence as the ability to behave and communicate effectively and appropriately in intercultural situations based on one's intercultural knowledge, skills and attitudes (2006).

This involves:

- Practising openness – by demonstrating acceptance of difference
- Being flexible – by demonstrating acceptance of ambiguity
- Demonstrating humility – through the suspension of judgment and demonstrating the ability to learn
- Being sensitive to others – by appreciating cultural differences
- Showing a spirit of adventure – by showing curiosity and seeing opportunities in different situations
- Using a sense of humour – through the ability to laugh at ourselves
- Practising positive change or action – by demonstrating a successful interaction with the identified culture

The following four attributes will guide you in developing cultural competence:

1. Self-knowledge and awareness about one's own culture
2. Awareness of one's own cultural worldview
3. Experience and knowledge of different cultural practices
4. Attitudes towards cultural differences

By applying these theories and methodologies to working with Black, Brown and Racialised children and young adults in the CJS, we can ensure that their voices are heard, understood and amplified.

The UK vs the US

The young people in our working group emphasised the difference between the UK and the US. In their own words, the UK is more 'subtly' racist because of its different history, and there is a lack of explicit acceptance or awareness of racism within the CJS in the UK. The young people felt that they faced additional barriers in the UK compared to the US, as racism has to be highlighted at every step of the way.

They noted that the narratives around racism that do exist in the UK's CJS stem from the US, as do the roots of the Black Lives Matter movement.

Although they recognised that there were similar problems within the two jurisdictions, they

felt it was important that practitioners in England and Wales understood the important distinctions too.

There was a perception that an empathetic approach to, and deeper understanding of, racism in the CJS is more mainstream among lawyers in America.

Lawyers in the UK need to be conscious of this. By articulating and acknowledging the inherent, systemic racism of the CJS in England and Wales when working with Black, Brown and Racialised children and young adults, lawyers can demonstrate empathy and knowledge and build trust.

'The UK is a bit more subtly racist in terms of the system ... And to say that it is a thing of the past is inaccurate, Black men are still wrongfully accused of crimes.'

'The US recognises the inherent racism in their legal system ... in the UK we have to convince people the judicial system is racist, and then push for the change. It is an extra step.'

An empathetic approach to practice

Unconscious bias

Identifying unconscious bias has often been the dominant focus of anti-racist training.²⁷ It is increasingly recognised that this training is insufficient to address racist practices as it only has a limited impact on long-standing behaviour

and fails to enable those who are white to understand, engage with and respond appropriately to a Black, Brown or Racialised person's experience of racism.²⁸ Two main types of unconscious bias are 'confirmation bias' and 'implicit bias'.

'Be committed to the case and dedicated to helping the client, whoever they may be.'

Unconscious bias

- Confirmation bias is defined as the tendency to look for evidence that confirms our biases and the process of reaching judgments or making decisions that confirm our biases. For instance, if we believe that Black or Brown children are lazy or criminal, then we will treat them in ways that reflect that view. In turn, the recipients of that treatment may become frustrated, angry and lose motivation – they may then behave in a way that we believe is confirming the stereotype.
- Implicit bias involves the reliance on attitudes or stereotypes that affect our understanding, decision-making and behaviour without our even realising it. Implicit bias functions automatically, including in ways we would not endorse if we had conscious awareness.

Practical advice: empathetic practice

The anti-racist lawyer training pioneered at by Professor Kristin Henning at the Georgetown University Law Center suggests that lawyers should:

1. Recognise the power of 'confirmation bias' and 'implicit bias'
 - Confirmation bias and implicit bias harm Black, Brown and Racialised children.²⁹
 - For instance, the fact that Black children get worse outcomes than their white counterparts is linked to the perception of them as more adult-like and inherently criminal.³⁰
2. Learn to replace biased responses with non-biased responses
Techniques for achieving this include:
 - Replace stereotypical responses with non-stereotypical responses – for example: if a Black client becomes distressed, instead of perceiving and/or treating them as 'difficult' or 'aggressive', be empathetic and ask them what assistance they need, recognise their reaction as a legitimate emotional response to the situation, and challenge your own racist assumptions.
 - Challenge assumptions based on appearance, by replacing a stereotypical image with a non-stereotypical image – for example: challenging assumptions that a young Muslim boy wearing Islamic garb and/or jewellery has extremist ideologies, rather than this simply being an expression of his religious and/or cultural identity.
 - Engage in perspective taking – imagine what it is like to walk in your client's shoes.
 - Get to know your client and learn more about their culture, background and life experiences.
3. Reinforce the learning by completing a bias self-audit
 - See below for an example of a completed bias self-audit.

27 D Robson, 'What unconscious bias training gets wrong ... and how to fix it', The Guardian, 25 April 2021, www.theguardian.com/science/2021/apr/25/what-unconscious-bias-training-gets-wrong-and-how-to-fix-it?CMP=Share_iOSApp_Other

28 D Robson, 'What unconscious bias training gets wrong ... and how to fix it', The Guardian, 25 April 2021, www.theguardian.com/science/2021/apr/25/what-unconscious-bias-training-gets-wrong-and-how-to-fix-it?CMP=Share_iOSApp_Other

29 See, for instance, YJB research relating to the racial bias in Asset risk assessment: 'Ethnic disproportionality in remand and sentencing in the youth justice system: Analysis of administrative data', 2021, 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. See also Dr Jahnine Davis' research on adultification: J Davis and N Marsh, 'Boys to men: the cost of "adultification" in safeguarding responses to Black boys', *Critical and Radical Social Work*, (2020) vol 8, no 2, 255–259, DOI: 10.1332/204986020X15945756023543

30 For more information, see W McMahon and R Roberts, 'Truth and lies about "race" and "crime"', *CJM* 83: Myths and criminal justice, www.crimeandjustice.org.uk/publications/cjm/article/truth-and-lies-about-race-and-crime

Example of a completed bias self-audit

TASK	Initial response: WHAT RACIAL BIAS LOOKS LIKE?	Modified response: EMPATHETIC RESPONSE
Initial contact with child / young adult	When I meet a young person for the first time, I sometimes assume Black young people know how the CJS works from their own previous experience (or that of friends and family).	I will assume that all young people enter the CJS with the same fear, anxiety and lack of information.
	When I learn that a young person lives with their grandmother (instead of a mother or father), I assume the young person does not have adequate family support.	I will engage with the young person's grandmother and make every effort to understand the full range of support she and other family members can offer. I will offer additional support to the family as needed.
	I make assumptions about the young person based on their demeanour in our initial meeting (eg arms crossed, not answering my questions).	I will remember that adolescents have a hard time engaging with others when they are afraid, anxious, embarrassed or feel like their arrest was unfair. I will engage all young people with patience and empathy.
Ongoing communication with child / young adult	When a Black, Brown or Racialised young person fails to attend an appointment, I assume that they don't care about their case or the services I have to offer. I also assume that they are incapable of complying with conditions and services.	I will remember that it takes time and patience to build trust with young people. I will persist with kindness each time I reach out. I will remember that many of the young people we serve have multiple traumas and demands.
Preparing a case	I do not always follow investigative leads suggested by Black, Brown or Racialised young people when they do not seem credible or viable to me.	I will collaborate with young people and families in the investigation of their cases. I will keep an open mind and explore all leads.
Advising on plea	I will encourage a Black, Brown or Racialised child or young adult to plead guilty for fear that they will be convicted by a jury and given a more severe sentence.	Every time I advise a Black, Brown or Racialised child or young adult, I will ask myself if my strategy would differ if my client were white and wealthy. I will make a conscious decision to fight as hard for all my clients, in particular Black, Brown and Racialised children and young adults, challenging the racism they face in the CJS as an integral part of my case theory.
Advising on evidence	I know that my Black, Brown and Racialised clients are so frustrated with police officers that I tend to believe police reports that indicate that my clients behaved aggressively on arrest.	I will remain open-minded and inquire thoroughly about the police-client interaction in my client interviews. I will remain open to the possibility that my client was polite and the officer's report is not accurate. I will integrate an awareness and understanding of institutional racism in the police to my analysis, recognising the increased likelihood of police brutality particularly against Black clients, as well as those from other Racialised groups.

Microaggressions

Microaggressions are defined as patterned behaviours by individuals in a dominant group, typically white people, that undermine, belittle, stereotype or insult those in Black, Brown and Racialised communities. Microaggressive behaviours intentionally or unintentionally communicate hostility, discrimination or prejudice towards an individual and community. There are degrees of intensity within microaggressions, from microinvalidations (subtle denials of a person's feelings, experiences or thoughts) to microinsults (verbal and non-verbal comments which demean or discredit) to microassaults (explicit verbal or non-verbal attacks).

Dr Chester M Pierce, the first African-American psychiatrist to join the faculty of the Harvard Medical School, invented the term microaggressions during the 1960s to capture the distorted relationship between races.³¹ He explained the concept as follows:

Most offensive reactions are not gross and crippling. They are subtle and stunning. The enormity of the complications they cause can be appreciated only when one considers that the subtle blows are delivered incessantly. Even though any single offense can ... be relatively innocuous, the cumulative effect to the victim and to the victimizer is of an unimaginable magnitude.³²

Practical advice: calling-out microaggressions

Case study:

In the youth court, the lawyer makes an application for their child client to be allowed out of the dock to sit with their supporting adult. The magistrate refuses the application and comments that the defendant is a 'big lad who doesn't look like he is going to find this process intimidating'. The lawyer could politely respond that it is of concern that the court has made assumptions about the child's ability to understand and participate in the proceedings based on his physical appearance.

For a detailed breakdown of common microaggressions and suggested responses, practitioners are encouraged to access the 'third party interrupter' toolkit devised by the Georgetown Juvenile Justice Clinic & Initiative and the Gault Center: Defenders of Youth Rights.³³

31 C Wells, 'Microaggressions: What They Are and Why They Matter', 24 Texas Hispanic Journal of Law and Policy, 2017, <https://racism.org/component/mailto/?tmpl=component&template=cloudbase3&link=f92f60ff08bbd2f6cf400733679affa06183258d>

32 Dr Chester Pierce, 'Offensive Mechanisms', in *The Black Seventies*, ed Floyd B Barbour (Boston: P Sargent, 1970), 265–266

33 Racial Justice for Youth: A Toolkit for Defenders, 'Confronting Bias', Georgetown Juvenile Justice Clinic & Initiative and the Gault Center: Defenders of Youth Rights, 2021/22, www.defendracialjustice.org/confronting-bias/

What do young people want from a lawyer?

We asked the young people in our working group whether they had experienced racism from their own legal representatives and other professionals in the CJS.

They described being racially stereotyped by defence lawyers and others within the CJS, and experiencing professionals failing to understand their experiences of being Black, Brown or Racialised.

We asked: What did you need from your lawyer when you were in the CJS, and which attributes did you most highly regard?

The young people responded with these key values and approaches:

- **Honesty and not being patronising**
'Sugar coating things is something lawyers tend to do with young people maybe just to protect them from information or for other reasons. I feel like when you have been through a lot already, you see it all for yourself, it's more frustrating than it is helpful when you have ... a lack of information being shared. So despite the age of the young person, just being 100 per cent honest.'
- **Trustworthiness**
'I only ever like a lawyer or trust a lawyer if they have previously done a good representation of a member of my family. One time I was arrested, my cousin got me a lawyer, she said don't worry, was very reassuring, and I was out within two hours.'

- **Friendliness tempered with professionalism and proper boundaries**

'As lawyers, especially dealing with younger kids, build that rapport with your clients and make sure they feel comfortable enough to be open with you.'

- **An open, non-judgmental approach**

'The first thing you should do is believe your client, because at the end of the day you are representing them ... If your lawyer is not believing you, no one else is going to be on your side.'

- **The giving of clear, direct and comprehensive advice**

'Reassurance, just to know that they know what they are talking about, what they are doing, and laying out options for what we can do in the courtroom ... If they are not confident how can we be confident?'

- **Respecting the child's agency instead of trying to push a particular outcome**

'What makes a good lawyer is getting to know the history of your client, getting to know their background properly, and just showing a sense of interest in that so you can build a better case on the circumstances which might have led your client to get to that situation.'

'With a lawyer, you have to be able to tell them everything'

Childhood as a legally protected characteristic

Treating children as children means adopting a child-first and child-centred approach to all aspects and stages of the CJS.³⁴ This means working in the child's best interests, adopting a non-criminalising attitude, and working collaboratively.³⁵

This approach is firmly established in domestic and international law and policy. Practitioners should ensure that they are familiar with the core principles of these frameworks.

Definition of a 'child'

- A 'child' is a person 'below the age of eighteen years': Article 1 of the UN Convention on the Rights of the Child
- A 'child' is 'a person under the age of 18': s91(6) Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)
- A 'juvenile' is a person 'who appears to be under the age of 18': s37(15) Police and Criminal Evidence Act 1984 (PACE) and PACE Code C para 1.5

The youth justice system

- The principal aim of the youth justice system is to prevent offending³⁶
- Courts have a duty to consider the welfare of the child³⁷
- Public bodies including police, YOTs and prisons have a duty to discharge their functions with regard to the need to safeguard and promote the welfare of children³⁸
- In all actions concerning children, the best interests of the child shall be a primary consideration³⁹

³⁴ 'Youth Justice Board for England and Wales: Strategic plan 2019–2022', 24 May 2019, www.gov.uk/government/publications/youth-justice-board-for-england-and-wales-strategic-plan-2019-22

³⁵ 'Youth Justice Board for England and Wales: Strategic plan 2019–2022', 24 May 2019, www.gov.uk/government/publications/youth-justice-board-for-england-and-wales-strategic-plan-2019-22

³⁶ s37 Crime and Disorder Act 1998

³⁷ s44 Children and Young Persons Act 1933

³⁸ s11(2)(a) Children Act 2004

³⁹ Art 3(1) UN Convention on the Rights of the Child; see also the European Court of Human Rights decision in *Neulinger and Shuruk v Switzerland*, App No 41615/07, [2010] ECHR 1053, (2010) 28 BHRC 706 which highlights that 'in all decisions concerning children, their best interests must be paramount' (at para 135)

Adultification and intersectionality

Adultification describes how preconceptions of Black children can result in their being treated and perceived as being more adult-like. The consequences can include their being treated without empathy or in ways which ignore child-centred approaches and which ignore that they are a young person.

The denial of a child-centred approach to Black children is a trend that has been considered by academics⁴⁰ viewing the experiences of young Black defendants through the lens of 'adultification' and 'intersectionality'. In this context, 'intersectionality' is an understanding of how a young

person's social, economic, cultural and political identities combine to create layers of discrimination, and an analytical framework for understanding how aspects of a young person's social and political identities combine to create different modes of discrimination and privilege.

It is important to note that the use of the term 'adultification' by no means legitimises police or state violence against Black adults, nor does it detract from the very real abuse Black children face. It is used in this context to understand how Black children are perceived by authority figures, including the police, schools and other public officials.

Adultification and intersectionality: key principles and impact

- Black boys are seen as less innocent, less vulnerable and more adult-like – to the extent that childhood innocence that is attributed to their white counterparts is often erased⁴¹
- Professionals apply perceptions of vulnerability to some children more than others, especially if the young person is Black and male and the harm they experience takes place outside of the home⁴²

There is a lack of critical analysis in the way professional services respond to Black children, in particular a lack of understanding of the interplay between factors such as race, ethnicity, class and gender⁴³

- The practical consequence of adultification is that services may overlook Black children's needs, and instead of providing them with support, disregard their right to protection, security and safeguarding⁴⁴

See, for example, the findings of the Serious Case Review into Child C's murder, who had been found aged 14 in Dorset hundreds of miles from his East London home in a 'cuckoo' house, in personal possession of a large amount of crack cocaine: 'The response to Child C while detained in Bournemouth and then on his return from there in October 2018 did not capitalise on a "reachable" moment for a child who was clearly being criminally exploited, and nor was all the information available from the authorities in Bournemouth transferred to their counterparts in Waltham Forest.'⁴⁵

- The problem of adultification may be further compounded by conscious and unconscious beliefs and stereotypes of Black boys, their resilience and perceived 'criminality'⁴⁶
- An intersectional approach to the provision of statutory services has been recommended as a means of combatting adultification and properly recognising the lived experiences of Black children in the UK⁴⁷

40 See J Davis and N Marsh, 'Boys to men: the cost of 'adultification' in safeguarding responses to Black boys', *Critical and Radical Social Work*, Vol 8, No 2, August 2020, pp255–259(5)

41 PA Goff, M Jackson, B Di Leone, C Culotta and N Ditomasso, 'The essence of innocence: consequences of dehumanizing Black children', (2014) *Journal of Personality and Social Psychology*, 106(4): 526–545; and R Epstein, J Blake and T Gonzalez, 'Girlhood interrupted: the erasure of Black girls' childhood', (2017) *The Georgetown Law Center on Poverty and Inequality*, doi: 10.2139/ssrn.3000695

42 PA Goff, M Jackson, B Di Leone, C Culotta, and N Ditomasso, 'The essence of innocence: consequences of dehumanizing Black children' (2014) *Journal of Personality and Social Psychology*, 106(4): 526–545; J Davis and N Marsh, 'Boys to men: the cost of "adultification" in safeguarding responses to Black boys', (2020) *Critical and Radical Social Work*, vol 8, no 2, 255–259, DOI: 10.1332/204986020X15945756023543

43 J Davis and N Marsh, 'Boys to men: the cost of "adultification" in safeguarding responses to Black boys', (2020) *Critical and Radical Social Work*, vol 8, no 2, 255–259, DOI: 10.1332/204986020X15945756023543

44 J Davis and N Marsh, 'Boys to men: the cost of "adultification" in safeguarding responses to Black boys', (2020) *Critical and Radical Social Work*, vol 8, no 2, 255–259, DOI: 10.1332/204986020X15945756023543

45 'Waltham Forest Safeguarding Children Board: Serious Case Review – Child C, a 14 year old boy', May 2020, www.walthamforest.gov.uk/sites/default/files/2021-11/WFSCB%20-%20SCR%20Child%20C%20May%20final_.pdf

46 K Welch, 'Black criminal stereotypes and racial profiling', *Journal of Contemporary Criminal Justice* (2007) 23(3): 276–88. doi: 10.1177/1043986207306870; J Davis and N Marsh (2020) 'Boys to men: the cost of "adultification" in safeguarding responses to Black boys', *Critical and Radical Social Work*, (2020) vol 8, no 2, 255–259, DOI: 10.1332/204986020X15945756023543

47 J Davis and N Marsh (2020) 'Boys to men: the cost of "adultification" in safeguarding responses to Black boys', *Critical and Radical Social Work* (2020), vol 8, no 2, 255–259, DOI: 10.1332/204986020X15945756023543

Trusting lawyers and client confidentiality

Most of the children and young adults in our working group were aware to some degree that their lawyers work for them and that they can fire their lawyer. However, the majority of them expressed mistrust of the legal system generally, and by extension their lawyer.

- Many did not trust their lawyers' confidentiality and feared that their information would be shared with the police.

'I don't trust anyone who works inside that police building. If they can come inside that police building with a pass from the police, they are all connected in some way.'

'It wasn't for me to tell the lawyer and the police what happened. The police has to do their own work on the case, it's not for me to help you.'

- Children and young adults felt that the fact a lawyer was not from their background meant there would be a gap of understanding, which led to a lack of trust.

'If you're not from their background, how are you going to make someone trust you?'

- Children and young adults also expressed concern that speaking to a lawyer about some details of a case could be considered 'snitching'. To some, trust was integral to them sharing the truth. Others were uncompromising in their position, saying they would uphold their 'code of silence' even with their lawyer and that their lawyer should simply work with the information they have to secure the best possible outcome.

'How young Black people are raised in our communities, [snitching] is never an option.'

'When something happens like that, the first rule is your code of silence.'

'If you discuss certain things with your lawyer that you trust, it's not really snitching. They are going to try and help you build a case around, rather than snitching to the police.'

'I came from a place where you don't snitch ... I just felt like I'm gonna take the rap ... But obviously in the police station I was more than happy to tell my solicitor about where [the firearm] came from ... because I trusted her and I knew that she is working for me ... it's my decision whether I want to disclose it further in interview. So with the information I gave [my solicitor] she was able to help me get the best outcome I could possibly get. So I was honest with her and she advised me to do a no comment interview to the police.'

- Children and young adults felt that in some circumstances, the truth would not help them, and they did not trust their lawyers would secure an outcome entirely in their favour (for example, an acquittal or a non-custodial sentence).

'I hear you, but the truth is not going to set me free in this situation.'

- Some Black boys repeatedly affirmed that they have very little trust in anyone except themselves, given their life experiences and what they have seen within their communities. While they understood that their lawyers worked for them, this did not alter these instincts.

'Firstly, I don't trust anyone ... But I do understand 100 per cent they work for me and legally they are not allowed to disclose anything.'

'I don't really trust anyone to be fair.'

'The only person I trust enough is myself ... I like to get information to make the best decision as possible.'

'There's been situations where I haven't told my lawyer the truth, because I don't trust that my lawyer is going to keep my information between us.'

Practical advice: building trust

When young clients trust their lawyer, the lawyer is able to get a better understanding of the case and can decide strategically on the best course of action.

To counter many of the concerns raised by Black, Brown and Racialised children and young adults about client–lawyer confidentiality and general mistrust in the system, lawyers should consider adopting the following strategies:

- Make it clear that you do not work with or for the police and that you will not share clients' information with the police. Express an understanding of the systemic racism and discrimination that Black, Brown and Racialised children and young adults face at the hands of the police
- Practise cultural competence (discussed at p6 above) to bridge any gaps in the client–lawyer dynamic
- Be respectful of the fact that some Black clients may be concerned about disclosing information for fear of 'snitching'. Be non-judgmental and open-minded about any 'code of silence' the young person wishes to uphold, while working to build trust with them to ensure they feel safe and comfortable enough to share the truth. Clients should be clearly informed that any information they share with their lawyer will not be shared with the court or Crown Prosecution Service (CPS) without their explicit consent and that they can discuss together how best to strategise without implicating others or creating problems within their community
- If a young person does not share any information about third parties for fear of 'snitching', obtain sufficient instructions to secure the best possible outcome. Explain the client's position to the court – that is, that the client is too afraid of repercussions to give full instructions
- Ensure that you convey realistic, but positive messages to young clients, by showing an active dedication and commitment to their cases so that they know someone is fighting their corner. This will enable clients to feel as though sharing the truth could be to their benefit and make a material difference to any outcomes

An incomprehensible system

Many of the young people in our working group explained finding the system incomprehensible and alienating. It made them feel undermined,

isolated, dehumanised and stripped of any sense of individuality, value or worth.

Article 40(1) UN Convention on the Rights of the Child

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Some felt, to some degree, that the purpose of the CJS is to formally punish and humiliate them. There are a number of reasons why the CJS is incomprehensible to any child but particularly to those from Black, Brown and Racialised communities:

- Systemic racism has led many Black, Brown and Racialised boys to hear and believe that they are inferior to other boys, including that they are 'less academic' and 'more badly behaved' than other children of the same age.
- The language used in courts in particular, but throughout the CJS, is archaic and exclusionary. Cultural references made by professionals may make Black, Brown and Racialised boys feel isolated rather than engaged.
- Historically the law was done unto children rather than them being active participants in the process. It is now understood that a child must be able to participate, engage and explain their side of the story in any legal proceedings. However, the system is not designed to think primarily about the participation of children caught up in it. It is the lawyers' responsibility to ensure that participation is a primary function.

Practical advice: making the system accessible for children and young adults

Lawyers should go above and beyond their normal practice and not make assumptions that a child or young adult understands what is happening. Children need to be centred in the process and enabled to engage in matters concerning them.

- Take extra time to brief and debrief child and young adult clients before and after court appearances.

'I was sitting in court and they were having this big discussion about how I would be sentenced, it was about four hours, maybe longer, I lost track of time. And I was sitting there and I was like, I don't understand anything anyone is saying I just want to hear the judge say you're being sentenced.'

- Make sure your young client sits close to you and a supporting adult who can explain things during proceedings.

'So obviously in court, solicitors and judges have a language or a way of speaking to each other that obviously isn't normal to the way I speak or listen to people speaking, especially at 16. So I couldn't understand the terms, the phrases, the types of words being used. It wasn't normal to me.'

'Being present in the moment is very daunting and uncomfortable and tiring, just sitting there as a youth trying to figure it out. It was very much like am I watching a TV show – is this my life?'

'The case is about you, your freedom, about your life, the effect on your loved ones. And you don't understand it. You don't understand anything, but your name, and whether you are found guilty or not. But in between – it's another language.'

'I feel like judges and people in the courtroom are talking a language that's not understood to the majority of people in the world and it's annoying for the perpetrator, for the victim, for the solicitors if they're not from that background, because the only thing you understand is if you're guilty and what time you're gonna get off – that's the only thing you have a clear understanding of. Everything else in between, you're confused.'

- Inform your young client of what kinds of conversations will be happening and with whom. Many children express concern when they see their lawyer talking to the prosecutor. If the purpose of this conversation has been explained (for example, getting evidence from the Crown, negotiating a lesser offence, willingness and availability of prosecution witnesses) the young client will understand the tactical reason behind the interaction and is less likely to feel betrayed.

'I think it should be up to the lawyers to debrief beforehand – explain what they are going to say, the process and procedure. In the breaks they have or directly after, they should explain to the young adults. There's a lot of terminology that general people won't know.'

- The client should be informed of what type of personal information is likely to be discussed in court. They should be consulted on how they feel about this, how the information should be presented and whether the client would like an application for it to be read by the judge, rather than discussed out loud, to be made. For example, lawyers have successfully argued for a co-defendant to be absent from the sentencing process and allowing the co-defendant's lawyer to be present, where the co-defendants were classmates and children in the school did not know that the defendant was living in care.
- Explain to your client what the possible outcomes of discussions are and enable the young person to explore tactical considerations collaboratively.
- Use language that is inclusive and understood by children rather than resorting to shorthand jargon which is exclusionary.

'It's Shakespearian language ... but we're living in the modern world, just get with the times please.'

'I couldn't understand anything that was being spoken about by anyone in the court. I was really confused and a little bit out of my depth.'

'Lawyers and judges should be speaking in a way young people can understand.'

'I wasn't participating, I was just sitting there ... For me ... I can't change the law ... but I just think it's like that form of power, you have to speak to that judge like that because they are in power and they have to be respected, but what about everyone else who doesn't have a clue what is being spoken about. So I wish that everyone would just speak normally!'

- It is commonplace for young people to answer 'yes' automatically when asked if they have understood something. This is often because they think they should understand or know the answer, or do not want to admit when they have not fully paid attention or engaged. Ask the young person to relay and explain back what has been advised to ensure that they have correctly understood.
- 'Part of it is to do with education, part of it is to do with experience as well.'
- Visual tools can help to describe certain aspects of the process. To ensure that this does not seem patronising, explain how these tools help to ensure that the child has understood the process, and use only where considered necessary. See, for example, the Hackney Speech and Language Youth Justice Services – Custody Flowchart.

Relational communication

The young people in our working group all described feeling invisible within court proceedings and unable to participate.

You need to tailor the ways you communicate, facilitate children's autonomy, and amplify children's voices in the process.

Relational communication is a communication style or an act of communication in which the primary focus is the relationship between the participants.⁴⁸ Within the CJS, this involves ensuring that a child or young adult can communicate and therefore participate by playing an active role in criminal proceedings.

On amplifying children's and young adults' voices in the courtroom, one of our young participants suggested: 'I know a lot of people who would've absolutely hated it and I know a lot of people who would have preferred to have a bit more of a voice. I think it's very circumstantial and there are other things you can do like writing letters to the judges, or having a video recording or something, just to humanise young people a bit because I do understand that.'

Black, Brown and Racialised children and young adults should engage in proceedings comfortably and meaningfully, to ensure that their dignity and autonomy are respected.

Relational communication in this context therefore includes you making sure you are:

- explaining the different roles and relationships of professionals in the CJS, the purpose of lawyers and collective aims; visuals may assist
- explaining the aims of any meeting or discussion, what needs to be covered and how long it will last; a simple agenda may assist and reduce the child's or young adult's anxiety
- aware of any communicational strengths and difficulties
- making adaptations to enable your young clients to communicate to the best of their abilities
- creating opportunities, relationships and environments that make children and young adults want to communicate
- getting the right support for communication if required
- encouraging young people to let them know when they do not understand, and minimising misunderstandings by using simple clear language and avoiding legal jargon
- giving positive messages when the child is doing well and being clear when they need them to go over information
- letting children know they can and should take their time.

'It builds up a level of frustration, you mention my name a few times but I don't know what you're saying in between ... in between it's like they are speaking another language literally.'

Participation

The young people in our working group all pointed to times when they were not involved or engaged with what was happening in their case. Most expressed a clear desire to participate in the process, but that they thought the system was inherently exclusionary.

Particularly for Black, Brown and Racialised children and young adults, this is compounded by race. They need to be emboldened and enabled to actively participate in proceedings in a way that traverses the many racial and class barriers they face. Lawyers need to take responsibility for this process.

As well as ensuring the provisions and procedures available for children are applied (see Part 2 of this series), to properly challenge the inherent imbalances of power in the CJS for Black, Brown and Racialised child and young adult defendants, lawyers should empower their clients to navigate their own way through the CJS.

This means combining procedural justice strategies (see p5 above) with relational communication (see p19 above) to counter the narrative that children cannot have self-determination and autonomy over proceedings and instead ensure that they are active participants.

'I was so anxious ... As much as you are a youth, it is your life that is ultimately being taken control of in that moment and you want to know what is being said ... I wanna know, I wanna be there, I think we have the right to be present.'

Practical advice: participation for Black, Brown and Racialised children and young adults

Many of the young people in our working groups felt that their participation in proceedings would be either inconsequential or actively harmful.

Some felt as though the opinions of other professionals were deferred to and given far more weight than their own views:

'When you're in court for your final court appearance ... if you can get custodial time, before the judge gives you anything, they ask if there's anything you'd like to say ... but to be honest I don't think it really matters if you can speak or not ... only recently I've been able to understand the court a lot more and for more people under 18, I've noticed the judge goes off the YOT team or the pre report.'

Others were concerned that the way they spoke would be poorly received by judges and increase their perceived criminality:

'Even listening to myself talking now, I still feel like if I was to talk like this in a courtroom I sound a bit rowdy. A bit ghetto, a bit stronger, a bit like "he's from those streets" ... You sound like you did commit the crime, from the judge's point of view.'

'Going to a courtroom and having to change your whole persona is very hard.'

'I feel like they would judge me for the way I speak because it's different from the way they speak.'

To effectively counter this, lawyers should:

- Ensure that Black, Brown and Racialised children and young adults are engaged in preparing YOT reports by understanding their purpose before speaking to YOT workers, so that they feel these reports are meaningful, comprehensive reflections of their views and circumstances
- Reassure children and young adults that their voices are important and legitimate, and challenge any preconceptions or microaggressions which occur as a result of the language, accent or vocabulary they use
- So that children and young adults feel more confident speaking in open court, lawyers should make every effort to help them prepare, and advise where appropriate.

'In the court I didn't really understand what was going on and it made me feel like I had no say.'

Trauma

Black, Brown and Racialised children and young adults may experience a heightened level of trauma from the CJS, in addition to the difficulties all defendants face. This includes both individual and systemic trauma: in their personal lives due to social, economic or cultural circumstances, racism (either directly or indirectly due to family members, friends or community experiences) and the trauma of interactions with police, custody, prosecution and the courts.

Lawyers therefore need to take a trauma-informed approach to working with Black, Brown and Racialised young clients. Trauma-informed lawyering rests upon characteristics intrinsic to all positive human relationships: empathy, responsive listening, restraint from judgment, demonstration of authentic care and concern.⁴⁹ However, lawyers should also incorporate changes into their practice that respond to the vulnerabilities common among traumatised children and young adults.⁵⁰

Trauma-based approach: ten basic principles

The ten basic principles of a trauma-informed approach are identified as:

1. Building trust

Traumatised children and young adults 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 or young adult that you can be trusted. Consider the approaches identified in the section on 'cultural competence' (see p6 above) to tailor this to working with Black, Brown and Racialised children and young adults.

2. 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. This approach was echoed by the Black, Brown and Racialised young people in our working group, who wanted lawyers to be friendly while maintaining professionalism.

3. Transparency

Transparency promotes trust and minimises the child's or young adult's feelings of powerlessness – a common trauma 'trigger'. This feeling of powerlessness will be heightened for Black, Brown and Racialised young people in the CJS. Transparency also helps to distinguish your relationship from past traumatic or dysfunctional relationships. Be transparent with the young client about the legal proceedings, explain your role clearly and be honest about what you can and cannot achieve, and have a candid conversation about the process including confidentiality, the purpose of note-taking and conversations with other parties. This approach is consistent with what the young people we spoke to said about ensuring lawyers do not 'sugar-coat' their advice and explanations.

4. Predictability

This can help a traumatised client feel safe. Repeatedly preview for the client what is to come. For example, explaining decisions the client will have to make, upcoming appointments, hearings or meetings. Creating routines with the client will help manage their distress where court procedures cause uncertainty (for example, listing delays or adjournments). Be clear with the client about what you know and when a decision might be made.

5. Client control

Give the client's voice an opportunity to be heard in decisions that affect them. Actively empower them by ensuring they are a part of their legal team. These efforts will counteract feelings of powerlessness, especially for Black, Brown and Racialised children and young adults. Explain to your client how, unlike other adults in their life, their relationship with their lawyer gives them decision-making power. Let them know they can 'fire' you and should hold you to account.

6. Ensure understanding

Regularly check-in with the client on their understanding of the issues at hand by asking them to explain back what you have told them.

49 T Kraemer and E Patten, 'Establishing a trauma-informed lawyer-client relationship (part one)', ABA Child Law Practice, vol 33 no 10, October 2014, p199, www.lsc-sf.org/wp-content/uploads/2015/10/Article_Establishing-a-Trauma-Informed-Lawyer-Client-Relationship.pdf

50 T Kraemer and E Patten, 'Establishing a trauma-informed lawyer-client relationship (part one)', ABA Child Law Practice, vol 33 no 10, October 2014, p199, www.lsc-sf.org/wp-content/uploads/2015/10/Article_Establishing-a-Trauma-Informed-Lawyer-Client-Relationship.pdf

7. Respect

Respect your client's choices about how much information they share with you. This is relevant to issues around Black clients being concerned about 'snitching' (as explained at p15 above). Explain to the client why you are seeking particular information and how it will help with your representation and/or affect any potential outcome.

8. Proactive support

Anticipate issues that may arise during the process that may be distressing or de-stabilising for your client. Ask for your client's consent to engage additional support where appropriate, such as a trusted adult, to help gather the necessary information. Consult mental health professionals and other appropriate adults in the child's life, where consent is given, to identify situations that may be stressful or triggering for your client. Clarify 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 a young client, and where possible make sure they have necessary support.

9. Patience

Building connections, rapport and trust takes time. The traumatised client may initially respond negatively to you or push you away. Remain patient, present and available.

10. 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. You may also want to provide materials for them to use while talking if needed (for example, pens and paper or age-appropriate toys). YJLC have published detailed guidance relating to how a practitioner can model a 'trauma-informed' approach in their practice.⁵¹ We advise you to read this in detail for further information on how to adopt the above principles.

Race and intersectional trauma

Racial trauma, sometimes called race-based traumatic stress, is the mental and emotional harm caused by personal or vicarious encounters with racial bias, racial discrimination, and systemic racism.⁵² There are now proven connections between the experience of racial trauma and health conditions such as depression, post-traumatic stress disorder (PTSD), hyper vigilance, panic, heightened sensitivity to threats and distrust, substance abuse, shame and self-harm.⁵³

The Black, Brown and Racialised children and young adults in our working group discussed at length their experiences of racism in the CJS and how this was associated with feelings of low self-worth, powerlessness and emotional distress.

These were particularly pertinent when children and young adults described their interactions with the police. Based on their experiences, they said:

'Police are never going to be held accountable because they are the people in power.'

Having police in schools 'make[s] children feel like criminals before they have even done anything wrong'.

'I remember being about 12 or 13, and my cousin used to explain to me wearing a black hoodie in all black with black trainers, you're more likely to get stopped than if you wear colours.'

They expressed pessimism about the system meaningfully changing, and about the inherent nature of power:

'I don't personally believe ... being realistic ... I don't see a way where it's ever going to be that way.'

'Very few people who have power use it responsibly.'

'How are you going to tell me as someone who has had a bad experience or someone whose family has had a bad experience, that maybe you should go into law and focus on being an officer of the law. It's never going to work.'

Lawyers need to be acutely aware of Black, Brown and Racialised children's and young adults' experiences of trauma and how interacting with the CJS is likely to be re-traumatising at every stage. For Black boys and young men in particular, knowledge of police brutality and discrimination will be a central point of trauma in police interviews, custody and interactions with police witnesses at court.

Muslim clients are likely to routinely receive Islamophobic treatment in the CJS.⁵⁴ For Muslim child clients, this includes being subject to the discriminatory 'Prevent' duty at school,⁵⁵ their negative interactions with the police,⁵⁶ Islamophobic tropes used by the police,^{57 58} and their experiences of Islamophobia within wider society.⁵⁹

Practitioners must acknowledge this and support clients through these experiences, using a 'trauma-informed' approach, to mitigate against elevated distress and subsequent harm.

'I personally feel like there's not a lot you can do to change the mindset of the police or a judge or someone who is not from that background. You are not going to understand what a young Black male goes through on a daily basis in terms of dealing with police, dealing with other youths around their area and stuff like that, they are never going to understand ... So we can't say how can we have a judge and police understand because these people aren't from our backgrounds.'

52 Definition cited by Professor Kristin Henning, Gault Center: Defenders of Youth Rights (formerly the National Juvenile Defender Centre, Georgetown University)

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Conclusion

Black, Brown and Racialised children and young adults continue to face widespread racism in the CJS, in both their treatment and outcomes. Therefore, for lawyers to properly integrate anti-racist approaches into their representation, they must be well-versed in both the relevant theory and practice. Anything short of this does our Black, Brown and Racialised young clients a disservice and fails to challenge the systemic barriers they face every step of the way.

In order to help children and young adults properly navigate and ultimately exit the CJS, we must always seek to tackle the racial injustice that is inherent to it. In the words of one of the young

adults in our working group: 'They have a choice to be stereotypical or racist. We don't have a choice to be Black.'

In this spirit, we as lawyers all have a choice too: a choice to challenge racism in the CJS, to ensure that the voices of Black, Brown and Racialised clients are heard, and to represent them fearlessly in police stations, against the CPS and in the courtroom.

We encourage all practitioners reading this guide to make this choice: with the aim of advocating for Black, Brown and Racialised children's and young adults' rights within the CJS and racial liberation beyond it.

#01

Fighting Racial Injustice: Background, childhood, legal representation & trauma

Written by Zehrah Hasan (Garden Court Chambers) in collaboration with the Youth Justice Legal Centre. Thank you to the young people who generously shared their experiences with us. Thank you to our expert advisory board: Aika Stephenson, Garry Green, Junior Smart, Sandra Paul, Kusai Rahal, Danielle Manson, Alexandra Wilson and Keir Monteith QC.



#01
Background,
childhood, legal
representation &
trauma

#02
Police station,
diversion, CCE,
effective
participation,
remand &
sentence

#03
Rap & drill

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.

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