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**Joint submission by  
Howard League for Penal Reform and Youth Justice Legal Centre, part of Just for Kids  
Law, to the CPS on its revised guidance for cases concerning children  
October 2019**

### Summary

1. The decision to revise and refresh Crown Prosecution Guidance for cases concerning children is welcomed.
2. In its present form the revised guidance presents a missed opportunity to signal the need for a radically different approach when children are prosecuted, in line with developing knowledge and standards in the fields of adolescent development and children's rights and progress made by other statutory bodies.
3. CPS guidance concerning children should take a child centred approach by:
  - a. Referring to children as children rather than "youths". Language matters and a child-centred approach requires recognition of children as children
  - b. Emphasising the UN Convention on the Rights of the Child throughout, in line with the Code for Crown Prosecutors and Government policy
  - c. Taking steps to counter discrimination faced by ethnic minority children facing prosecution
4. CPS guidance should adhere to the welfare principle and the preventative aim of the criminal justice system for children by being structured to ensure that in all cases prosecutors:
  - a. Continually review the need for prosecution at all times, especially in the case of children in care and children who may be potential victims of exploitation
  - b. Consider the use of diversionary measures where possible
  - c. Ensure that the court has all relevant information pertaining to a child's best interests
  - d. Are mindful that in the case of children the adversarial approach must be tempered by the welfare principle at all stages of the case
5. Recent developments in case law and science have recognised that young people continue to develop into their mid-twenties and that turning 18 should not be a cliff edge. The guidance should recognise the particular needs of young adults, many of whom were children at the time of the offence.
6. Specific comments are made in respect of a number of aspects of the guidance with a view to achieving better outcomes for children.

## **1. The respondents to this consultation**

- 1.1 This is a joint response from the Howard League for Penal Reform and Just for Kids Law. Both organisations have drawn upon their lawyers' experience in practice, direct work with children and young adults, and policy expertise in this response.

### **About the Howard League for Penal Reform**

- 1.2 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
- 1.3 The Howard League works for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.
- 1.4 The Howard League legal team works directly with children and young adults in prison, dealing with hundreds of requests for assistance every year. At the heart of our legal service is our free and confidential advice line that is available to young people in prison. Our legal team provides legal advice and representation on a wide range of issues, from parole, recall and criminal appeals against sentence, to help with resettlement into the community and treatment while in prison.
- 1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

### **About Just for Kids Law**

- 1.6 Just for Kids Law is an award winning 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.
- 1.6 The Youth Justice Legal Centre was set up by Just for Kids Law in 2015 to provide much-needed legally accurate information, guidance and training on youth justice law.

## **2. A missed opportunity for a radically different approach for children**

- 2.1 We welcome the decision to refresh and revise the guidance. However, in its present form the revised guidance presents a missed opportunity to signal the need for a

radically different approach when children are prosecuted. While the reference in the guidance to “Youth Specialists prosecutors and Area Youth Leads”, currently still subject to review, is welcome, it is important that all prosecutors have sufficient training to take a tailored approach to children facing prosecution.

2.2 A fully child-centred approach would be in line with developing knowledge and standards in the fields of adolescent development and children’s rights. These developments have been recognised by the United Nations Committee on the Rights of the Child in its revised General Comment, GC 24/2019 which has been drafted to reflect “developments that have occurred since 2007 as a result of the promulgation of international and regional standards, the Committee’s jurisprudence, new knowledge about child and adolescent development, and evidence of effective practices, including those relating to restorative justice” (§1). The Committee notes that:

“Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults” (§2).

2.3 Other statutory bodies have amended practice and guidance in line with these developments. For example, the revised overarching principles on sentencing children and young people (Sentencing Council, 2017) and a number of protocols and policy documents from government departments, such as the concordat on children in custody (Home Office, 2017) and the National protocol on reducing criminalisation of looked-after children (Department of Education, 2018), referred to in the guidance.

2.4 We consider that CPS guidance concerning children should take a child-centred approach by:

- a. Referring to children as children rather than “youths”. Language matters and a child-centred approach requires recognition of children as children
- b. Emphasising the UN Convention on the Rights of the Child throughout, in line with the Code for Crown Prosecutors and Government policy
- c. Taking steps to counter discrimination faced by ethnic minority children facing prosecution

### ***Language***

2.5 We note that throughout the guidance children are often referred to as “youths” and specialist prosecutors for children are referred to as “Youth Specialist prosecutors”. All references to people under the age of 18 should be to “children”, in line with the definition of a child in the following provisions:

- United Nations Convention on the Rights of the Child (UNCRC) 1989, Article 1
- Children Act 1989, s105(1)
- Family Law Reform Act 1969 s1

2.6 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 s91(6) explicitly states that “child” means a person under the age of 18. The amendments to the

Police and Criminal Evidence Act 1984 by Criminal Justice and Courts Act 2015 resulted in s.37(15) enabling the provisions to apply all children under the age of 18.

- 2.7 We strongly urge you to adopt this approach rather than reinforcing the outdated language of “youth” and “youth offenders”.
- 2.8 In addition to importance of referring to children as children, the welfare principle requires us to see children who commit offences as children first and offenders second. The language in the draft guidance does not facilitate this with its frequent use of the word “offenders”. Labelling children as “offenders” entrenches their identity as offenders, which in turn undermines the aim of preventing reoffending, which is the principle aim of the justice system for children (s37, Crime and Disorder Act 1998).
- 2.9 The Howard League and Just for Kids Law have advocated for years that referring to children as “offenders” serves only to encourage the stigmatisation and criminalisation of children. For instance, the average parent collecting their child from school would not refer to collecting their “youth”. Labelling children as “offenders” reinforces a feeling of exclusion and discourages positive re-integration into society (McAra L and McVie S, 2007). The majority of children in conflict with the law will grow away from the criminal justice system (Smith D et al, 2001). Defining a child whose main objective is to refrain from offending as an ‘offender’ is unnecessary and unhelpful. Negative labelling neither promotes the welfare of the child nor discourages re-offending. We propose children be referred to as children and not offenders throughout the guidance.
- 2.10 This approach is in line with Article 40 of the UN Convention on the Rights of the Child which recognises “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.” General comment No. 24 (2019) on children’s rights in the child justice system (2019) reinforces this point at paragraph 7 which states that “the Committee encourages the use of non-stigmatizing language relating to children alleged as, accused of or recognized as having infringed criminal law.”

### ***UN Convention on the Rights of the Child***

- 2.11 The revised guidance contains two references to the UN Convention on the Rights of the Child. This is welcomed. However, the guidance should be clear that every decision should be underpinned by the rights in the Convention. Such an approach is also in line with government policy to ensure all new legislation and policy gives due consideration to the UNCRC. On 6 December 2010, in a Written Ministerial Statement in connection with the publication of the Independent Review of the Children's Commissioner, the then Children's Minister, Sarah Teather MP, gave a commitment on behalf of the Government that it would always give due consideration to the UNCRC in the making of new policy and legislation (Hansard, 2010). Subsequently, Cabinet Office issued guidelines that before any legislation starts on its journey through Parliament, it has to have gone through the various articles of the UNCRC to review whether it is compliant with them. The guidance states:

‘The Government has made a commitment to give due consideration to the articles of the UN Convention on the Rights of the Child (UNCRC) when making new policy and legislation.’ (Cabinet Office, 2017, para 12.29)

- 2.12 As the guidance notes, the Code for Crown Prosecutors refers explicitly to the UNCRC in the criteria as to whether or not to prosecute. However, Convention rights protect the best interests of the child (Article 3), the requirement to ensure children are detained as a last resort and the shortest possible period of time (Article 37) and the duty to treat children in conflict with the law with dignity (Article 40). These are applicable to many decisions made by Crown Prosecutors including decisions about diversion, bail, which charges to pursue and sentence.
- 2.13 General Comment 24 provides specific guidance on the application of the UNCRC in respect of children in conflict with the law and should be expressly referred to in this guidance.

### ***Countering discrimination***

- 2.14 Children from Black and Ethnic Minority (BAME) backgrounds often face multiple disadvantages (Lammy, 2017). BAME children are also more likely to be represented in the criminal justice system than their peers. The guidance should remind prosecutors to be mindful of this when dealing with young people. This would echo the sentiment at paragraph 1.18 of the Sentencing Council's guideline on children which reminds sentencers of the overrepresentation of BAME children in the criminal justice system.

## **3. CPS guidance should be structured so as to adhere to the aims of the criminal justice system for children**

- 3.1 CPS guidance should adhere to the welfare principle and the preventative aim of the criminal justice system for children by being structured to ensure that in all cases prosecutors:
- a. Continually review the need for prosecution at all, especially in the case of children in care and children who may be potential victims of exploitation
  - b. Consider the use of diversionary measures where possible
  - c. Ensure that the court has all relevant information pertaining to a child's best interests
  - d. Are mindful that, in the case of children, the adversarial approach must be tempered by the welfare principle at all stages of the case
- 3.2 While the guidance deals with the most of these issues, it does not prompt a structured approach to encourage Crown prosecutors to take these steps. The decision to prosecute is referred to at page four of the guidance. Diversion is referred to briefly at page five without reference to the welfare principle or Article 3 of the UNCRC. The duty to conduct the case with regard to the best interests of the child throughout and ensuring the court has the relevant information in that regard is not emphasised generally as opposed to in the context of particular types of cases. The need to prioritise the welfare principle in all decisions, including sentencing, over and above the usual adversarial approach ought to be emphasised in the guidance. The considerations outlined in a – d above might be usefully set out as a step by step process for prosecutors to consider and could be included in the current section "headlines" in addition to the important points raised there.

## **4. Young adults**

- 4.1 Recent developments in case law and science have recognised that young people continue to develop into their mid-twenties and that turning 18 should not be a cliff edge.
- 4.2 There is now a firmly established evidence base that young adults are still developing physically and psychologically until their mid-twenties (Royal College of Psychiatrists, 2015). Young adults have a greater capacity for change in a shorter period of time than older adults (R v Lang [2005] EWCA Crim 2864, paragraph 17(vi)). They often retain the vulnerabilities of childhood. In R v Clarke [2018] EWCA Crim 185 the Lord Chief Justice observed:

“Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear... Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g The Age of Adolescence: [thelancet.com/child-adolescent](http://thelancet.com/child-adolescent); 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday.”

- 4.3 Many young people turn 18 between the time when their offence is committed and the matter coming to court. The guidance should recognise the particular needs of young adults, many of whom were children at the time of the offence.

## **5. Specific comments on other headings in the guidance**

In this section the headings correspond to the headings in the revised guidance.

### **5.1 Determination of age**

- 5.1.1 This section usefully sets out some of the law on the process of age determination in criminal proceedings. However, it does not appear to provide guidance as to the approach the prosecutor ought to take in such cases. It would be useful to remind prosecutors here that the best interests and welfare principle and statutory duties owed to children by their local authority continue to apply to all children who are in reality children (G v Bedford County Council [2017] EWCA Civ 1521).
- 5.1.2 It would also be useful to ensure that the law is up to date in this section so that prosecutors can ensure that the court is taking the correct factors into account and putting appropriate weight on those factors. In particular, it should note that the physical appearance of a child has been deemed to be a poor indicator of age (R (M) v Hammersmith Magistrates Court [2017] EWHC 1359 (Admin)). R (B) v Merton LBC [2003] EWHC 1689 (Admin) sets out the principles about how age can be fairly assessed. We would also recommend including R. v Steed (Gareth) (1990-91) 12 Cr. App. R. (S.) 230 as per previous CPS guidance – where the age of the defendant is unclear it is usually appropriate to adjourn for further enquiries to be made, given the potential for procedural problems should the matter press ahead. Age

assessment guidance produced by the ADCS is also a useful reference to include.

- 5.1.3 International treaty bodies, including those monitoring the implementation of the European Convention on Action against trafficking in Human Beings and the UNCRC, suggest children should be given the benefit of the doubt if their age is not clear. See General Comment No. 24 (2019) on children's rights in the child justice system:

**'Birth certificates and age determination**

A child who does not have a birth certificate should be provided with one promptly and free of charge by the State, whenever it is required to prove age. If there is no proof of age by birth certificate, the authority should accept all documentation that can prove age, such as notification of birth, extracts from birth registries, baptismal or equivalent documents or school reports. Documents should be considered genuine unless there is proof to the contrary. Authorities should allow for interviews with or testimony by parents regarding age, or for permitting affirmations to be filed by teachers or religious or community leaders who know the age of the child.

Only if these measures prove unsuccessful may there be an assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals skilled in evaluating different aspects of development. Such assessments should be carried out in a prompt, child and gender-sensitive and culturally appropriate manner, including interviews of children and parents or caregivers in a language the child understands. States should refrain from using only medical methods based on, inter alia, bone and dental analysis, which is often inaccurate, due to wide margins of error, and can also be traumatic. The least invasive method of assessment should be applied. In the case of inconclusive evidence, the child or young person is to have the benefit of the doubt.'

- 5.1.4 The guidance should also highlight that where the court has reasonable grounds to believe that a person may be a victim of human trafficking, and the person may be a child, an assessment is carried out, the court must assume that the person is a child (Modern Slavery Act 2015, s51).

## **5.2 The decision to prosecute**

- 5.2.1 As noted above, this is a crucial section of the guidance and should be given as much prominence as possible. The overarching principles that apply to children in making this decision should be highlighted at the outset of this section. It should be noted that in applying the welfare principle to this decision, prosecutors must recognise the potential harm that can be caused by prosecuting children including the potential impact on their life chances in a variety of areas including education, housing, travel and employment.
- 5.2.2 At the evidential stage, prosecutors will have due regard to the fact that the mind of a child is growing and developing, when considering the mens rea of the offence in question: for instance, when considering recklessness, whether there was appreciation of a risk, or of the need to mitigate it, or of the

consequences which might follow. Prosecutors will also carefully consider evidence of an admission, or acceptance of responsibility, at any stage, by a child, taking into account all the circumstances in which it came to be made, in order to assess its reliability.

### **5.3 Diversion**

- 5.3.1 The section on diversion should be strengthened in recognition of the importance of diversion in fulfilling obligations towards children in domestic and international law. The section should make it clear that measures for dealing with children that avoid resorting to judicial proceedings should be considered and addressed by prosecutors carefully in all cases. Diversion involves the referral of matters away from the formal criminal justice system, usually to programmes or activities. They can take the form of informal and formal disposals.
- 5.3.2 For all the reasons outlined above, the guidance should emphasise the importance of diversion to avoid the stigmatizing effect of criminalisation and the legal duty on prosecutors to fully consider it at every possible opportunity.

### **5.4 Bail**

- 5.4.1 We support comments in Transform Justice's response to this consultation on bail and remand.
- 5.4.2 In addition to the useful information in this section, it should emphasise the extremely high threshold required to refuse bail for a child especially given that international treaty bodies have repeatedly stated that pre-charge remand and custody should be a last resort for a child. Plainly, last resort should mean the that it is only used for the most serious of offences where there are no alternative options to protect the public from serious harm. At least 30% of the sentenced population and a similar proportion of the remand population of children in custody are there for non-violent alleged or actual offences. The majority of children on remand go on to either be acquitted (29%) or receive a non-custodial sentence (63%). The number of children on remand has been increasing (Gibbs and Ratcliffe, 2018).
- 5.4.3 At present the guidance for prosecutors deciding whether or not to oppose bail states that "opposing bail in a case involving a youth should be considered carefully, wherever possible having consulted the Youth Offending Team and considering any representations and bail conditions proposed by the defence advocate." This does not give sufficient weight to the welfare principle and the duty to ensure custody is a last resort and for the shortest appropriate period of time. The guidance ought to be strengthened to prompt prosecutors to make such decisions expressly bearing in mind these<sup>1</sup> duties as per the legislation in the Bail Act 1976 and Legal Aid, Sentencing and Punishment of Offenders Act 2012. It may be useful to refer here, as earlier in the guidance, to UN Rules for the Protection of Juveniles Deprived of their Liberty and this passage in particular:



“Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures”.

- 5.4.4 The guidance should emphasise that remand in Youth Detention Accommodation should not be used except in the most serious cases, and even then, only after community or local authority placement has been carefully considered.

## 5.5 Effective Participation

- 5.5.1 This section is extremely important and is welcomed. However, it covers all stages of proceedings and therefore ought to be earlier in the guidance. At present the guidance reads as though it is limited the trial process itself.
- 5.5.2 It may be useful if the guidance were to provide a short summary of the impact of developmental immaturity and how that, either alone or combined with the prevalence of neurological and other learning disabilities, can mean that child defendants are more likely to have effective participation issues.
- 5.5.3 In addition to the case law provided in the guidance, it might be sensible to deal with *T v United Kingdom* (Application no. 24724/94), *V v United Kingdom* (Application no. 24888/94), in which the court concluded: “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.” It may also assist to refer to *SC v United Kingdom* (Application no. 60958/00), where the court considered again what effective participation might consist of. The court in its judgment stated that ‘effective participation’ in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.
- 5.5.4 The Criminal Practice Direction for vulnerable defendants (CrimPD Part D-G) also applies in the youth court and we would recommend reference to it.
- 5.5.5 The following paragraph from the UN Committee on the Rights of the Child’s General Comment 24 should also be referred to.

“Children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age

of criminal responsibility. If not automatically excluded, such children should be individually assessed.”

## **5.6 Offending behaviour in Children’s homes**

- 5.6.1 We strongly recommend that the heading of this section is changed to ‘Looked after child’ or ‘Children in care’ so as to bring it in line with the national protocol to reduce the criminalisation of looked after children and care leavers, which is already referred to in this section and applies to call children in and leaving care, not just those in residential care.
- 5.6.2 The Howard League’s programme to end the criminalisation of children in care has revealed that looked after children are more likely than their peers to experience police contact. They are disproportionately criminalised often because the police are called for instances where the same response would not occur in a family home. They are also less likely to receive support or unconditional emotional investment from a family or a trusted adult. Children in residential care are most at risk, being around 10 times more likely to be criminalised than other children (Howard League, 2019).
- 5.6.3 It is critical that these cases, which often also coincide with cases where children are subjected to exploitation, are meaningfully and continuously reviewed both in respect of the necessity to prosecute at all and in terms of diversion.

## **5.7 County Lines**

- 5.7.1 This section is very welcome. However, we note that county lines is just one form of exploitation that children are subjected to and therefore suggest this heading is changed to “child exploitation” so as to cover the wider spectrum of cases.
- 5.7.2 In addition to highlighting the possible use of the Modern Slavery defence, this section should also highlight the need to reconsider the need to prosecute at all, as well as the relevance of exploitation to diversion and sentencing.

## **5.8 Rape and other offences by and against children under 13 (sections 5 to 8 Sexual Offences Act 2003) and Child sex offences committed by children or young persons**

- 5.8.1 The offence of statutory offence of a child under 13 (section 5) was designed to stop predatory adults raping children. However, it appears that it is regularly used in respect of child defendants who will be guilty of statutory rape of a child if they have sex with a child under 13, even if they are also under 13 and they believed the act was consensual. Between 2011 and 2013 around one fifth of defendants in section 5 cases were children (Janes, 2016). It is also well known that sexual acts by children that could be the subject of a criminal prosecution are just as likely to be dealt with under the child protection system as the criminal justice system (Lovell, 2002). However, the outcomes for children dealt with under the criminal justice system tend to be particularly damaging and may even delay access to

therapy. This should be highlighted in the guidance to assist prosecutors in their decisions as to whether or not it is appropriate to prosecute children accused of harmful sexual behaviour.

- 5.8.1 In addition, it should be noted that there are much lower recidivism rates and other options that can be taken that are effective for community sentences or even diversion (Hargreaves and Frances, 2013; Boswell et al, 2014).

## **5.9 Sentencing**

5.9.1 The reference to the Sentencing Council guidance is welcome. However, as sentencing has such an impact on children's lives it is essential that prosecutors adhere to the legal duty that the process complies with the welfare principle.

5.9.1 Prosecutors should be aware of the full range of sentences available for children and that community sentences can be used in combination with packages of care to provide better outcomes. Sentence may be deferred on one occasion for up to six months. The Howard League has produced a toolkit on sentencing children that may be of interest (Howard League, 2018).

## **6. Conclusion**

- 6.1 We hope that this submission is of assistance and that the CPS will take on board our recommendations to create guidance that adheres to the principles of the system for children and encourages a completely different approach to children in trouble.
- 6.2 We would be happy to meet to discuss our views further.

**The Howard League for Penal Reform and Just for Kids Law  
October 2019**

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### **Statute, regulations and codes of practice**

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Legal Aid, Sentencing and Punishment of Offenders Act 2012

Modern Slavery Act 2015

Police and Criminal Evidence Act 1984

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