



## Ending the detention of unsentenced children during the Covid-19 pandemic

### A guide for practitioners

#### Key points

- Custody is a damaging environment for children in normal times but it has become even worse since the start of the Covid-19 pandemic. Severely restricted prison regimes have led to the majority of children being held in prolonged solitary confinement; no face-to-face visits; virtually no education or therapy; and difficulties in contacting families and professionals making planning for court hearings especially problematic
- The proportion of unsentenced children is at an all-time high at one third of all children in the youth secure estate. Over two thirds of children remanded to prisons in the South of England are from black, Asian and minority ethnic backgrounds
- In the year ending March 2019, over two thirds of children remanded to youth detention accommodation did not subsequently receive a custodial sentence
- Courts are required to subject decisions to remand children to custody to *anxious scrutiny* because all decisions about children should take account of their welfare and their best interests. Depriving a child of liberty should always be a last resort and for the shortest period of time. During the pandemic it is not possible to guarantee any of these things
- This guide provides legal and practical guidance for defence lawyers to resist applications to remand children to custody and assist them in making effective bail applications for children during the pandemic.

## **Overview: Children remanded to custody**

Two thirds (66 per cent) of children given a remand to youth detention accommodation did not subsequently receive a custodial sentence in the year ending March 2019.<sup>1</sup>

The proportion of unsentenced children in custody is at an all-time high: in March 2020, 274 (34 per cent) of 738 young people in the youth secure estate were remanded. This is a significant change since 2015 when remanded children represented just 22 per cent of the youth secure estate.<sup>2</sup>

Around half the children in custody are black, Asian and minority ethnic (BAME) (49 per cent in 2018/19).<sup>3</sup> In Feltham and Cookham Wood prisons, around one third on remand are white.<sup>4</sup>

## **Covid-19 and the need to reduce the use of remands to custody for children**

Evidence from a host of independent sources shows that custody can be harmful and difficult for children in ordinary times. Children's experience in custody during the Covid-19 pandemic is particularly difficult. The regime in prisons has been severely restricted, with most children being placed in prolonged solitary confinement. There are no face-to-face visits, virtually no face-to-face education and no therapy. Children are experiencing particular difficulties in accessing the support they need to plan for release. For more information see the Howard League's briefing, 'Children in prison during the Covid-19 pandemic'.<sup>5</sup>

Defence advocates should therefore do all they can to ensure children are not remanded to custody at this time by ensuring that the courts apply *anxious scrutiny* to all decisions concerning bail, that all steps are taken to ensure appropriate bail packages are in place and bail applications are renewed wherever possible in line with the distinct legal duties that apply to children in contact with the criminal justice system. This short guide aims to support practitioners to keep unsentenced children out of prison.

## **Legal framework for decisions affecting liberty of children and Covid-19**

Judges and magistrates should be encouraged to ensure that any decision to remand a child to custody should be subject to *anxious scrutiny* in light of the virus. Children should not be remanded unless there are wholly exceptional circumstances.

Such anxious scrutiny is in line with the welfare principle that underpins the youth justice system (Children and Young Persons Act 1933, s44(1)):

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

The welfare principle is mirrored by the best interests principle required by Article 3 of the UN Convention on the Rights of the Child (UNCRC) which provides that *“In all actions concerning children...the best interests of the child shall be a primary consideration.”*

Article 37(b) of the UNCRC also provides that the *“detention ... of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time”*.

The UNCRC should be interpreted in light of the Committee's General Comment 24, published in September 2019 which states:<sup>6</sup>

*“86...Pretrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered...”*

*87...Pretrial detention should be subject to regular review and its duration limited by law. All actors in the child justice system should prioritize cases of children in pretrial detention.”*

A number of international bodies have called for the release of people in detention. See for

example, the UN Committee on the Rights of the Child,<sup>7</sup> UN High Commissioner for Human Rights<sup>8</sup> and the World Health Organisation.<sup>9</sup>

There is precedent for a different approach by the domestic courts during this period. In the Chelsea Football Club Ltd case, handed down on 6 April 2020<sup>10</sup>, Mr Justice Chamberlain discharged an adult's sentence noting, inter alia, that it was in the "*public interest, because it serves to avoid increased strain on the NHS at a time when it is already under great strain. It also serves to lessen pressure on those responsible for running the prisons when they too are under considerable strain caused by manpower shortages connected with Covid-19*" (para 27).

The Lord Chief Justice has explicitly encouraged judges and magistrates to take into consideration the current conditions in prison in a judgment dated 30 April 2020, *R v Manning* [2020] EWCA Crim 592:

*"The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19"* (paragraph 41).<sup>11</sup>

## Applications for bail for children<sup>12</sup>

Bail applications for children are a two-stage process.

- Stage 1: The court must first decide whether or not to grant bail. There is a

statutory right to bail for children, unless certain statutory exceptions apply.

- Stage 2: If bail is refused, then the court may go on to consider whether the conditions to remand to youth detention accommodation (YDA) are met – Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, ss98–102. There are two sets of conditions – section 98 'the offence conditions' and section 99 'the history conditions'. If the court does not remand to YDA then the court *must* remand the child to local authority accommodation (RLAA) – LASPO 2012, s91(3).

The decision to remand a child to custody is always ultimately a matter of the court's discretion.

### *Stage 1 - whether or not to grant bail*

The statutory right to bail applies (Bail Act 1976, s4), except where charged with or convicted of murder, attempted murder, manslaughter or certain serious sex offences and the defendant has a previous conviction for any of these offences (Criminal Justice and Public Order Act 1994, s25(2)). When charged with murder, only a Crown Court judge may grant bail.

Exceptions to the right to bail (when charged with imprisonable offences) are set out in the Bail Act 1976, Sch 1, Part I:

- fail to surrender to custody
- commit an offence on bail
- interfere with witnesses or otherwise obstruct the course of justice

Or bail may be withheld:

- for the child's own welfare or protection (different from an adult, where it's only for own protection)
- the child is already in custody serving a sentence
- there is insufficient information
- the child has been on bail in these proceedings and is arrested for breach of bail conditions
- it is impracticable to complete enquiries or make a report unless in custody.

The objection to bail that a child will commit further offences is likely to be weaker during the lockdown restrictions as there will be less opportunity to offend and there are unlikely to be grounds for refusal of bail for a child's own welfare owing to the current conditions in the secure estate.<sup>13</sup>

### *Stage 2 - Refusal of Bail and Remand to Local Authority Accommodation*

In circumstances where a court refuses bail, the court must then consider remand to youth detention accommodation (YDA). It can only remand to YDA if certain conditions are met.<sup>14</sup>

Even where the conditions for remand to YDA are met, the court has a discretion whether to remand the child to YDA – LASPO 2012, s91(4)(a).

It should be argued that during the coronavirus pandemic the secure estate is unable to meet children's welfare needs – there is no education or training provision for the majority of children in custody (consideration of which is required by s44 of the Children and Young Persons Act 1933) and most children are spending up to 23 hours a day in their cells.

The court should therefore exercise its discretion not to remand to YDA and remand to local authority accommodation.

If the conditions are not met, or the court decides not to remand to YDA, the court *must* remand the child to local authority accommodation (RLAA) - LASPO 2012, s91(3).

### *Repeat bail applications (children on remand)*

The court's duty to have regard to a child's welfare may in itself require a court to allow repeat bail applications - *R (B) v Brent Youth Court* [2010] EWHC 1893 (Admin).

The following may amount to a change of circumstances for the purposes of a further bail application:

- The coronavirus pandemic and worldwide public health emergency.
- The postponement of all trials and uncertainty around the resumption of jury trials means that children remanded to youth detention accommodation are detained indefinitely, have no certainty over when they might be released and the impact will be more severe for children (than adult inmates) due to their young age.
- The postponement of all trials and uncertainty around the resumption of jury trials means that many children on remand are likely to serve longer on remand than any custodial sentence they could receive.
- The general restrictions on movement and closure of businesses imposed by the Coronavirus Regulations reducing the risk of committing further offences or failure to surrender.
- Having regard to a child's welfare, the conditions in the secure estate are unable to make adequate provision for children's education and training.<sup>15</sup>
- The risk of infection is higher in the secure estate than for the general population.<sup>16</sup>
- The traumatic impact on children detained in the secure estate concerned about the safety and wellbeing of family members due to the threat of the coronavirus on close family members who are elderly or have underlying health conditions.<sup>17</sup>

### **Securing an effective bail package**

The Youth Offending Team (YOT) has a statutory duty to provide support for children on bail (or remanded to local authority accommodation) – Crime and Disorder Act (CDA) 1998, s38(4)(c).

It is therefore essential to liaise with the YOT who will prepare a bail supervision and support package or intensive supervision and surveillance bail package (where appropriate). YOTs are continuing to meet their statutory duties and are assessing children over video-link where necessary and conducting supervision on bail through Facetime, skype etc.

Although YOTs have a duty to provide a bail package consisting of support and

supervision, they do not have the power or resources to provide children with somewhere to live and extensive welfare support. Children may struggle to get bail because they do not have a suitable package of personal support and accommodation.

Local authority children's services are required to provide accommodation to any child (under 18) if they have no-one to look after them or have nowhere suitable to live (sections 17 and 20 of the Children Act 1989, *G v Southwark*, [2009] UKHL 26.)<sup>18</sup>

The availability of accommodation and support can be directly relevant to whether a child is remanded to custody or not.

In urgent situations where a child's liberty is at stake, and the Youth Offending Team or allocated social worker is unable to confirm the package of accommodation and welfare support for a child who needs it to be bailed, it may be appropriate to write to the director of children's services. The contact details, including email addresses, for all directors of children's services can be found online.<sup>19</sup> Template emails are provided for a range of scenarios in the Appendix. Provided the child (and if under 16, a person with parental consent) agrees, correspondence should set out:

- the details of the child (name, age, date of birth)
- their last known address
- any previous contact with social care including the names of any social worker or personal advisor
- what is required in terms of accommodation and/or support
- that it must be approved by YOT for the purpose of bail
- when it should be provided by, and
- that there is a legal duty to provide the above in accordance with the requirements of the Children Act 1989 and statutory guidance.

It should be noted that if there is no concrete or suitable plan available within the specified time frame, legal action can be taken as a means of enforcement. This will generally involve the child instructing a community care lawyer who can prepare a letter before claim for breach of

statutory duties. Legal aid is available for this work (initially under legal help).<sup>20</sup>

A list of community care lawyers specialising in the rights of young people is available<sup>21</sup> and solicitors firms with community care legal aid contracts can be found on the Law Society website, using the "social welfare" search, refined by the "community care – legal aid", option.<sup>22</sup>

All children remanded to youth detention accommodation are "looked after" children. The responsible local authority will be designated by the court that remanded the child in accordance with s.104 LASPO 2012.

The responsible local authority must appoint a social worker to complete an assessment of the child's needs and prepare a detention placement plan (DPP). This plan should describe how the local authority will meet the child's needs and record the roles and responsibilities of other partner organisations. The DPP should include details of how the child will be supported when their period on remand comes to an end, including whether the child will need to be accommodated by the home authority or by another local authority on release and whether any other services should be provided by the home authority or by another local authority under the Children Act 1989.

Becoming looked after by virtue of being remanded to custody and therefore becoming entitled to a package of care and support that may not have been available at the point of remand may constitute a change of circumstances and trigger a fresh bail application.

## Footnotes

<sup>1</sup> Youth Justice Board / Ministry of Justice, *Youth Justice Statistics 2018/19*, published 30 January 2020 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/862078/youth-justice-statistics-bulletin-march-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/862078/youth-justice-statistics-bulletin-march-2019.pdf)

<sup>2</sup> HMPPS, *Youth custody report: March 2020*, <https://www.gov.uk/government/statistics/youth-custody-data>

<sup>3</sup> *House of Commons Library Briefing: Youth Custody*, 31 January 2020, p9, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8557>

<sup>4</sup> Response to Freedom of Information Act (FOIA) Request – 200209004, 23 April 2020

<sup>5</sup> Howard League for Penal Reform, *Children in prison during the Covid-19 pandemic*, 2020, <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf>

<sup>6</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en)

<sup>7</sup> [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1\\_Global/INT\\_CRC\\_STA\\_9095\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/INT_CRC_STA_9095_E.pdf)

<sup>8</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>

<sup>9</sup> [http://www.euro.who.int/\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1](http://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1)

<sup>10</sup> <https://www.baillii.org/ew/cases/EWHC/QB/2020/827.html>

<sup>11</sup> <https://www.baillii.org/ew/cases/EWCA/Crim/2020/592.html>

<sup>12</sup> For a detailed summary of law and practice concerning Bail for children see *Youth Justice Law and Practice* (LAG, 2019), <https://www.lag.org.uk/shop/book-title/206106/youth-justice-law-and-practice> Co-author Kate Aubrey-Johnson has contributed to the drafting of this practitioner's guide.

<sup>13</sup> Howard League for Penal Reform, *Children in prison during the Covid-19 pandemic*, 2020, <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf>

<sup>14</sup> For useful checklists and flowcharts setting out the conditions, see the Youth Bench Book from page 39ff <https://www.sentencingcouncil.org.uk/wp-content/uploads/youth-court-bench-book-august-2017.pdf>

<sup>15</sup> Howard League for Penal Reform, *Children in prison during the Covid-19 pandemic*, 2020, <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf>

<sup>16</sup> Expert report by Professor Coker, April 2020, [https://howardleague.org/wp-content/uploads/2020/04/2020\\_04\\_01\\_COKER\\_Report\\_HL\\_PRT.pdf](https://howardleague.org/wp-content/uploads/2020/04/2020_04_01_COKER_Report_HL_PRT.pdf)

<sup>17</sup> Howard League for Penal Reform, *Children in prison during the Covid-19 pandemic*, 2020, <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf>

<sup>18</sup> The Howard League has produced detailed resources setting out the legal duties to support children's safe release from custody by ensuring that local authorities comply with their statutory duties. This includes a detailed handbook <https://howardleague.org/wp-content/uploads/2016/04/Resettlement-law-guide.pdf> and a step by step guide [https://howardleague.org/wp-content/uploads/2020/01/Resettlement-toolkit\\_2020\\_01\\_21-PG.pdf](https://howardleague.org/wp-content/uploads/2020/01/Resettlement-toolkit_2020_01_21-PG.pdf)

<sup>19</sup> <https://adcs.org.uk/contacts/directors-of-childrens-services>

<sup>20</sup> <https://www.lag.org.uk/article/202780/use-it-or-lose-it--community-care>

<sup>21</sup> <https://cccyplaw.org.uk/providers> Also see Garden Court Chambers' specialist Community Care team - <https://www.gardencourtchambers.co.uk/areas-of-law/community-care-law>

<sup>22</sup> <https://solicitors.lawsociety.org.uk/>

<sup>23</sup> <https://adcs.org.uk/contacts/directors-of-childrens-services>

## Appendix 1 – Template emails to social care to highlight the need for a package of accommodation and support for children for the purpose of bail

These templates are based on letters to heads of children's services on the basis that if such an email is required, it will usually be because the matter is urgent and what is required in terms of a package of accommodation and support is clearly not yet available. The contact details for heads of service can be found for each local authority online.<sup>23</sup>

1. *For a child already purportedly being supported by children's services, but who has nowhere suitable to live.*

I write on behalf of [X, dob, current or last known address].

I attach X's signed authority. I am writing to you as the director of Children's Services to draw this matter to your attention as it concerns the liberty of a child.

X is known to your service [if possible insert details of social worker or personal advisor and care status – eg child in need, looked after child, on a full care order].

X has been charged with [insert brief details] and is due to appear before [insert court details] on [date] when a decision will be made as to whether or not X is remanded to custody.

X requires a package of accommodation and support approved by X's YOT/YOS worker [insert any specific requirements such as exclusion zones or level of staff support] and you have a duty to provide it in accordance with the requirements of the Children Act 1989 and the law as set out in *G v Southwark* [2009] UKHL 26.

X's liberty is contingent on this support being provided by [insert time limit of hearing/bail app].

If X is not provided with this support, which X is entitled to by law, X is likely to be remanded to custody. Being in custody at this time means that X will be subjected to punishments far beyond

a deprivation of liberty. Covid-19 restrictions mean that X is likely to be in solitary confinement for a prolonged period without any contact with the outside world or meaningful education and therapy (see <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf>).

X is entitled to this support and may have no choice but to initiate a legal challenge should it not be provided.

Please confirm the package of support in consultation with X's YOT/YOS worker, [insert name], by [insert time limit, ideally working day prior to hearing/bail app].

*2. A child is not already known to or being supported by children's services, but has nowhere suitable to live.*

I write on behalf of [X, dob, current or last known address].

I attach X's signed authority. I am writing to you as the director of Children's Services to draw this matter to your attention as it concerns the liberty of a child.

X has been charged with [insert brief details] and is due to appear before [insert court details] on [date] when a decision will be made as to whether or not X is remanded to custody. X requires a package of accommodation and support provided by you and approved by X's YOT/YOS worker.

Please treat his as an urgent child in need referral in accordance with the provisions of s17 of the Children Act 1989. The reason I am making this request is [insert key vulnerabilities and circumstances giving rise to the need].

Please assess X for support under section 17 of the Children Act 1989 as a matter of urgency. If you are unable to complete your assessment immediately, please provide interim support while you are carrying out the assessment.

Please ensure the assessment covers accommodation and section 20 support on release as required by the leading case of G v Southwark [2009] UKHL 26.

X's liberty is contingent on this support being provided by [insert time limit of hearing/bail app].

If X is not provided with this support, which X is entitled to by law, X is likely to be remanded to custody. Being in custody at this time means that X will be subjected to punishments far beyond a deprivation of liberty. Covid-19 restrictions mean that X is likely to be in solitary confinement for a prolonged period without any contact with the outside world or meaningful education and therapy (see <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf>).

X is entitled to this support and may have no choice but to initiate a legal challenge should it not be provided.

Please confirm the package of support in consultation with X's YOT/YOS worker, [insert name], by [insert time limit, ideally working day prior to hearing/bail app].

*3. A child can go home but needs additional welfare support*

I write on behalf of [X, dob, current or last known address]. [Insert here if X is already known to Children's Services].

I attach X's signed authority. I am writing to you as the director of Children's Services to draw this matter to your attention as it concerns the liberty of a child.

X has been charged with [insert brief details] and is due to appear before [insert court details] on [date] when a decision will be made as to whether or not X is remanded to custody. X currently resides [insert details]. However, X requires additional support in the home/ placement, which needs to be provided by you and approved by X's YOT/YOS worker.

Please treat this as an urgent child in need referral in accordance with the provisions of s17 of the Children Act 1989. The reason I am making this request is [insert key vulnerabilities and circumstances giving rise to the need].

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

If you are unable to complete your assessment immediately, please provide interim support while you are carrying out the assessment.

X's liberty is contingent on this support being provided by [insert time limit of hearing/bail app].

If X is not provided with this support, which X is entitled to by law, X is likely to be remanded to custody. Being in custody at this time means that X will be subjected to punishments far beyond a deprivation of liberty. Covid-19 restrictions mean that X is likely to be in solitary confinement for a prolonged period without any contact with the outside world or meaningful education and therapy (see <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf>).

X is entitled to this support and may have no choice but to initiate a legal challenge should it not be provided.

Please confirm the package of support in consultation with X's YOT/YOS worker, [insert name], by [insert time limit, ideally working day prior to hearing/bail app] and whether that support is being provided under section 17 or 20 of the Children Act 1989.

## About the Howard League for Penal Reform

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