



# Children in the Justice System Seminar Series

April - May 2020



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# Non-criminalisation of children during COVID-19 lockdown

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Garden Court Chambers

21 April 2020



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# Agenda

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- General principles: non criminalisation of children
  - New Covid-19 law and guidance and how it impacts on the policing of children
  - Potential public law challenges and civil actions against the police
  - Case studies
  - Next steps
- 
- NB. Dealing with England only



# General principles: non criminalisation of children



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# Underlying principle of the youth justice system – to prevent offending

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The principle aim of youth justice system is 'to prevent offending' (s37(1) Crime and Disorder Act 1998).

- Academic research has established that system contact has a tainting effect – negatively labelling children and increasing the likelihood of reoffending (see for example *The Edinburgh Study of Youth Transitions and Crime* - McAra, L, McVie, S (2007). Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending. *European Journal of Criminology*, 4 (3), 315-334).
- The youth justice system should promote reintegration into society (UNCRC, Article 40(1)).  
‘It is important to avoid “criminalising” children and young people unnecessarily; the primary purpose of the youth justice system is to encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish.’

“Offending by a child or young person is often a phase which passes fairly rapidly.’

*[Excerpts from Sentencing Council’s Children and Young People Overarching Principles, June 2017.]*



# The offending curve

Figure 1: the age-crime curve<sup>2</sup>

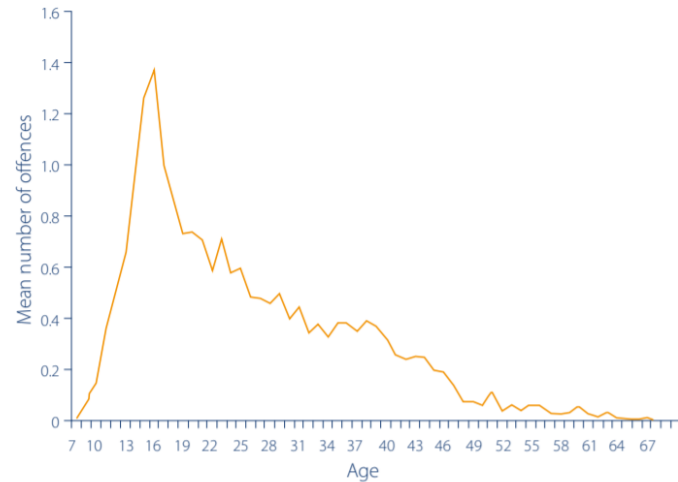
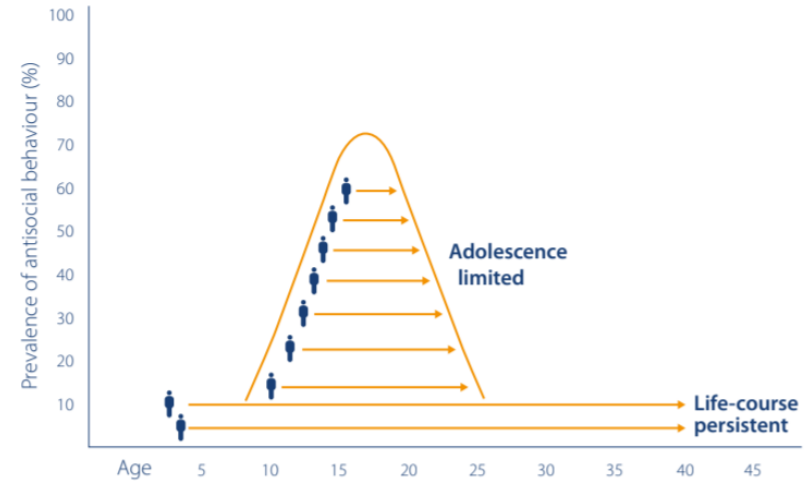


Figure 2: adolescent-limited and life-course persistent offenders<sup>6</sup>



Source: [Valuing Youth Diversion: A Toolkit for Practitioners](#), Centre for Justice Innovation



# Children are less culpable and more susceptible to change

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Children are likely to be less culpable than adults and more receptive to changing their behaviour.

- They ‘are not fully developed and have not attained their full maturity’.
- Their lack of maturity ‘can impact on their decision making and risk taking behaviour’.
- They are more likely to act impulsively as a result of their ‘inexperience, emotional volatility or negative influences’.
- ‘They may not appreciate the effect their behaviour can have on other people...’.
- They are more ‘susceptible to peer pressure and other external influences and changes taking place during adolescence.’
  
- ‘For these reasons, children and young people are likely to benefit from being given an opportunity to address their behaviour and may be receptive to changing their conduct.’

- Sentencing Council’s Definitive Guideline on *Sentencing Children and Young People Overarching Principles*, June 2017.





# Welfare principle

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## Duty to have regard to a child's welfare

- [Section 11 Children Act 2004](#) places a duty on the police, youth offending teams, local authorities and prisons to ensure their functions are discharged having regard to the need to safeguard and promote the welfare of children.
- 'Every court in dealing with a child... 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.' - [Section 44\(1\) Children and Young Persons Act 1933](#)



# General presumption in favour of diverting children away from the justice system

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It is not usually in the public interest to criminalise children.

Children should be diverted away from the criminal justice system wherever possible avoiding the trauma and stigma of their contact with it.

- The United Nations Convention on the Right of the Child (UNCRC) provides that:

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ – UNCRC Article 3.1 (the ‘best interests’ principle)

‘Whenever appropriate and desirable, [state parties shall promote] measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.’ - UNCRC Article 40(3)(b).



# General presumption in favour of diversion

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- [‘National Strategy for the Policing of Children & Young People’](#), National Police Chiefs’ Council, 2015, p 11:  
‘It is important that young people are not criminalised for behaviour which can be dealt with more appropriately by other means.’
- [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.
- [Youth Justice Board Strategic Plan 2019-2022](#) – children first, offender second  
‘A *child first, offender second* approach means that all youth justice services... [p]romote a childhood removed from the justice system, using pre-emptive prevention, diversion and minimal intervention. All work minimises criminogenic stigma from contact with the system.’  
p.7.
- [How to use out-of-court disposals: case management guidance](#), Youth Justice Board, 1 May 2019  
‘Offences with a gravity score of 3 or below, or with a higher gravity score and mitigating factors, should always be considered for diversion.’ para 2.2



# Diversion, informal and formal out of court disposals for children

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- Diversion / informal out of court disposals –
  - No further action
  - Community resolution
- Formal out of court disposals –
  - Youth caution
  - Youth conditional caution

Note: Diversion may be offered as a repeat option, for example:

- if two low gravity offences have been committed in a short timeframe, and you have not yet offered diversionary support to the child
- if the second offence is a considerable time (over six months) after the initial offence
- if the second offence, though also low gravity, is of a different type than the first



# Diversion, informal and formal out of court disposals for children

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- Diversion / informal out of court disposals –
  - No further action
    - Not in the public interest - crime outcome code 9/10
    - Suspect identified further investigation not in the public interest - Outcome 21
    - Deferred prosecution - Outcome 22 (pilot)
    - Youth Restorative Diversion/Intervention
    - Triage
  - Community resolution - crime outcome code 8
- Formal out of court disposals –
  - Youth caution
  - Youth conditional caution



# New criminal offences and guidance since Covid-19



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# Impact of Covid-19 – New Legislation

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## Primary Legislation

- [Coronavirus Act 2020](#) (enacted 20<sup>th</sup> March 2020)
- [The Public Health Act 1984](#)

## Delegated Legislation: Regulations

- [The Health Protection \(Coronavirus Restrictions\) \(England\) Regulations 2020](#) ('the Coronavirus Regulations 2020')
- In force on 26<sup>th</sup> March 2020. 6 month expiry
- Require review by SoS every 21 days (last review by 16/04/20)
- No parliamentary debate
- Wide ranging and most restrictive measures ever imposed (even surpassing those in wartime conditions)
- Anomalies in different jurisdictions (England, Wales, Scotland and NI) e.g. exercise, powers to return home



# Impact of Covid-19 – Guidance

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Conflict with Ministerial statements and official advice

Interim guidance and protocols

- [National Police Chiefs' Council \(NPCC\) and College of Policing \(CoP\) Health Protection Regulations 2020 Police Briefing](#) (published 30/3/20)
- [National Police Chiefs' Council \(NPCC\) and College of Policing \(CoP\) Coronavirus Act 2020 Police Briefing](#) (published 3/4/20)
- Social distancing what constitutes reasonable excuse guidance - '[NPCC and CoP Guidance \(England only\) - What constitutes a reasonable excuse to leave the place where you live](#)' – (published 16/4/20)

Charging and Public Interest

- [National Police Chiefs' Council and CPS Interim Charging Protocol – Covid-19 crisis response](#)
- [Coronavirus: Interim CPS Case Review Guidance - Application of the Public Interest Covid-19 crisis response](#) (published 14/4/20)





# Other Guidance

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## Police Stations and Interviews

- [Coronavirus \(Covid-19\) Police Interview protocol between NPCC, CPS, The Law Society, Criminal Law Solicitors' Association and London Criminal Courts Solicitors' Association](#) (published 2/4/20)

## Other Guidance

- Coronavirus [Outbreak](#) FAQs (last updated 29/03/2019) (inconsistent in parts)



# Impact of Covid-19 – UNCRC compliance

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UN Committee on the Rights of the Child has issued a statement about the effect of the Covid-19 pandemic on children globally. Amongst the recommendations, the UN Committee has called upon member states to:

- **Protect children whose vulnerability is further increased by the exceptional circumstances by the pandemic.** [recommendation 7]
- **Release children in all forms of detention, whenever possible, and provide children who cannot be released with the means to maintain regular contact with their families.** [recommendation 8]
- **Prevent the arrest or detention of children for violating State guidance and directives relating to COVID-19,** and ensure that any child who was arrested or detained is immediately returned to his or her family. [recommendation 9]

The UN Office of the High Commissioner for Human Rights (OHCHR) has issued [COVID-19 Guidance on People in detention and institutions](#), which states: ‘there should be a moratorium on children entering detention, and states should release all children from detention who can be safely released.’



# New Coronavirus Act offences

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These relate to infected persons

- Coronavirus Act 2020 places responsibility for children complying with the restriction requirements on individuals who have responsibility for the child.
- Public health officers can place requirements or restrictions on a child, but this cannot be done without the presence of a responsible adult, except for in the most exceptional circumstances.



# Coronavirus Regulations offences

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## Regulation 6:

- No person, other than someone who is homeless, may leave their home without a 'reasonable excuse'.

Regulation 2 sets out 13 'reasonable excuses'; however this is a non-exhaustive list.

- Note distinction between Regulations and Guidance/Ministerial statements
- Policing failures arose



# Corona Virus Regulations: Reasonable Excuse

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R6(2)

a reasonable excuse includes the need—

- (a) to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money...
- (b) to take exercise either alone or with other members of their household;
- (c) to seek medical assistance
- (c) to provide care or assistance... to a vulnerable person, or to provide emergency assistance;
- (c) to donate blood;



# Corona Virus Regulations: Reasonable Excuse

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R6(2)

- (f) to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living;
- (g) to attend a funeral of a member of the person's household, a close family member, or if no-one within sub-paragraphs (i) or (ii) are attending, a friend;
- (f) to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings;
- (g) to access critical public services, including—
  - (i) childcare or educational facilities (where these are still available to a child in relation to whom that person is the parent, or has parental responsibility for, or care of the child);
  - (ii) social services;
  - (iii) services provided by the Department of Work and Pensions;
  - (iv) services provided to victims (such as victims of crime);



# Corona Virus Regulations: Reasonable Excuse...

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- (j) in relation to children who do not live in the same household as their parents, or one of their parents, to continue existing arrangements for access to, and contact between, parents and children...;
- (k) in the case of a minister of religion or worship leader, to go to their place of worship;
- (l) to move house where reasonably necessary;
- (m) to avoid injury or illness or to escape a risk of harm.



# Corona Virus Regulations: R.7

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Regulation 7 prohibits public gatherings of two persons or more unless

- (a) they are from the same household
- (b) where the gathering is essential for work purposes,
- (c) to attend a funeral,
- (d) where reasonably necessary—
  - (i) to facilitate a house move,
  - (ii) to provide care or assistance to a vulnerable person, including relevant personal care..,
  - (iii) to provide emergency assistance, or
  - (iv) to participate in legal proceedings or fulfil a legal obligation.

What does a gathering mean?





# Coronavirus Regulations: Enforcement

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Regulation 8 provides the police with a number of powers to enforce the regulatory provisions.

Regulation 8(3) applies where if they believe is outside the place they are living without reasonable excuse. The 'relevant person' may:

- Direct that person to return to the place they are living (regulation 8(3)(a)) or
- Remove that person to where they are living (regulation 8(3)(b)).
- Where the power under 8(3)(b) is used, the relevant person may use reasonable force (Regulation 8(4)).

Regulation 8(9) applies where a relevant person considers that three or more people are gathered together in contravention of regulation 7. They may:

- direct the gathering to disperse (a) ;
- direct any person in the gathering to return to the place where they are living (b);
- remove any person in the gathering to the place where they are living (c).

Broad provisions re. Regulation 7: take such action as is necessary



# Coronavirus Regulations: Enforcement – Child Specific

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- (5) Where the person outside the place where they are living without reasonable excuse is a child accompanied by an individual who has responsibility for the child—
- (a) the relevant person may direct that individual to take the child to the place where they are living, and
  - (b) that individual must, so far as reasonably practicable, ensure that the child complies with any direction or instruction given by the relevant person to the child.
- (6) Where a relevant person has reasonable grounds to believe that a child is repeatedly failing to comply with the restriction in regulation 6(1), the relevant person may direct any individual who has responsibility for the child to secure, so far as reasonably practicable, that the child complies with that restriction.
- (7) For the purposes of this regulation, an individual has responsibility for a child if the individual has custody or charge of the child for the time being, or has parental responsibility for the child



# Caveat

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- The powers in paragraph (3), (5) or (6) can only be exercised ‘if the relevant person considers that it is a necessary and proportionate means of ensuring compliance with the requirement’ (R.8(8)).
- Broad, nebulous and subjective test. No requirement for reasonable belief (objective test).



# Offences: Regulation 9

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- It is an offence to contravene a requirement in Regulation 8 without 'reasonable excuse' (R.9(1))
- A person who obstructs, without reasonable excuse, any person carrying out a function under these Regulations commits an offence (R.9(2)).
- A person who, without reasonable excuse, contravenes a direction given under regulation 8, or fails to comply with a reasonable instruction or a prohibition notice given by a relevant person under regulation 8, commits an offence (R.9(3))
- Offences under this regulation are punishable on summary conviction by a fine (R.9(4)).



# Fixed Penalty Notices: Regulation 10

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- Regulation 10 provides for fixed penalty notices.
  - £30
  - Second: £120
  - Third and subsequent fixed penalty notice received, double the amount specified in the last fixed penalty notice received by that person, to a maximum of £960.
- A FNP cannot be given to a child under the age of 18.
- NB. Some areas do not yet have in place provisions for administering FNPs



# Power to arrest children for breaching regulations?

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## Power to arrest children for breaching regulations?

- Regulation 8(5), (6) and (7) Coronavirus Regulations 2020 place responsibility for children complying with the restriction requirements on individuals who have responsibility for the child.
- But children can still be directed or removed to their residential address, including use of force (Regulation 8(3) and (4))
- There is no power to stop and account (College of Policing)
- Children may commit other offences
- But...



# Arresting children during the pandemic

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Why arresting children might not be proportionate, reasonable or lawful:

- Police guidance clearly encourages policing by consent:
  - engage, explain, encourage, enforce.
  - **'Enforcement should be a last resort.'** (NPCC & CoP Police Briefing in Response to Coronavirus Government Legislation)
- Given the profile of children who offend - police should engage with children and ascertain why they are not adhering to social distancing.



# NPCC & CoP: Policing Briefing

## Safeguarding: we need you to be the professional decision makers on the street

Keep an **inquisitive, questioning** mind-set.

It may not be safe for everyone to be at home. Consider whether there are any **safeguarding issues** at play.

For example, are you dealing with aspects of **domestic abuse, child abuse or mental health**?

Be **professionally curious**, do the checks and ask the questions. Find out what's really going on and enquire about the environment the person is living in.

If home is **not a safe place** for the person to return to, we need to solve the problem in partnership. In these cases, do not utilise this legislation. Instead, revert to normal process and legislation dealing with vulnerable people.

If you have issues with partnership working, escalate through the usual channels in your force.



# Profile of children who offend

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Children in the criminal justice often share similar characteristics:

- Many of the children in the criminal justice system have suffered adverse childhood experiences (ACEs) such as experience of abuse, poverty and neglect, poor parental employment records, exclusion from mainstream education, parental substance misuse, absent parent, offending by family members, parent or close family member in prison.
- Children in the criminal justice system are likely to have complex needs, prevalence of learning and mental health difficulties, speech and language difficulties and child criminal exploitation.
- BAME children and looked after children are overrepresented.



# Welfare assessment

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Make a proper assessment of the child's circumstances:

- Duty to have regard to a child's welfare (s11 Children Act 2004).
- Are the child's living arrangements suitable?
- Interaction with other agencies. School? Social worker? Youth offending team? Children's Services?
- Are there alternative arrangements for the child to live with a relative or family friend (see the NPCC/CoP Guidance on ['What constitutes a reasonable excuse to leave the place where you live'](#)). What other support is available?



# Children who commit offences

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Children caught committing low level offences e.g. shoplifting, criminal damage, common assault. Is it in the public interest to arrest and charge? Can they be dealt with by diversion/out of court disposal?

- Arrest as last resort – detention at police station danger to health and practical challenges to interviewing – see [Coronavirus \(Covid-19\) Police Interview protocol](#) (published 2/4/20)
- [Interim CPS Charging protocol](#) - three categories of case
  - A Immediate cases (homicide, robbery, serious assaults, serious public disorder & custody
  - B High priority cases (serious offences includes youth court cases to avoid delay) – non-custody bail cases
  - C Other cases – released under investigation or no arrest required
- [Coronavirus: Interim CPS Case Review Guidance - Application of the Public Interest Covid-19 crisis response](#) (published 14/4/20)



# CPS – Public Interest Covid-19

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[Coronavirus: Interim CPS Case Review Guidance - Application of the Public Interest Covid-19 crisis response](#)  
(published 14/4/20) – paragraph 12

12. Each case must be decided on its own facts and merits, but factors that are likely to be relevant to determining what is in the interests of justice, not only for victims and witnesses, but also for each suspect and defendant are:

Whether an out of court disposal may be an appropriate response to the offender and / or seriousness and consequences of the offending.

Whether a guilty plea to some, but not all charges, or to a less serious offence, would enable the court to pass a sentence that matches the seriousness of the offending.

The length of time a suspect / defendant has spent on remand in custody; and any likely period of remand prior to trial.

The age and maturity of the suspect / defendant: prosecutors should have regard to CPS guidance on [Youth Offenders](#).

All cases involving youth offenders must be dealt with expeditiously and avoid delay, which has at its core the principle that there is little point in conducting a trial for a young offender long after the alleged commission of an offence when the offender will have difficulty in relating the sentence to the offence. To maximise the impact on the youth offender, the case must be dealt with as soon as possible.



# Covid-related offences

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Children who are caught spitting and coughing and committing low level offences e.g. shoplifting, criminal damage, common assault.

- These will be high priority cases
- Public Interest
- Still really important to make representations
- Was it just 'childish behaviour'?
- Why are they out etc?



# Referrals

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Section 47 Children Act: Child Protection Referral to Local Authority (where reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm. This includes neglect).

Section 17 Children Act: Child in Need assessment

Section 20 Children Act: if homeless



# Public law challenges & civil actions



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# Public law and civil actions arising from arrest & detention of children

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- Public Law challenge to lawfulness of restrictions in the Regulations
- Deprivation of liberty
- Statutory authorisation?
- Public interest
- Challenge in policing
  - A public health emergency and not public order
- Decisions to Charge
- Unlawful Arrests and Detention
- Misuse/Misunderstanding of Powers





# Case studies



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## Boy, 13, is arrested for breaking new coronavirus lockdown laws after refusing to give his name to police

- The teenager was taken into custody by officers in Leeds on Saturday morning
- His mother was also reprimanded for being responsible person failing to comply
- It comes after hundreds of people continue to flout strict government advice
- **Coronavirus symptoms:** what are they and should you see a doctor?

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By [RAVEN SAUNT FOR MAILONLINE](#)

**PUBLISHED:** 15:01, 29 March 2020 | **UPDATED:** 08:16, 1 April 2020



# High Priority/Public Interest

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The screenshot shows a news article from the Mirror website. The page has a black navigation bar at the top with the Mirror logo in white on a red background. To the right of the logo are menu items: CORONAVIRUS, NEWS, POLITICS, SPORT, FOOTBALL, CELEBS, TV, and MORE. Further right are social media icons for Facebook, Twitter, Pinterest, and Instagram, followed by a search icon and a user profile icon. Below the navigation bar, the breadcrumb trail reads: News > UK News > Crime. The main headline is "Boy, 14, arrested after doctor robbed on way to work at hospital" in large, bold black text. Below the headline is a sub-headline: "The medic was marched to a cash point and ordered to draw out money during the robbery by three people in Harlow, Essex, on Wednesday night. Police are linking it with a further two robberies". At the bottom of the article, there is a share section with icons for Facebook, Twitter, and LinkedIn, and the text "7 SHARES". To the right of the share section, it says "By Henry Vaughan" and "14:45, 26 MAR 2020". In the bottom right corner of the article area, there is a red button with the word "NEWS" in white capital letters.

**Mirror** CORONAVIRUS NEWS POLITICS SPORT FOOTBALL CELEBS TV MORE

News > UK News > Crime

## Boy, 14, arrested after doctor robbed on way to work at hospital

The medic was marched to a cash point and ordered to draw out money during the robbery by three people in Harlow, Essex, on Wednesday night. Police are linking it with a further two robberies

SHARE    7 SHARES

By **Henry Vaughan**  
14:45, 26 MAR 2020

**NEWS**



# Public Interest?



## Teenager charged with theft and assault at Peterborough supermarket

A teenager has been charged following reports of theft and assault at a Peterborough supermarket.

By The Newsroom

Thursday, 9th April 2020, 12:01 pm



# Next steps



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# Garden Court Chambers – Child Protocol in criminal cases

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## CHILD PROTOCOL IN CRIMINAL CASES

- Police officers should avoid arresting children unless it is an exceptional case where the public are at risk of death or serious personal injury.
- 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 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.
- 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.



# Garden Court Chambers – Child Protocol in criminal cases

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- 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 court has a duty to have regard to a child's welfare 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.



# Garden Court Chambers – Child Protocol in criminal cases

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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.





# Garden Court Chambers – Child Protocol in criminal cases

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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.



# On the horizon

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Watch this space:

- NPCC / CPS Protocol on Out of Court Disposals



# Thank you

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