



Child Protocol in Criminal Cases

Preamble

The impact of COVID-19 and the guidance from Government to take all precautions to avoid unnecessary contact, has seen understandable and unprecedented changes to the justice system. The Lord Chief Justice has announced that, where possible, criminal hearings should take place remotely and no new jury trials can begin, causing all future trials to be postponed.¹

It is not usually in the public interest to criminalise children.² Children should be diverted away from the criminal justice system, wherever possible,³ avoiding the trauma and stigma of their contact with it.⁴

The impact of courts not sitting will be felt most heavily by children who are awaiting trial or sentence on remand to youth detention accommodation (currently remanded secure children's homes, secure training centres and young offender institutions).

Children living in poverty, who have suffered abuse or neglect, where there is parental absence, who have special educational needs and/or emotional or behavioural problems will find it hardest to cope with the social isolation and restrictions of the Covid-19 lockdown. These children are already over-criminalised.⁵ Looked after children and black and minority ethnic (BAME) children even more so. It is important that all professionals working in the justice system seek to protect children's rights at this unprecedented time.

¹ <https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/>

² CPS Legal Guidance on Youth Offenders, Principles guiding the Decision to Prosecute. There is a presumption of diverting children away from the formal criminal justice system where possible.

³ NPCC 'National Strategy for the policing of children and young people', 2015, p 11 & UNCRC Article 3.1.

⁴ UNCRC Article 40(3)(b).

⁵ See for example The Sentencing Council's 'Overarching Principles - Sentencing Children and Young People Definitive Guideline', June 2017 at paras 1.16 – 1.18.

We have drafted this Child Protocol to address five concerns, that:

- Children will be arrested and detained during the Covid-19 lockdown and placed at unnecessary risk of infection, trauma and harm.
- Children will not be able to effectively participate in criminal proceedings taking place remotely over audio and video-link.
- Children appearing over live-link are less likely to be granted bail and more likely to be remanded to youth detention accommodation.⁶
- Children sentenced over live-link are more likely to receive custodial sentences.⁷
- Children on remand are now facing indefinite pre-trial detention in conditions akin to solitary confinement, 23 hours a day in a cell without access to education or family visits.

ACTIONS

Arrest, detention and interview of suspects should, during the period of lockdown, be restricted to the most serious of alleged crimes. Children are the most vulnerable suspects detained at police stations and so their arrest and detention should be restricted to truly exceptional and the most serious cases.

We call upon the Home Office, National Police Chiefs' Council and Youth Justice Board to issue guidance that children should not be arrested and detained during the Covid-19 lockdown other than in exceptional circumstances. In particular, children should not be arrested for breaching the coronavirus regulations.

PROTOCOL

- Police officers should avoid arresting children unless it is an exceptional case where the public are at risk of death or serious personal injury.⁸
- The circumstances where it will be proportionate to use police powers to arrest a child and place them at increased risk of Covid-19 infection, by breaching the

⁶ See 'Defendants on video – conveyor belt justice or a revolution in access?' By Penelope Gibbs, Transform Justice, October 2017, p30.

⁷ See 'Defendants on video – conveyor belt justice or a revolution in access?' By Penelope Gibbs, Transform Justice, October 2017, pp25 – 30 & Evaluation of Police Station to Court Virtual Hearings (published 2010) found that those who appeared on video were more likely to plead guilty, more likely if sentenced to get a prison sentence, and less likely to get a community sentence.

⁸ Please see PROTOCOL FOR SOLICITORS REPRESENTING SUSPECTS AT A POLICE STATION, Garden Court Chambers, 1 April 2020, in particular para 6.

social distancing advice including detaining them at the police station, will be extremely rare.

- For the avoidance of doubt, children should not be arrested for contravening The [Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#) [‘the Coronavirus regulations’], paragraphs 8(5), (6) and (7) of the regulations place responsibility for children complying with the restriction requirements on individuals who have responsibility for the child.⁹
- Where a police interview is considered necessary, arrangements should be made for a voluntary police interview and arrangements should be put in place to conduct the interview remotely with an appropriate adult and free legal advice and representation. It simply may not be possible to conduct such an interview at this time.¹⁰
- Where a child is arrested, custody sergeants should not allow children to be held in police cells other than in the very exceptional circumstances (set out above) and the child should be released under investigation pending a police investigation or released on bail to attend court.
- Most children suspected of committing offences will appropriately be dealt with by diversion (triage or other youth restorative intervention; community resolution; youth caution or youth conditional caution) so the proportionate response is for the police to release them under investigation until the ‘Covid-19 lock down’ is lifted.
- Essential court hearings involving children should proceed safely. The usual prohibition on video-link hearings as set out in the Consolidated Criminal Practice Directions paragraphs 3N.13-15 will need to be modified to allow hearings to proceed.
- Where possible, children should not be remanded in custody. The secure estate is currently not allowing any visiting arrangements, children are not accessing education and are being placed in their cells for up to 23 hours a day. It should also be noted that the Chief Inspector of Prisons has already deemed ‘no part of the secure estate safe for children’. The court has a duty to have regard to a child’s welfare¹¹ as well as the child’s article 8 right to family life and article 3 right to life - in the current circumstances children should be granted bail or remanded to local authority accommodation.¹²

⁹ [Briefing for police: The Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#) and [NPCC COP Police Briefing in Response to Coronavirus Government Legislation](#)

¹⁰ [Interview Protocol between National Police Chiefs’ Council, Crown Prosecution Service, The Law Society, Criminal Law Solicitors’ Association and London Criminal Courts Solicitors’ Association](#)

¹¹ Children and Young Persons Act 1933 s 44

¹² Legal Aid Sentencing and Punishment of Offenders Act 2012, s91(3).

- Courts should consider bail applications for children on remand who are facing indefinite pre-trial detention now that trials are unable to proceed.
- Youth offending teams will be able to continue to meet the National Standards to provide bail support and intensive bail supervision and support as well as Referral Orders and Youth Rehabilitations Orders. A Youth Offending Team officer should participate in the remote hearing.
- To overcome the usual prohibition on sentencing children over livelink.

(A) The judge or magistrate should state openly in the presence of the child:

“We note that there is evidence that children sentenced over video link are more likely to receive custodial sentences or be refused bail.

We note that there are currently disproportionately high numbers of BAME (black, Asian and minority ethnic) children in custody and that this includes Gypsy, Traveller and Roma children. As a result, we have reviewed our decision to ensure no prejudice or bias has affected our ruling.”

(B) There should be a member of the youth offending team present during the hearing and the method by which the worker will explain the outcome of the hearing to the child should be communicated to the child during the hearing.

(C) Arrangements must be in place for the legal representative to communicate with the child before and after the hearing.

(D) A supporting adult should be present and able to participate in the remote hearing to support the child.

(E) It can be challenging for participants to follow what is happening during a remote hearing. Every effort should be made to facilitate the child’s involvement in the hearing, this might include regular breaks during a remote hearing so the legal representative can communicate directly with their client to explain what is happening and check their understanding.

**Drafted by Kate Aubrey-Johnson, Joanne Cecil and Anya Lewis
Garden Court Chambers, 3rd April 2020**