

#06 Criminal Practice Directions

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This legal guide is intended to assist lawyers representing children in the criminal courts and explains how the Criminal Practice Directions¹ can support in this context.

The Criminal Practice Directions (CrimPD) supplement the Criminal Procedure Rules (CrimPR) by guiding judicial discretion, detailing a range of adjustments that should be considered in all criminal cases that involve children. The new Criminal Practice Directions were issued on 19th April 2023 and came into force on 29th May 2023. The new CrimPD has been drafted to contain only necessary information, and in a more accessible style. Paragraphs that restate the law (statute, case law, and CrimPR), that are descriptive only, or that refer to information in other guidance have been removed. Throughout this guide, we refer to both the Rules, the CrimPR, and the Practice Directions, the CrimPD.

Introduction

It is well known that many children appearing in criminal courts have communication or learning difficulties.² They are disproportionately likely to have a neurodisability, mental health problem or to have suffered a traumatic brain injury.³ These factors, as well as age and normal adolescent development, can make it difficult for children to participate in criminal proceedings, particularly in the Crown Court.

Defendants have a right to effective participation when they appear in criminal proceedings. This right has been articulated by the European Court of Human Rights (ECtHR)⁴ through Article 6 of the European Convention on Human Rights (ECHR), 'right to a fair trial'. The CrimPD is the key domestic provision that sets out in detail ways to implement that effective participation right – it details a range of adjustments to proceedings that should be considered when children appear in the criminal courts.

- 2 K Bryan, G Garvani, J Gregory and K Kilner, 'Language difficulties and criminal justice: the need for earlier identification', *International Journal of Language and Communication Disorders*, Nov–Dec 2015, 50(6), pp763–775. See also G Branston and H Norton, 'Youth defendants in the Crown Court', *Judicial College*, August 2022 (<https://bit.ly/440HpMn>), 2H, para22: 'It is common for most, if not all, young defendants to have communication needs, whether due to their age alone or in combination with other vulnerabilities'
- 3 N Hughes, H Williams, P Chitsabesan, R Davies, and L Mounce, 'Nobody made the connection: the prevalence of neurodisability in young people who offend', *Office of the Children's Commissioner*, 2012 (bit.ly/3uPqgzl). See also CrimPD 6.2.8: 'Communication needs (such as short attention span, suggestibility and reticence in relation to authority figures) are common to many witnesses and defendants under 18'
- 4 *Stanford v UK* [1994] ECHR 6

Overview

Status of the Criminal Practice Directions

The CrimPR are the 'rules' governing the practice and procedure to be followed in the criminal courts.⁵ They are secondary legislation.

The CrimPD, on the other hand, are not secondary legislation. They:

- supplement the rules acting as a guide for the exercise of judicial discretion

- are binding on the criminal courts⁶
- detail a range of adjustments (special measures and procedural modifications) that should be considered in all cases that involve a child defendant.⁷

Overview of modifications for child defendants

The CrimPD permits the use of modifications to the trial process, including:⁸

- use of a courtroom that better facilitates communication
- the support of intermediaries
- removal of wigs and gowns
- allowing the child to sit not in the dock but rather with family members or others in a like relationship, and in a place which permits easy and informal communication with lawyers

- Attendance throughout proceedings of a suitable supporting adult
- giving evidence via live link
- a 'ground rules hearing' (GRH) to plan the questioning of a child defendant, and
- timetabling that accommodates the child defendant's ability to concentrate.

Applying the Criminal Practice Directions

- Legal representatives must be familiar with the detailed provisions in the CrimPD and ensure that they are complied with.⁹
- Time for raising the CrimPD:
 - In the Crown Court, at the plea and trial preparation hearing (PTPH), where the PTPH form requires identification of any modifications sought or likely to be sought.¹⁰

- In the youth court, at the first appearance.¹¹
- Where an application for special measures is granted or refused, the court must give its reasons.¹²

- 5 s69 Courts Act 2003
- 6 CrimPD 1.1.3: 'The Criminal Procedure Rules and the Criminal Practice Directions are the law'. CrimPD 1.1.4: 'They provide a code of current practice that is binding on the courts to which they are directed'. CrimPD 1.1.5: 'Participants must comply with the Rules and Practice Direction, and directions made by the court!'
- 7 The term 'child defendant' is used here to align with the definition of a 'child' under United Nations Convention on the Rights of the Child, Article 1: 'a child means every human being below the age of 18 years'. Note that the CrimPD, however, uses the terms 'young defendant' or 'defendants under 18'
- 8 A full list of the modifications provided for by the CrimPD can be found at Annex 1 of this guide
- 9 CrimPD 1.1.5
- 10 The online PTPH form that practitioners are required to complete for the purposes of Crown Court proceedings was amended in 2019 to ensure greater adherence to the CrimPD as it applies to child and vulnerable defendants. The new form (known as 'PTPH2') applies from 22 July 2019 (bit.ly/3uQtrHp). The introduction to the guidance to PTPH2 provides that 'the court has an obligation actively to manage the case with the assistance of the parties and the form is a tool to do that. For the parties it is a convenient place to record key information that might otherwise have to be sent in other ways' ('PTPH2: The revised PTPH form – a guide for practitioners', issued by the office of the Senior Presiding Judge, July 2019, bit.ly/3ipyV9t). The guidance goes on to state that: 'Where a defendant is under 18, or vulnerable in other ways, the defence should consider what orders should be made at PTPH to address this using the section for young/vulnerable/intimidated defendants' (a dropdown section that acts as a prompt for legal representatives and the court) (p4)
- 11 If the need for modifications only becomes apparent at a later stage of proceedings, however, a case management hearing should be sought for these to be considered
- 12 CrimPR (as amended on 5 April 2021 by SI 2021/40) 18.5(3)

Background

In 1999, in the case of *V v UK*¹³ the ECtHR was asked to consider whether there had been a violation of Article 6 of the ECHR where two very young children had been tried in the adult Crown Court. The defendants were 11 years old at the time of their trials, and both had learning difficulties. The court had to decide whether the children had been able to 'effectively participate' in their trial.¹⁴ The ECtHR was critical of the way England and Wales treated young children in the criminal justice system, stating that:

... it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.¹⁵

The ECtHR further noted that proceedings involving children in the adult Crown Court should be conducted in such a way as 'to reduce as far as possible [the child defendant's] feelings of intimidation and inhibition'.¹⁶

The decision led to domestic reforms for children in the criminal justice system in England and Wales in the form of a Criminal Practice Direction – 'Practice Direction (Crown Court: Young Defendants)' – issued in 2000 by the then Lord Chief Justice (Lord Bingham), which set out the steps that should be taken in the trials of 'young defendants'.¹⁷

In 2000, the CrimPD applied specifically and exclusively to young defendants, which it defined as 'children and young persons', aligning with the language of other legislation concerning children. Since 2000, there have been various amendments and overhauls that have extended the protective elements of the CrimPD to include all vulnerable people in court, whether children or adults. This legal guide explains the CrimPD as it can be applied specifically to children in the criminal courts. It should be used alongside other law, rules, and guidance; some of which is referenced in the CrimPD but some of which is not.

13 *V v UK* [1999] ECHR 171

14 *V v UK* para82

15 *V v UK* para86

16 *V v UK* para87

17 [2000] 1 WLR 659 para1

The applicable legal framework

The duty of the parties

The CrimPR state that the parties are under a duty to alert the court to any potential impediment to the defendant's effective participation in the trial.¹⁸

The court's duty

The court is under a duty to:

- take 'every reasonable step' to encourage and facilitate the participation of any person, including the defendant¹⁹
- have regard to the welfare of a child defendant, as required by s44 Children and Young Persons Act 1933²⁰ and
- enable a witness or defendant to give their best evidence.²¹

Discharging the court's duty

The court discharges the duty by (a) identifying the needs of witnesses at an early stage and (b) making provision for arrangements (whether statutory special measures or other modifications to the trial process) to meet those needs.

- The CrimPD note that 'communication needs ... are common to many witnesses and defendants under 18. Consideration must be given to the communication needs of all children and young people appearing in the criminal courts and to adapting the trial process to address any such needs'.²²
- The modifications provided for by the CrimPD are not exhaustive. The court retains its inherent power at common law to make directions to ensure the effective participation of vulnerable defendants.²³
- Special measures are also available under the Youth Justice and Criminal Evidence Act (YJCEA) 1999. CrimPR Part 18 sets out the procedure to be followed. Child defendants were originally specifically excluded from these special measures, but a 'defendant's live link direction', according to which a child defendant may be allowed to give evidence by live link, is now available.²⁴
- The CrimPD makes explicit provision for intermediaries to be used for the benefit of child defendants.
- The following sections of the CrimPD detail the relevant modifications available to vulnerable and child defendants:
 - CrimPD 6.1: 'Vulnerable people in the courts'
 - CrimPD 6.2: 'Intermediaries'
 - CrimPD 6.4: 'Vulnerable defendants'
 - CrimPD 5.5: 'Use of live link'.
- Certain parts of the CrimPD apply solely to children – ie witnesses and defendants who are under 18:
 - CrimPD 6.2.8-6.2.9(intermediaries and communication needs)
 - CrimPD 5.4.13 (absence of defendant).

18 CrimPR 3.3(2)(f)

19 CrimPD 6.1.1; CrimPR 3.8(3)(b)

20 Unlike earlier versions, the 2023 CrimPD does not make explicit reference to the welfare duty under the 1933 Act. However, this does not alter the statutory duty on the court under the Children and Young Persons Act 1933, s44 to have regard to the welfare of the child.

21 CrimPD 6.1.1

22 CrimPD 6.2.8

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

24 s33A YJCEA 1999

Practical advice

- Use the welfare duty²⁵ and 'best interests'²⁶ arguments to support applications for any modifications (whether those modifications are explicitly set out in the CrimPD or not) that are necessary to ensure the child's effective participation and to prevent the child from experiencing intimidation or distress.
- The types of modifications that might be needed are wide-ranging and must be tailored to the particular needs and circumstances of the child in question.
- Conversations with key workers, youth justice service (YJS) workers,²⁷ social workers, mental health professionals, family members and intermediaries could help to elicit steps that could be taken to promote effective participation.

25 Derived from s44 Children and Young Persons Act 1933

26 United Nations Convention on the Rights of the Child, Article 3: 'In all actions concerning children . . . undertaken by . . . courts of law . . . the best interests of the child shall be a primary consideration'

27 Previously referred to as Youth Offending Teams (YOTs)

The key parts of the Criminal Practice Directions

CrimPD 6.1: 'Vulnerable people in the courts'

6.1.1

Assistance

- 'Every reasonable step' must be taken to facilitate the participation of any witness (whether 'vulnerable' or 'intimidated'), including the defendant.²⁸
- Facilitating participation includes:
 - enabling a witness or defendant to give their best evidence and
 - enabling a defendant to comprehend proceedings.
- The pre-trial and trial process should, so far as is necessary, be adapted to meet those ends.

6.1.2

Endorsement of the Advocate's Gateway toolkits

- Advocates should consult and follow the relevant guidance in the Advocate's Gateway toolkits²⁹ whenever they prepare to question a young or otherwise vulnerable witness or defendant.
- Judges should also use the toolkits to aid case management

6.1.4-

Ground rules hearings

6.1.6

- 6.1.4: Ground rules hearings must be considered in all cases involving a vulnerable accused (this includes child defendants). The greater the level of vulnerability the more important it will be to hold such a meeting. A ground rules hearing is required in all trials involving an intermediary.³⁰
- 6.1.5: It is essential for a note of decisions reached in the GRH to be created. The judge must use this document to ensure the agreed ground rules are complied with. The document should record any adaptations to the trial arrangements that are considered necessary and any time limits or subject boundaries for questions.
- 6.1.6: The judiciary is responsible for controlling questioning. Over-rigorous or repetitive cross-examination of a child or vulnerable witness should be stopped.
- 6.1.6: The need for intervention will be minimised if the communication needs of vulnerable witnesses are discussed in advance and ground rules are agreed and adhered to.

6.1.7-

Limitations on questioning

6.1.8

- Limitations will arise where there is a risk of a child 'failing to understand, becoming distressed or acquiescing to leading questions'.
- Where limitations on questioning are prescribed, these limitations:
 - must meet the specific needs of the witness in a particular case
 - must be clearly defined and
 - may include 'a radical departure from traditional cross-examination', including restrictions on the advocate 'putting the case'.

²⁸ CrimPR 3.8(3)(b)

²⁹ These toolkits are available at: bit.ly/2TOSVEM

³⁰ See also CrimPR 3.9

CrimPD 6.2: 'Intermediaries'

6.2.1	Intermediary role and function <ul style="list-style-type: none">• Role: to 'facilitate communication with witnesses and defendants who have communication needs'.³¹• Primary function: to 'improve the quality of evidence and aid understanding between the court, the advocates and the witness or defendant'. Duty to court <ul style="list-style-type: none">• Intermediaries are 'independent of parties and owe their duty to the court'.³²
6.2.2	Assessment <ul style="list-style-type: none">• The process 'begins with assessment by an intermediary and a report'.³³
6.2.4-6.2.6	Intermediaries for defendants <ul style="list-style-type: none">• 6.2.4: The court 'may direct the appointment of an intermediary to assist a defendant in reliance on its inherent powers (C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin))' but there is 'no presumption that a defendant will be so assisted' and 'even where an intermediary would improve the trial process, appointment is not mandatory'.• 6.2.4: The court should nonetheless adapt the trial process to address a defendant's communication needs.³⁴<ul style="list-style-type: none">6.2.5: Other measures designed to accommodate the needs of a vulnerable defendant will need to be considered, whether or not an intermediary is appointed.• 6.2.6: The court may exercise its inherent powers to direct appointment of an intermediary to assist a defendant when giving evidence or for an entire trial. Terms of appointment are for the court.³⁵
6.2.8-6.2.9	Intermediaries for witnesses and defendants under 18 <ul style="list-style-type: none">• 6.2.8: Communication needs (such as short attention span, suggestibility and reticence in relation to authority figures) are common to many witnesses and defendants under 18. Consideration should therefore be given to the communication needs of all children and young people appearing in the criminal courts and to adapting the trial process to address any such needs.• 6.2.9: Assessment by an intermediary should be considered for witnesses and defendants under 18 who seem liable to misunderstand questions or to experience difficulty expressing answers, including those who seem unlikely to be able to recognise a problematic question (such as one that is misleading or not readily understood), and those who may be reluctant to tell a questioner in a position of authority if they do not understand.

Practical advice – the appointment of intermediaries to facilitate a defendant's participation

The CrimPR states that the court must exercise its power to appoint an intermediary to facilitate a defendant's effective participation in the trial where the defendant's ability to participate is likely to be diminished by reason of age, if the defendant is under 18.³⁶ The CrimPR give special consideration to providing intermediary support to those under the age of 18 and the impact on their ability to 'give evidence, and understand what is said and done by the court and other participants'³⁷ which should be considered alongside 6.2.8-6.2.9 (above).

In addition to the specific criteria of age, at 18.23(2) the CrimPR set out the matters the court must consider when asked to exercise its power to appoint an intermediary for a defendant:

- (f) the adequacy of arrangements for questioning the defendant in the absence of an intermediary;
- (g) any assistance that the defendant has received in the past—
 - (i) while giving evidence in legal proceedings,

31 See also CrimPR 18.3(a) (iv): an 'intermediary' is a person appointed by the court to facilitate a 'defendant's effective participation in the trial, when the defendant gives evidence or at any other time, where otherwise that defendant's communication needs would impede such participation'

32 See also CrimPR 18.26

33 See also CrimPR 18.26(2)(b): if appointed, intermediaries are under a duty to continually assess the ability of the witness or defendant (as the case may be) to participate effectively. See CrimPR 18.28 for the matters that must be addressed in an intermediary's report

34 CrimPD 6.2.4, citing R v Cox [2012] EWCA Crim 549

35 CrimPR 18.23.

36 CrimPR 18.23(1)(a)(i)

37 CrimPR 18.23(2)(d)(i), (ii)

- (ii) while being questioned during the investigation of an alleged offence, or
- (iii) as a defendant in a criminal case;
- (h) any assessment of the defendant's health by a mental health practitioner acting independently of the parties to assist the court;
- (i) any expert medical opinion that the court may have received; and
- (j) any other relevant matter.

CrimPD 6.4: 'Vulnerable defendants'

- | | |
|-------------|---|
| 6.4.1-6.4.6 | <ul style="list-style-type: none"> • This section is exclusively directed at vulnerable (including child) defendants. • 6.4.1 A ground rules hearing must always be considered in a case involving a young or otherwise vulnerable defendant • 6.4.2: Includes a series of modifications available to the court to ensure that a vulnerable defendant can participate.³⁸ For a summary of these, see Annex 1 to this guide. • The Crown Court PTPH2³⁹ form sets out all of the modifications provided for in CrimPD 6.4, and has at the end a box for 'other' modifications that might be required. |
|-------------|---|

- | | |
|-------------|---|
| 6.4.3-6.4.6 | <p>Vulnerable defendants at trial</p> <ul style="list-style-type: none"> • 6.4.3: Consideration must be given to the need to ensure, by any appropriate means, that the defendant can comprehend and participate effectively in the trial process. • 6.4.4: A vulnerable defendant who wishes to give evidence by live link, in accordance with s33A YJCEA 1999 may apply for a direction to that effect. The procedure in CrimPR 18.14-18.17 should be followed. • 6.4.5: The court should consider restricting attendance by members of the public in the courtroom, perhaps limited to those with an immediate and direct interest in the outcome. The court may also restrict the number of reporters attending in the courtroom. • 6.4.6: Where it has been decided to limit access to the courtroom, arrangements should be made for the proceedings to be related audibly, and if possible, visually to another room. |
|-------------|---|

CrimPD 5.5: 'Use of live links'

- | | |
|-------|--|
| 5.5 | <p>Use of Live Link</p> <ul style="list-style-type: none"> • Where it is lawful and in the interests of justice to do so, courts should exercise their statutory and other powers to conduct hearings by live link. The Live Link in Criminal Courts Guidance⁴⁰ issued by the Lord Chief Justice must be complied with. |
| 6.4.4 | <ul style="list-style-type: none"> • A vulnerable defendant who wishes to give evidence by live link, in accordance with s33A YJCEA 1999, may apply for a direction to that effect; the procedure in CrimPR 18.14-18.17 should be followed. |

³⁸ Those set out in CrimPD 6.4 are not exhaustive: the court retains its inherent powers to make any modifications necessary to ensure the child defendant's effective participation

³⁹ See above at n10

⁴⁰ <https://bit.ly/3O07Rg5>

Practical advice – child defendant giving evidence by live link

Defence representatives should remember that special measures under the YJCEA 1999 and CrimPR Part 18, including the use of a live link, are available to defence as well as to prosecution witnesses who meet the statutory criteria. Guidance on the use of live link was previously included in the CrimPD (3N). It is now contained in the guidance issued by Lord Chief Justice (see fn40 above) and defence representatives should refer to this guidance. This includes:

- Para 10: arrangements must be made in advance of any live link hearing to enable the youth offending worker to be at the secure establishment where the child is in custody. In the event that such arrangements are not practicable, the youth offending worker must have sufficient access to the child via the live link booth before and after the hearing
- Para 11: It is rarely appropriate for a child defendant to be sentenced over a live link. Potentially, this may be acceptable where the child defendant is:
 - (i) already serving a custodial sentence and either the sentence to be imposed is bound to be a further custodial sentence, or a non-custodial sentence is likely to be imposed which will have no material impact on the sentence being served;
 - (ii) detained in a secure establishment a long way from court, and being produced would materially affect them,
 - (iii) so disturbed their production would be a significant detriment to their welfare
- Defence representatives should always consider whether their witnesses would benefit from giving evidence by live link and should apply for a direction if appropriate, either at the case management hearing or as soon as possible thereafter.

9.6 Sentencing remarks in the Crown Court

9.6.1

- The provision of written sentencing remarks can be helpful and in the case of a young or otherwise vulnerable defendant is to be encouraged.

Practical advice - sentencing remarks in Crown Court

Defence representatives should request written sentencing remarks from the sentencing judge. This helps facilitate children's understanding of the outcome. Defence representatives may also remind the court via a welfare note (CrimPD 6.4.2(j)) of the child's communication needs; and refer the court to the guidance in Appendix II of the Crown Court compendium: Part II Sentencing⁴¹ which contains a glossary of terms used in adult courts with suggestions for age-appropriate alternatives.⁴²

⁴¹ Crown-Court-Compendium-Part-II-Sentencing-June-2022 (4).pdf

⁴² Endorsed in ZA v R [2023] EWCA Crim 596.

Annex 1: Special measures and modifications provided for in the Criminal Practice Directions

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- 6.4.2(a) • The need to sit in a court in which communication is more readily facilitated.
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- 6.4.2(b) • Court familiarization visit before hearing.
• If an intermediary is being used, intermediary attendance at pre-trial visit.
-
- 6.4.2(c) • If use of live link is being considered, a practice session.
-
- 6.4.2(d) • Allowing (subject to appropriate security arrangements) a child defendant to sit with members of their family or others in a like relationship or with another suitable supporting adult (such as a social worker) in a place which permits easy, informal communication with their lawyers.
• A suitable supporting adult should be available throughout proceedings.
-
- 6.4.2(e) • The need to timetable the case to accommodate the defendant's ability to concentrate.
-
- 6.4.2(g) • Removal of robes and wigs, taking into account the wishes of vulnerable defendant and vulnerable witness.
-
- 6.4.2(h) • Security staff for child defendant in custody should not be in uniform.
• No recognisable police presence in the courtroom save for good reason.
-
- 6.4.2(i) • Police protection from intimidation, vilification or abuse from public or media.
-
- 6.4.2(j) • Where appropriate the defence will provide information about the defendant's welfare.
-
- 6.4.3 • Consideration must be given to the need to ensure, by *any* appropriate means [emphasis added], that the defendant can comprehend and participate effectively in the trial process.
-
- 6.4.4 • Evidence given via live link
-
- 6.4.5 • Restriction on the attendance of members of the public to a small number, perhaps limited to those with an immediate and direct interest in the outcome.
• Restriction on reporters attending to a number that is practicable and desirable, although the public has a right to be informed about the administration of justice.
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#06 Criminal Practice Directions

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YJLC

#06

**Legal
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Youth Justice Legal Centre

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

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

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.