



Sentencing Guidelines Council

Overarching Principles – Sentencing Youths

Consultation Guideline

FOREWORD

The Sentencing Guidelines Council was created in 2004 in order to frame guidelines to assist courts as they deal with criminal cases across the whole of England and Wales.

The Council receives advice from the Sentencing Advisory Panel which consults widely before tendering that advice. The Council then produces a draft guideline on which it seeks the views of a limited group as provided by the Criminal Justice Act 2003.

The background to these offences and the approach to sentencing are set out in the advice from the Panel (and the consultation paper that preceded it), which are published alongside this draft guideline.

All documents can be found at www.sentencing-guidelines.gov.uk or can be obtained from the Council's Secretariat at 4th Floor, 8-10 Great George Street, London SW1P 3AE.

Responses to the consultation should be received no later than 28 August 2009. When the consultation period is concluded, the Council will consider any responses received and then issue a definitive guideline to which every court is required to have regard in accordance with section 172 of the 2003 Act.

Chairman of the Council
June 2009

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GENERAL APPROACH

A. Statutory provisions

1.1 Offence seriousness is the starting point for sentencing. In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.¹ In imposing sentence, the restrictions on liberty must be commensurate with the seriousness of the offence.

1.2 Section 142A of the Criminal Justice Act 2003 sets out relevant considerations when sentencing an offender aged under 18; a court must² have regard to:

- (a) the principal aim of the youth justice system (to prevent offending (including re-offending) by those under 18);
- (b) the welfare of the offender; and
- (c) the purposes of sentencing.³

1.3 The purposes of sentencing listed for those aged under 18 are:

- (i) punishment;
- (ii) reform and rehabilitation;
- (iii) protection of the public; and
- (iv) reparation to those affected by the offence.⁴

1.4 In addition to the statutory provisions, a court sentencing a young offender must be aware of obligations under a range of international conventions which emphasise the importance of avoiding "criminalisation" of young people whilst ensuring that they are held responsible for their actions and, where possible, take part in repairing the damage that they have caused. This includes recognition of the damage caused to the victims and understanding by the young person that the deed was not acceptable. Within a system that provides for both the acknowledgement of guilt and sanctions which rehabilitate, the intention is to establish responsibility and, at the same time, to promote re-integration rather than to impose *retribution*. The young offender should learn the lesson and never repeat the wrongdoing.

B. Sentencing principles

2.1 Far more than with adults, the approach to sentence will be individualistic.

2.2 The youth of the offender is widely recognised as requiring a different approach from that which would be adopted in relation to an adult. Even within the category of "youth", the response to an offence is likely to be very different depending on whether the offender is at the lower end of the age

¹ Criminal Justice Act 2003, s.143(1)

² This section does not apply when imposing a mandatory life sentence, when imposing a statutory minimum custodial sentence, when imposing detention for life under the dangerous offender provisions or when making certain orders under the Mental Health Act 1983.

³ section 142A(2)

⁴ section 142A(3)

bracket, in the middle or towards the top end; in many instances, the maturity of the offender will be at least as important as the chronological age.

2.3 However, the sentence must remain proportionate to the seriousness of the present offence (except in the rare circumstances where the criteria for a sentence under the dangerous offender provisions are met) and should not impose greater restrictions on liberty than the seriousness of the offence justifies simply to deal with the risk of re-offending. Particular care will need to be taken where a young person has committed a relatively less serious offence but there is a high risk of re-offending.

2.4 Whilst a court is required to aggravate the seriousness of an offence where there are previous convictions (if the court considers that to be reasonable taking account both of the offence and the time that had elapsed since the previous conviction⁵), a sentence that follows re-offending does not need to be more severe than the previous sentence solely because there has been a previous conviction.

(i) Approach to determining sentence

2.5 When determining sentence, the court will:

- (1) Assess the culpability of the offender and the harm caused (or intended or foreseeable) taking into account aggravating and mitigating factors relating to the offence.**

The assessment of offence seriousness will fix the most severe penalty that can be imposed and will determine whether an offence has crossed the necessary threshold to enable the court to impose a community or custodial sentence.

Even where the custody threshold has been crossed, a court is not required to impose a custodial sentence; similarly with the community sentence threshold.⁶

Harm may be to individual victims or to the community or society at large. Of the four levels of culpability for sentencing purposes, intention is the highest followed by recklessness, knowledge and negligence. Even within those levels there will be gradations of seriousness.

Statutory aggravating factors (including previous convictions) will be relevant in assessing the seriousness of an offence.

- (2) Consider any mitigating factors that apply to the offender and any reduction for a guilty plea.**
- (3) Having taken account of all these factors, a court must then determine sentence including any relevant ancillary orders.**

⁵ Criminal Justice Act 2003, s.174(2)

⁶ *ibid.*, s.148(5)

The overall impact of the sentence and the ancillary orders must be considered to ensure that the restrictions on liberty are no more than is commensurate with the seriousness of the offence.

(ii) The principal aim of the youth justice system

2.6 By section 37 of the Crime and Disorder Act 1998, the principal aim of the youth justice system is to prevent offending⁷ by children and young people. For the offender, it incorporates the need to demonstrate that such conduct is not acceptable in a way that makes an impact on the offender whilst also identifying and seeking to address any other factors that make offending more likely. For any victim of the offence and society as a whole, it incorporates the need to demonstrate that the law is being effectively enforced and to sustain confidence in the rule of law.

(iii) The welfare of the offender

2.7 By section 44 of the Children and Young Persons Act 1933, “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”.

2.8 In other requirements or obligations, different terminology – *best interests*, *well-being* or *welfare* – may be used. Generally, although there are shades of difference between the meanings, it is unlikely that different decisions will arise solely from those differences.

2.9 Accordingly, since “welfare” is the term used in the legislation applicable to England & Wales, that is the term used in this guideline. Welfare includes the obligation to secure proper provision for education and training,⁸ where appropriate to remove from undesirable surroundings⁹ and the need to choose the best option for the young person taking account of the circumstances of the offence.

In having regard to the “welfare” of the young person, a court should ensure that it is alert to:

- **the high incidence of mental health issues amongst young people in the criminal justice system;**
- **the high incidence of those with learning difficulties or learning disabilities amongst young people in the criminal justice system;**
- **the effect that speech and language difficulties might have on the ability of the young person (or any adult with them) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction;**
- **the extent to which young people anticipate that they will be discriminated against by those in authority and the effect that it has on the way that they conduct themselves during court proceedings;**

⁷ including re-offending; s.142A(2)(a)

⁸ Children and Young Persons Act 1933, s.44

⁹ *ibid.*

- **the vulnerability of young people to self harm, particularly within a custodial environment;**
- **the extent to which changes taking place during adolescence can lead to experimentation;**
- **the effect on young people of experiences of loss or of abuse.**

2.10 In the light of the high incidence of these issues amongst young people in custody or subject to a community sentence, and taking account of the fact that the principal aim of the youth justice system is reducing offending, a court should always seek to ensure that it has access to information about how best to identify and respond to those issues and, where necessary, that a proper assessment has taken place in order to enable the most appropriate sentence to be imposed.

(iv) The purposes of sentencing

2.11 As set out in paragraph 1 above, a court sentencing a person under the age of 18 is obliged to have regard to the principal aim of the youth justice system, to the welfare of the offender in accordance with section 44 of the 1933 Act and to the four further purposes of sentencing. As with offenders aged 18 and over, no order of priority is given in statute to those purposes. There will be occasions when all these obligations point in the same direction but there will be other occasions when they do not and a court will be required to determine the best balance following the approach set out in this guideline.

2.12 A difference from the purposes set out for adult offenders¹⁰ is the omission of “the reduction of crime (including its reduction by deterrence)”. As the principal aim of the youth justice system¹¹ is the prevention of offending by children and young people; the emphasis should be on approaches that seem most likely to be effective with young people who are before a court for sentence.

C. Effect on sentence of the offender being a young person

3.1 In addition to the distinctive range of penalties available for youths, there is an expectation that, generally, a young person will be dealt with less severely than an adult offender, although this distinction diminishes as the offender approaches age 18 (subject to an assessment of maturity and criminal sophistication). In part, this is because young people are unlikely to have the same experience and capacity as an adult to realise the effect of their actions on other people or to appreciate the pain and distress caused and because a young person is likely to be less able to resist temptation, especially where peer pressure is exerted.

3.2 Additionally, in most cases a young person is likely to benefit from being given greater opportunity to learn from mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the young person, and, therefore, on the likelihood of effective integration into society.

¹⁰ Criminal Justice Act 2003, s.142

¹¹ see para. 2.6 above

3.3 When sentencing a young offender whose offence involves sexual activity but there is no evidence of a coercive or abusive relationship or of anything other than consensual activity, a court will need to be aware that a desire to explore gender identity or sexual orientation may result in offending behaviour. Depending on the seriousness of the offending behaviour, offender mitigation may arise where that behaviour stems from sexual immaturity or confusion.¹²

3.4 Individual sanctions are likely to have a greater impact on a youth than on an adult, especially lengths of time spent in a custodial establishment, not least because of the exposure to influences likely to entrench criminal conduct (to which a young person may be more susceptible than an adult) and the greater risk of self harm than exists in relation to an adult.

3.5 There is some research evidence that suggests that, when youths are considering whether or not to commit an offence, “they lack the maturity to fully understand the consequences of their harmful acts” and, typically, they are viewed as “impulsive, inexperienced, emotionally volatile or vulnerable, and more easily influenced by negative family members, peers, negative culture values and poverty than older adolescents and young adults”.¹³

3.6 Factors regularly present in the background of those juveniles who commit offences include: low family income, poor housing, poor employment records, low educational attainment, early experience of offending by other family members or of violence or abuse (often accompanied by harsh and erratic discipline within the home) and the misuse of drugs.¹⁴ There is also some evidence that those young people who are “looked after” have been more at risk of being drawn into the criminal justice system than other young people acting *in similar ways*.¹⁵

3.7 It is clear that these factors do not cause delinquency (since many who have experienced them do not commit crime); nonetheless, there is a strong association and any response to criminal activity amongst young people will need to recognise the presence of such factors if it is to be effective.

The following factors have led to a different approach to the sentencing of young people who offend (compared with the approach for adult offenders) and will affect the sentence imposed in an individual case:

- **offending by a young person is frequently a phase which passes fairly rapidly and therefore the reaction to it needs to be kept well balanced in order to avoid alienating the young person from society;**
- **a criminal conviction at this stage of a person’s life may have a disproportionate impact on the ability of the young person to**

¹² The Sentencing Advisory Panel has previously stated that Crown Prosecutors and the court should take account of an offender’s immaturity and normal juvenile experimentation: *Sexual Offences Act 2003 – the Panel’s Advice to the Council* – page 4, para. 21, www.sentencing-guidelines.gov.uk

¹³ Corrado et al., *Should deterrence be a sentencing principle under the Youth Criminal Justice Act* (2006) 85 Canadian Bar Review at p.548

¹⁴ See, for example, the range of approaches in the *Youth Crime Action Plan 2008* Chapter 5: www.homeoffice.gov.uk

¹⁵ See, for example, *Care experience and criminalisation* The Adolescent and Childcare Trust, September 2008 www.tactcare.org.uk

gain meaningful employment and play a worthwhile role in society;

- **the impact of punishment is felt more heavily by young people in the sense that any sentence will seem to be far longer in comparison with their relative age compared with adult offenders;**
- **young people may be more receptive to changing the way they conduct themselves and be able to respond more quickly to interventions;**
- **young people should be given greater opportunity to learn from their mistakes;**
- **young people will be no less vulnerable than adults to the contaminating influences that can be expected within a custodial context and probably more so.**

D. Balancing the relevant considerations

4.1 This guideline sets out a process that will enable the various obligations and requirements to be applied consistently. It is, however, only a framework and is intended to apply to the generality of cases.

In balancing the purposes of sentencing, the key elements are:

- **the age of the offender (chronological and emotional),**
- **the seriousness of the offence,**
- **the likelihood of further offences being committed, and**
- **the extent of harm caused or likely to result.**

Far more than with adults, the approach to sentence will be individualistic.

Proper regard should be had to the mental health and capability of the young person, and to any learning difficulties or disorders or speech and language difficulties, all of which are likely to affect the likelihood of those purposes being achieved.

4.2 The younger an offender (taking account of maturity and not just chronological age) the more likely it is that considering the welfare of the young person will be of greater significance. Since many young people “grow out of” crime, the obligation to have regard to the welfare of a young person who has offended might in some circumstances be best manifested by protecting that person from the adverse effects of intervention in his or her life rather than by providing for some positive action.

4.3 The requirement to have regard to the welfare of a young person is subject to the obligation to impose only those restrictions on liberty that are commensurate with the seriousness of the offence; accordingly, a court should not impose greater restrictions because of other factors in the young person’s life.

4.4 In relation to custodial sentences, the reconviction rate is high and there are concerns about the effect on vulnerable young people of being in closed conditions. Risks commonly found are those of self harm and suicide and, in

relation to female offenders, the additional impact on both the offender herself and on the child if the offender is the primary carer of a small child or is pregnant.¹⁶ Since a court is obliged to have regard to the welfare of the young person, it must have regard to these issues when considering sentence.

- 4.5 Particular care should be taken where an offender has issues arising from mental health, from learning difficulties or from a disability. Research shows that there is a high incidence of these issues in young people in the youth justice system and, in particular, in custody. For reference, information about the level of incidence is summarised in Annex A.
- 4.6 Some young people may attend court believing that they will be discriminated against or otherwise unfairly treated; this might be for any of a wide range of reasons including ethnicity and sexuality. However unjustified that belief is, a court will need to be alert to the fact that the young person's behaviour in court might be affected by it.
- 4.7 These issues are not always able to be identified at an early stage in the proceedings leading to sentence. As a result, a court needs to be alert to the possibility that the conduct of the young person (and that of any adult accompanying them in court) might be affected by issues relating to mental health, learning or communication, or some other form of disability that has not previously been identified.
- 4.8 In such circumstances, care needs to be taken in ensuring that the young person is able to take a proper part in the court proceedings, is able to understand what the court requires as a result of the sentence imposed and that that sentence properly takes account of difficulties in compliance that may arise from those issues.
- 4.9 The obligations to treat the reduction of offending as the principal aim of sentencing and to have regard to the welfare of the young person both require a court to consider the issues noted above, not only in determining the sentence to be imposed, but also in determining the length or content of that sentence.

The proper approach for the Crown Court, a magistrates' court or a youth court when sentencing a young offender is for the court, within a sentence that is no more restrictive on liberty than is proportionate to the seriousness of the offence(s), to seek to impose a sentence that fulfils the purposes of sentencing and other matters to which the court must have regard (see section A above) by:

- **confronting the young offender with the consequences of the offending and helping the young offender to develop a sense of personal responsibility – these consequences may be experienced by the offender himself or herself, by the family of the offender, by the victim(s) of the offence and/or by the community;**

¹⁶ *The Corston Report – a review of women with particular vulnerabilities in the Criminal Justice System*, March 2007, Home Office, www.homeoffice.gov.uk

- **tackling the particular factors (personal, family, social, educational or health) that put the young person at risk of offending;**
- **strengthening those factors that reduce the risk that the young person will continue to offend:**
- **encouraging reparation to victims;**
- **defining, agreeing and reinforcing the responsibilities of parents.**

E. Crossing a significant age threshold between commission of an offence and sentence

5.1 There will be occasions when an increase in the age of an offender¹⁷ will result in the maximum sentence on the date of *conviction* being greater than that available on the date on which the offence was *committed*.

5.2 In such circumstances, the approach should be:

- where an offender crosses a relevant age threshold between the date on which the offence was committed and the date of conviction or sentence, a court should take as its starting point the sentence likely to have been imposed on the date on which the offence was committed;
- where an offender attains the age of 18 after committing the offence but before conviction, section 142 of the Criminal Justice Act 2003 applies (whilst section 142A applies to those aged under 18) and the sentencing disposal has to take account of the matters set out in that section;¹⁸
- it will be rare for a court to have to consider passing a sentence more severe than the maximum it would have had jurisdiction to pass at the time the offence was committed even where an offender has subsequently attained the age of 18;
- however, a sentence at or close to that maximum may be appropriate, especially where a serious offence was committed by an offender close to the age threshold.

F. Persistent offenders

6.1 Certain sentences are available only where the offender is a “persistent offender” - in particular, a youth rehabilitation order with intensive supervision and surveillance or with fostering in relation to an offender aged between 10 and 14¹⁹ and a detention and training order in relation to an offender aged between 12 and 14.²⁰ This criterion does not have to be met before the Crown Court imposes long term detention (see paragraph 12 below) or detention for life.

¹⁷ primarily attaining the age of 12, 15 or 18

¹⁸ accordingly, when sentencing those convicted when aged 18 and above who have committed an offence whilst under that age, more general public policy considerations may play a greater part

¹⁹ Criminal Justice and Immigration Act 2008, s.1(4)(c)

²⁰ Powers of Criminal Courts (Sentencing) Act 2000, s.100(2).

6.2 Similarly, additional powers may be available to a court where a youth rehabilitation order has been breached “wilfully and persistently”.

6.3 “Persistent offender” is not defined in legislation but has been considered by the Court of Appeal on a number of occasions. However, following the implementation of the 2008 Act, the sentencing framework is different from that when the definition was judicially developed, particularly the greater emphasis on the requirement to use a custodial sentence as “a measure of last resort”.

6.4 A dictionary definition of “persistent” is “persisting or having a tendency to persist”; “persist” is defined as “to continue firmly or obstinately in a course of action in spite of difficulty or opposition”.

In determining whether an offender is a persistent offender for these purposes, a court should consider the simple test of whether the young person is one who persists in offending. In most circumstances, therefore, the normal expectation is that the offender will have had some contact with authority in which the offending conduct was challenged before being classed as “persistent”.

6.5 This conclusion may be derived from information about previous convictions but may also arise from orders which require an admission or finding of guilt – these include reprimands, final warnings, restorative justice disposals and conditional cautions; since they do not require such an admission, penalty notices for disorder are unlikely to be sufficiently reliable.

6.6 Even where a young person is found to be a persistent offender, a court is not obliged to impose the custodial sentence or youth rehabilitation order with intensive supervision and surveillance or fostering that becomes available as a result of that finding. The other tests continue to apply and it is clear that Parliament expects custodial sentences to be imposed only rarely on those aged 14 or less.

A young offender is likely to be found to be persistent (and, in relation to a custodial sentence, the test of being a measure of last resort is most likely to be satisfied) where the offender has been convicted of, or made subject to a pre-court disposal that involves an admission or finding of guilt in relation to, imprisonable offences on at least 3 occasions in the past 12 months.

Similarly, an offender is likely to be found to have “persistently” breached a youth rehabilitation order where there have been three breaches demonstrating a lack of willingness to comply with the order; the court must find the breaches to have been ‘wilful’ if it is to gain access to the extra powers.

G. Enforcing the responsibilities of parents and guardians

- 7.1 A significant difference arising from the procedures for dealing with young people who commit criminal offences is the importance attached to the presence of a parent, carer or appropriate adult at key stages, especially when sentence is imposed. In addition, specific provisions exist to enable a court to reinforce the responsibilities of a parent or guardian.
- 7.2 The statutory framework clearly envisages the attendance of an adult with a degree of responsibility for the young person; this obligation reflects the principal aim of reducing offending, recognising that that is unlikely to be achieved by the young person alone. A court must be aware of a risk that a young person will seek to avoid this requirement either by urging the court to proceed in the absence of an adult or in arranging for a person to come to court who purports to have (but in reality does not have) the necessary degree of responsibility.
- 7.3 Insistence on attendance may produce a delay in the case before the court; however, it is important that this obligation is maintained and that it is widely recognised that a court will require such attendance, especially when imposing sentence. If a court proceeds in the absence of a responsible adult, it should ensure that the outcome of the hearing is properly communicated.
- 7.4 Where a person under the age of 18 is convicted of an offence, the court is under a duty to **bind over a parent or guardian** if satisfied that such a course of action would be desirable in the interest of preventing the commission of further offences.²¹ Such an order may not be made where the court imposes a referral order. Similarly, the court has the power to make a **parenting order** where it would be desirable in the interest of preventing the commission of any further offence.²² Where the offender is aged 16 or less and the court considers that a parenting order would be desirable, there is a presumption in favour of the order being made and reasons must be given if it is not made.²³ In most circumstances, where an order is necessary it is more likely that a parenting order will be appropriate.
- 7.5 When considering whether to impose a parenting order, the court should give careful consideration to the strength of the familial relationships and to any diversity issues that might impact on the achievement of the purposes of the order. Such factors and issues arising may be documented in a pre-sentence report.
- 7.6 Particular issues may arise in relation to an offender who is, or who runs the risk of, experiencing familial abuse or rejection on the grounds of sexual orientation. In considering such factors, which may be documented in a PSR, the court must take care not to disclose facts about an offender's sexual orientation without his or her consent. Similar issues might arise in a family where racial tensions exist.

²¹ Powers of Criminal Courts (Sentencing) Act 2000, s.150

²² Crime and Disorder Act 1998, s.8(6)

²³ *ibid.*, s.9(1)

SENTENCES

A. REFERRAL ORDERS

- 8.1 Where an offender is being sentenced in a youth court or a magistrates' court, a Referral Order is a mandatory sentence in many circumstances in which a young person is to be sentenced for the first time and is discretionary in a wider range of situations. In particular, it is possible to make an order on a second conviction where a referral order was not made following the first conviction.
- 8.2 When an order is made, the court determines the length of the order (between 3 months and 12 months) but the action taken during that order is decided by a Youth Offender Panel consisting of members of the community supported by a member of a Youth Offending Team. Any victim of the offence may be invited to attend the meeting of the Panel at which the terms are agreed.
- 8.3 When determining the length of an order, although the needs of the offender are a factor, the primary consideration in most circumstances is the relative seriousness of the offence. Given the mandatory nature of the order in many circumstances, it is less likely that the needs of the offender will be considered in a pre-sentence report. This consideration is more likely to take place once the order has been made and in preparation for the Panel meeting since, within the period of the order, the Youth Offender Panel will agree what needs to be undertaken by the young person both in the light of the nature of the offence and of the young person's needs.
- 8.4 **A court should be prepared to use the whole range of periods allowed; in general, orders of 10-12 months should be made only for the more serious offences.**
- 8.5 Typically, the length of an order should be between 3-5 months for offences where the court assesses seriousness to be relatively low, between 5-7 months for an offence of medium level seriousness and between 7-9 months for an offence where the court considers seriousness to be relatively high. In determining which level applies, a court may find assistance in Section 2 of the Youth Court Bench Book issued by the Judicial Studies Board which provides indications of the level of seriousness of an average offence of the types described.²⁴

²⁴ www.jsboard.co.uk/downloads/ycbb/ycbb_section2.pdf

B. FINANCIAL ORDERS

9.1 A court may impose a fine for any offence. In accordance with statutory requirements, where financial orders are being considered, priority must be given to compensation orders and, where an order for costs is to be made alongside a fine, the amount of the costs must not exceed the amount of the fine.

9.2 In practice, many young people who offend have few financial resources. Where a young person is in receipt of the *Education Maintenance Allowance* or a similar provision which is related to the means of the offender or those with whom the offender lives, a court will need to consider the extent to which making a deduction from the allowance would prejudice the access of the young person to education or training.

9.3 As a general rule, it will rarely be appropriate to take the allowance into account as a resource from which a financial penalty may be paid, especially where the recipient is a young person who is living independently or as part of a household primarily dependent on state benefit.

C. YOUTH REHABILITATION ORDERS

10.1 The Criminal Justice and Immigration Act 2008 provides for a single community sentence (the youth rehabilitation order) within which a court may include one or more requirements variously designed to provide for punishment, for protection of the public, for reducing reoffending and for reparation.

10.2 A youth rehabilitation order with intensive supervision and surveillance or with fostering is also provided but may be imposed only where a custodial sentence otherwise would have been appropriate (see 10.23 below).²⁵

(i) Threshold and availability

10.3 In order for a court to be able to impose a youth rehabilitation order, it must be satisfied that the offence is “serious enough”.²⁶ Even where an offence crosses this threshold, a court is not obliged to make a youth rehabilitation order.²⁷

10.4 In determining the content and length of an order, the guiding principles are proportionality and suitability since statute provides that the restrictions on liberty within such an order must be commensurate with the seriousness of the offence²⁸ and that, taken together, the requirements within the order are the most suitable for the offender.²⁹

²⁵ Criminal Justice and Immigration Act 2008, ss.1(3) and 1(4); Criminal Justice Act 2003, s.174(2)(ca) and (cb) as inserted by Criminal Justice and Immigration Act 2008, sched.4, para.80(2); however, it may be imposed in other circumstances following “wilful and persistent” breach of a youth rehabilitation order: see para. 10.41 below

²⁶ Criminal Justice Act 2003, s.148(1)

²⁷ *ibid.*, s.148(5)

²⁸ *ibid.*, s.148(3)(b)

²⁹ *ibid.*, s.148(3)(a)

10.5 In contrast to the provisions relating to adult offenders, a court may impose a youth rehabilitation order (other than one with intensive supervision and surveillance or fostering³⁰) for an offence that is not imprisonable.

10.6 A youth rehabilitation order is not an available sentence where the “compulsory referral conditions” are found to exist; accordingly, the order will not be available in a youth court or other magistrates’ court for a first time offender who has pleaded guilty to an imprisonable offence.

(ii) Effect of a guilty plea

10.7 Where a court is considering sentence for an offence for which a custodial sentence is justified, a guilty plea may be one of the factors that persuades a court that it can properly impose a youth rehabilitation order instead and no further adjustment to the sentence needs to be made to fulfil the obligation to give credit for that plea.

10.8 Where the provisional sentence is already a youth rehabilitation order, the necessary reduction for a guilty plea should apply to those requirements within the order that are primarily punitive rather than to those which are primarily rehabilitative.

(iii) Approach to determining nature and extent of requirements

10.9 In determining the nature and extent of requirements to be included within an order and the length of that order, the key factors are the assessment of the seriousness of the offence, the purpose(s) of sentencing the court wishes to achieve, the risk of re-offending, the ability of the offender to comply, and the availability of requirements in the local area.

10.10 Since a court must determine that the offence (or combination of offences) is “serious enough” to justify such an order, a court will be able to determine the nature and extent of the requirements within the order primarily by reference to the likelihood of the young person re-offending and to the risk of the young person causing serious harm. This is in accordance with the principal aim of the youth justice system, the welfare principle and the sentencing aim of “protection of the public”.

10.11 Before making an order a court will consider a pre-sentence report. In preparing that report, (following national standards and practice guidance) the Youth Offending Team (YOT) will be seeking to identify an appropriate balance between the seriousness of the offence, the risk of harm in the future from any further offences the young person might commit and the needs of the young person.

10.12 In most cases, the assessment by the YOT will be undertaken by use of *Asset*³¹ supported by professional judgement. An initial assessment will calculate the risk of re-offending; where necessary, an additional assessment will assess the risk of serious harm likely to be involved in further offending.

³⁰ such an order may be imposed following wilful and persistent failure to comply with a youth rehabilitation order imposed for a non-imprisonable offence: Criminal Justice and Immigration Act 2008, schedule 2, para. 6(13) and para. 8(12)

³¹ A “common, structured framework for the assessment of all young people involved in the criminal justice system” which is designed to “identify a multitude of factors and circumstances .. which may have contributed” to the offending behaviour: see www.yjb.gov.uk

Those assessments will be reviewed by the YOT in the context of all other available information and the report will identify a level of intervention for the court to consider.

10.13 There are three intervention levels:

- **Standard level** - for those who show a low likelihood of reoffending **and** a low risk of serious harm; in those circumstances, the order primarily will seek to repair the harm caused by the offence – typically, this will involve interventions to meet the requirements of the order and the engagement of parents in those interventions and/or in supporting the young person;
- **Enhanced level** - for those who show a medium likelihood of reoffending **or** a medium risk of serious harm; in those circumstances, the order will, in addition, seek to enable help or change as appropriate – typically, this will involve greater activity in motivating the young person and in addressing the reasons for non-compliance with the law and may involve external interventions;
- **Intensive level** - for those with a high likelihood of reoffending **or** a high or very high risk of serious harm; in those circumstances, the order will, in addition, seek to ensure control of the young person as necessary to minimise the risk of further offending or of serious harm – typically this will involve additional controls, restrictions and monitoring.³²

10.14 For the broad generality of offences where a youth rehabilitation order is to be imposed, this approach will enable the writer of a pre-sentence report to make proposals that match the obligations on the court to balance the various statutory obligations that apply.

10.15 Where a young person is assessed as presenting a **high risk of re-offending or of causing serious harm** despite having committed a relatively less serious offence, the emphasis is likely to be on requirements that are primarily rehabilitative or for the protection of the public. Care will need to be taken to ensure both that the requirements are “those most suitable for the offender” and that the restrictions on liberty are commensurate with the seriousness of the offence.

10.16 Where a young person is assessed as presenting a **low risk despite having committed a relatively high seriousness offence**, the emphasis is likely to be on requirements that are primarily punitive, again ensuring that restrictions on liberty are commensurate with the seriousness of the offence. In relation to young offenders, the primary purpose of punitive sanctions is to achieve acknowledgement by the young person of responsibility for his or her actions and, where possible, taking a proper part in repairing the damage caused.

³² YOUTH JUSTICE: The Scaled Approach, YJB 2009 www.yjb.gov.uk/scaledapproach

(iv) Length of order

10.17 When imposing a youth rehabilitation order, the court must fix a period within which the requirements of the order are to be completed; this must not be more than 3 years from the date on which the order comes into effect.³³ Where the order contains two or more requirements, the order may specify an earlier date for any of those requirements.³⁴

10.18 The period specified as the overall period for the order will normally commence on the day after the order is made but, where the young person is already subject to a detention and training order, the court may specify that the youth rehabilitation order will take effect either on the day that supervision begins in relation to the detention and training order or on the expiry of the term of that order.³⁵

10.19 It is not possible to make a youth rehabilitation order when the young person is already subject to another youth rehabilitation order or to a reparation order unless the court revokes those orders.³⁶

10.20 The overall length of an order has three main consequences:

- where a supervision requirement is included, the obligation to attend appointments as directed by the responsible officer continues for the whole period;
- where a young person is in breach of a youth rehabilitation order, one of the sanctions available to a court is to amend the order by including within it any requirement that it would have had power to include when the order was made;³⁷ however, that new requirement must be capable of being complied with before the expiry of the overall period;³⁸
- a young person is liable to re-sentence for the offence(s) for which the order was made if convicted of another offence whilst the order is in force.³⁹

10.21 In determining the length of an order, a court should allow sufficient time for the order as a whole to be complied with, recognising that the young person is at risk of further sanction throughout the whole of the period, but allowing sufficient flexibility should a sanction need to be imposed for breach of the order. Where appropriate, an application for early discharge may be made.

(v) Determining the requirements and the length of an order - summary

10.22 As set out in paragraph 2.1 above, the approach to the sentencing of a youth will be far more individualistic than with an adult offender. Where a court is satisfied that an offence has crossed the community sentence

³³ Criminal Justice and Immigration Act 2008, sched.1, para. 32(1)

³⁴ *ibid.*, para. 32(2)

³⁵ *ibid.*, para. 30

³⁶ *ibid.*, para. 30(4)

³⁷ *ibid.*, sched.2, para. 6(2) (magistrates' court) and para. 8(2) (Crown Court)

³⁸ *ibid.* para. 6(6) and para. 8(6)

³⁹ *ibid.* para. 18 and para. 19

threshold and that such a sentence is necessary or has crossed the custody threshold but is an offence for which a youth rehabilitation order is nonetheless considered to be appropriate, taking account of the assessment in the pre-sentence report, the consideration process that the court should follow is:

- i) what requirements are most suitable for the offender?***
- ii) what overall period is necessary to ensure that all requirements may be satisfactorily completed?***
- iii) are the restrictions on liberty that result from those requirements commensurate with the seriousness of the offence?***

(vi) Orders with intensive supervision and surveillance or with fostering

10.23 Such orders may be made where:⁴⁰

- the court is dealing with a young person for an offence punishable with imprisonment;
- that offence (or combination of offences) crosses the custody threshold; and
- custody would be an appropriate sentence.

If the offender was under 15 at the time of conviction, such an order may be imposed only where the offender is a “persistent offender”.

10.24 When imposing such an order, the court must give its reasons for concluding that the offence(s) cross(es) the community sentence threshold and that the requirements set out above have been met.⁴¹

(a) With intensive supervision and surveillance

10.25 A youth rehabilitation order with intensive supervision and surveillance is an order that contains an “extended activity requirement”, that is, an activity requirement with a maximum of 180 days. As a result, there are further obligations to include a supervision requirement⁴² and a curfew requirement.⁴³

10.26 Where appropriate, a youth rehabilitation order with intensive supervision and surveillance may also include additional requirements, although the order as a whole must comply with the obligation that the requirements must be those most suitable for the offender and that any restrictions on liberty must be commensurate with the seriousness of the offence.

10.27 When imposing such an order, a court must ensure that the requirements are not so onerous as to make the likelihood of breach almost inevitable.

⁴⁰ though see the additional powers where an offender has “wilfully and persistently” failed to comply with a youth rehabilitation order; para. 10.41 below

⁴¹ Criminal Justice Act 2003, s.174(2)(ca) and (cb)

⁴² a requirement to attend appointments with the responsible officer (or any other person determined by the responsible officer): Criminal Justice and Immigration Act 2008, sched.1, para. 9

⁴³ a minimum of 2 hours and a maximum of 12 hours on any one day which must fall within the period of 6 months from the day on which the requirement first takes effect: *ibid.*, para.14. It is likely that this curfew will be electronically monitored: *ibid.*, para. 3(4)(b) and para.2

(b) With fostering

10.28 Where a fostering requirement is included within a youth rehabilitation order, it will require the offender to reside with a local authority foster parent for a specified period; that period must not exceed 12 months.⁴⁴ The court must be satisfied that a significant factor in the offence was the circumstances in which the young person was living and that the imposition of a fostering requirement would assist in the rehabilitation of the young person. It is likely that other rights will be engaged (such as those under Article 8 of the European Convention on Human Rights⁴⁵) and any interference with such rights must be proportionate.

10.29 Before including this requirement, the court must consult both the young person's parent or guardian (unless impracticable) and the local authority; it cannot be included unless the offender was legally represented in court when the court was considering whether or not to impose the requirement or, having had the opportunity to be represented, the offender has not applied for representation or that right was withdrawn because of the offender's conduct.⁴⁶ This requirement may be included only where the court has been notified that arrangements are available in the area of the relevant local authority.

10.30 A fostering requirement cannot be included with intensive supervision and surveillance and it cannot be included in a youth rehabilitation order unless the higher criteria described above have been met. Where appropriate, a youth rehabilitation order with fostering may also include other requirements (and must include supervision) although the order as a whole must comply with the obligation that the requirements must be those most suitable for the offender and that any restrictions on liberty must be commensurate with the seriousness of the offence.

10.31 It is unlikely that the statutory criteria will be met in many cases; where they are met and the court is considering making an order, care should be taken to ensure that there is a well developed plan for the care and support of the young person throughout the period of the order and following conclusion of the order. A court will need to be provided with sufficient information, including proposals for education and training during the order and plans for the offender on completion of the order.

⁴⁴ Criminal Justice and Immigration Act 2008, sched.1, para.18

⁴⁵ right to respect for family and private life

⁴⁶ Criminal Justice and Immigration Act 2008, sched.1, para.19

(vii) Breaches

10.32 Where a young person fails to comply with a youth rehabilitation order, the “responsible officer” must consider whether there was a reasonable excuse. If the officer considers that there was no reasonable excuse and this is the first failure to comply with the order without reasonable excuse, the officer must issue a “warning”.⁴⁷

10.33 The warning will describe the circumstances of the failure to comply, a statement that the failure is not acceptable and a warning that a further failure to comply may lead to the order being referred back to the court. In most circumstances, two warnings will be permitted within a 12 month period before the matter is referred back to court.

10.34 There is a presumption in favour of referring the matter back to court after a third failure to comply and a discretionary power to do so after the second failure to comply.⁴⁸

10.35 Breach of an order brought before a court may arise from a failure to keep an appointment or otherwise co-operate with the responsible officer or may arise from a failure to comply with one or more of the other requirements of the order.

10.36 Even where a breach has been proved, a court is not obliged to make any order but may allow the youth rehabilitation order to continue as imposed. In contrast with the powers in relation to an adult offender, there is no obligation on the court to make an order more onerous. Where a court determines that a sanction is necessary, it has the power to:

- impose a fine (in which case the order continues in its original form);
- amend the terms of the order; or
- revoke the order and re-sentence the offender.⁴⁹

10.37 If amending the terms of the order, the court may impose any requirement that it could have imposed when making the order and this may be in addition to, or in substitution for, any requirements contained in the order. If the youth rehabilitation order did not contain an unpaid work requirement and the court includes such a requirement using this power, the minimum period of unpaid work is 20 hours; this will give greater flexibility when responding to less serious breaches or where there are significant other requirements to be complied with.⁵⁰

10.38 A court may not amend the terms of a youth rehabilitation order that did not include an extended activity requirement or a fostering requirement by inserting them at this stage; should these requirements be considered appropriate following breach, the offender must be re-sentenced and the original youth rehabilitation order revoked.⁵¹

⁴⁷ Criminal Justice and Immigration Act 2008, schedule 2, para. 3

⁴⁸ *ibid.*, para. 4; where a young person has attained the age of 18 since the order was made, except where the order was made in the Crown Court and no direction was made permitting breach proceedings to be dealt with in the youth court or a magistrates' court, breach proceedings will be dealt with in a magistrates' court other than a youth court: *ibid.*, para.5(3). However, the powers of the magistrates' court are the same as those of a youth court: *ibid.*, para.6

⁴⁹ *ibid.*, para. 6, 8

⁵⁰ *ibid.*, para. 6(7) and para. 8(7)

⁵¹ *ibid.*, para. 6(8) and para. 8(8)

10.39 Before imposing a custodial sentence as a result of re-sentencing following breach, a court should be satisfied that the YOT and other local authority services have taken all steps necessary to ensure that the young person has been given appropriate opportunity and support necessary for compliance.⁵²

10.40 Where the failure arises primarily from non-compliance with reporting or other similar obligations and a sanction is necessary, the most appropriate response is likely to be the inclusion of (or increase in) a primarily punitive requirement such as the curfew requirement, unpaid work, the exclusion requirement and the prohibited activity requirement or in the imposition of a fine. However, continuing failure to comply with the order is likely to lead to revocation of the order and re-sentencing for the original offence.

10.41 Where the offender has “wilfully and persistently” failed to comply with the order, and the court proposes to sentence again for the offence(s) in respect of which the order was made, additional powers are available.⁵³ These additional powers include:

- the making of a youth rehabilitation order with intensive supervision and surveillance even though the offence is not imprisonable or a custodial sentence would not have been imposed if the order had not been available;
- the imposition of a detention and training order for 4 months for breach of a youth rehabilitation order with intensive supervision and surveillance imposed following wilful and persistent breach of an order made for a non-imprisonable offence even though the offence is not imprisonable.

10.42 In considering whether the failure to comply is “persistent”, account should be taken of the principles set out in paragraph 6 above.

The primary objective when sentencing for breach of a youth rehabilitation order is to ensure that the young person completes the requirements imposed by the court.

Where the failure arises primarily from non-compliance with reporting or other similar obligations, where a sanction is necessary, the most appropriate is likely to be the inclusion of (or increase in) a primarily punitive requirement.

A court must ensure that it has sufficient information to enable it to understand why the order has been breached and that all steps have been taken by the YOT and other local authority services to give the young person appropriate opportunity and support. This will be particularly important if the court is considering imposing a custodial sentence as a result of the breach.

⁵² cp Education and Skills Act 2008, s.45(5)

⁵³ in accordance with paragraphs 6 and 8 of schedule 2 to the Criminal Justice and Immigration Act 2008

Where a court is determining whether the young person has “wilfully and persistently” breached an order, it should apply the same approach as when determining whether an offender is a “persistent offender”. In particular, a young person is likely to be found to have “persistently” breached a youth rehabilitation order where there have been three breaches demonstrating a lack of willingness to comply with the order.

D. CUSTODIAL SENTENCES

11.1 There is a statutory presumption that a person aged under 18 will be dealt with summarily, usually in a youth court; in such circumstances, the maximum custodial sentence will be a detention and training order of no more than 24 months. Such an order may be made only for the periods prescribed – 4, 6, 8, 10, 12, 18 or 24 months.⁵⁴

11.2 The custodial sentences available in the Crown Court are:

- detention and training order of up to 24 months;
- long term detention - in relation to a young person convicted⁵⁵ in the Crown Court, under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000;
- extended sentence of detention or detention for public protection - where a young person is sent for trial or committed for sentence to the Crown Court to be dealt with under the dangerous offender provisions. In each case, the minimum period to be spent in custody under the sentence must be two years.
- detention for life – for offences of murder

11.3 A detention and training order may not be imposed on an offender aged 10 or 11 years at the time of conviction; an order may be imposed in relation to an offender aged between 12 and 14 at the time of conviction only if the offender is a “persistent offender” (see paragraph 6 above).⁵⁶ However, the ‘persistent offender’ criterion does not have to be met before the Crown Court imposes long term detention or detention for life in relation to offenders who are under 15 years of age.

11.4 A pre-sentence report must be considered before a custodial sentence is imposed.

(i) Threshold and approach

11.5 Under both domestic law and international convention, a custodial sentence must be imposed only as a “measure of last resort”; statute provides that such a sentence may be imposed only where an offence is “so serious that neither a community sentence nor a fine alone can be justified”.⁵⁷

⁵⁴ although consecutive sentences may lead to different periods being imposed in total

⁵⁵ on the implementation of provisions contained in Criminal Justice Act 2003, sched.3, this sentence is likely to be able to be imposed following conviction in a youth court also subsequent to an indication to plead guilty

⁵⁶ Powers of Criminal Courts (Sentencing) Act 2000, s.100(2).

⁵⁷ Criminal Justice Act 2003, s.152(2)

11.6 For a first time offender who has pleaded guilty to an imprisonable offence, in most circumstances a referral order will be the most appropriate sentence.

11.7 Since the minimum length of a custodial sentence in the youth court is 4 months (significantly in excess of the minimum available in relation to an adult offender) and since the term of a custodial sentence must be the shortest commensurate with the seriousness of the offence, it is inevitable that the custody threshold is higher in the case of a young person than in the case of an adult - any case that warrants a detention and training order of less than four months must result in a non-custodial sentence.

11.8 In relation to a person under the age of 18, in determining whether an offence has crossed the custody threshold a court will need to consider whether the offence has resulted (or could reasonably have resulted) in serious harm. In determining whether a custodial sentence is unavoidable, generally, a court will need to take account both of the seriousness of the offence (particularly the extent to which it caused (or was likely to cause) serious harm) and of the risk of serious harm in the future. A custodial sentence is most likely to be unavoidable where it is necessary to protect the public from serious harm.

11.9 In addition, a court must take account of:

- i) the requirement to have regard to the principal aim of the youth justice system;⁵⁸
- ii) the requirement to have regard to the welfare of the offender and the evidence that the risks associated with young offenders in a custodial setting are high.⁵⁹

11.10 Even where the threshold is crossed, a court is not required to impose a custodial sentence.

11.11 In determining whether an offence has crossed the custody threshold,

Before deciding to impose a custodial sentence on a young offender, the court must ensure that all the statutory tests are satisfied - namely

(i) that the offender cannot properly be dealt with by a fine alone or by a youth rehabilitation order;

(ii) that a youth rehabilitation order with intensive supervision and surveillance or with fostering cannot be justified; and

(iii) that custody is the last resort

and in doing so should take account of the circumstances, age and maturity of the young offender.

⁵⁸ the reduction of offending (including re-offending); see para. 2.6 above

⁵⁹ see part B above

11.12 When a custodial sentence is imposed, a court must state its reasons for being satisfied that the offence(s) is (are) so serious that no other sanction is appropriate and, in particular, why a youth rehabilitation order with intensive supervision and surveillance or with fostering cannot be justified.⁶⁰ This justification will need to be based on the principles and purposes of sentencing set out in the statutory framework.

Where the offence(s) has crossed the custody threshold, the statutory tests are likely to be satisfied only where a custodial sentence will be more effective in preventing offending and in achieving the other specified purposes. The obligation to have regard to the welfare of the offender will require a court to take account of a wide range of issues including those relating to mental health, capability and maturity.

(ii) Length of sentence

11.13 A court imposing a custodial sentence is required to set the shortest term commensurate with the seriousness of the offence(s).⁶¹ Offence specific guidelines do not generally provide starting points or ranges for offenders aged under 18 because of the wide range of issues that are likely to arise and the marked differences in the sentencing framework depending on the age of the offender. Where they are provided, they are for offenders aged 17 with a provision that, for younger offenders, a court should consider whether a lower starting point is justified in recognition of the offender's age and maturity.

11.14 Any approach needs to take account of the general sentencing rules that apply where there is more than one offence or more than one defendant. Where the offence has been committed by offender(s) aged 18 or over and by offender(s) aged under 18, the court will need to consider the role of each offender and the number of offenders involved.

11.15 Where the primary offender is under the age of 18, a court is likely to determine sentence for that offender first giving proper weight to the offender's age and maturity; that will provide a framework within which sentence for the offender(s) over 18 can be determined. Where the primary offender is over 18, a court is likely to determine sentence for that offender first; that will provide a framework within which sentence for the offender(s) under 18 can be determined giving proper weight to age and maturity.

11.16 Where an offence crosses the custodial threshold **and** the court determines that a custodial sentence is unavoidable:

- **where the offender is aged 15, 16 or 17, the court will need to consider the maturity of the offender as well as chronological age. It may be appropriate, depending on maturity, to consider a starting point from half to three quarters of that which would have been identified for an adult offender.**

⁶⁰ Criminal Justice Act 2003, s.174(4B) as inserted by Criminal Justice and Immigration Act 2008, sched.4, para.80(3)

⁶¹ Criminal Justice Act 2003, s.153(2)

It will be particularly important to consider maturity when the court has to sentence more than one offender. When the offenders are of different ages, including when one or more is over 18, the court will also need to have proper regard to parity between their sentences.

The closer an offender was to age 18 when the offence was committed and the greater the maturity of the offender or the sophistication of the offence, the closer the starting point is likely to be to that appropriate for an adult. Some offenders will be extremely mature, more so than some offenders who are over 18, whilst others will be significantly less mature.

For younger offenders, greater flexibility will be required to reflect the potentially wide range of culpability.

Where an offence shows considerable planning or sophistication, a court may need to adjust the approach upwards.

Where the offender is particularly immature, the court may need to adjust the approach downwards.

- **where the young person is aged 14 or less**, sentence should normally be imposed in a youth court (except in cases of homicide or where the young person comes within the “dangerous offender” criteria); the length of a custodial sentence will normally be shorter than for an offender aged 15-17 convicted of the same offence.
- **an offender aged 14 years or less** should be sentenced to long term detention⁶² only where that is necessary for the protection of the public either because of the risk of serious harm from future offending or because of the persistence of offending behaviour.

11.17 In determining the term of a detention and training order, the court must take account of any period for which the offender has been remanded in custody or on bail subject to a qualifying curfew condition and electronic monitoring.⁶³ As the available terms are specified, the proper approach in taking a remand period into account is to reduce, if possible, the sentence otherwise appropriate to reflect that period. Where a short custodial sentence was being considered, the court might conclude that a non-custodial sentence was appropriate.

11.18 On the implementation of the relevant parts of schedule 3 to the Criminal Justice Act 2003, a “plea before venue” procedure will be introduced for offenders under the age of 18 and will include a general power to commit for sentence where a court accepts jurisdiction following indication of a guilty plea. As with adult offenders, where a young person could have been dealt with in the Crown Court but the youth court has retained jurisdiction, where appropriate the maximum period of 24 months may be imposed following a guilty plea at the first reasonable opportunity where that plea was a factor in retaining a case for sentence in the youth court.

⁶² Powers of Criminal Courts (Sentencing) Act 2000, s.91

⁶³ Powers of Criminal Courts (Sentencing) Act 2000, s.101(8), (9); for these purposes, “remanded in custody” includes periods held in police detention and certain remands or committals to local authority accommodation: *ibid.* s.101(11)

TRIAL AND SENTENCING OF CASES IN THE CROWN COURT

12.1 There is a clear principle (established both in statute and in domestic and European case law) that cases involving young offenders should be tried and sentenced in the youth court wherever possible. This section summarises the relevant statutory provisions and case law.⁶⁴

12.2 It has long been recognised that the Crown Court should be reserved for the most serious cases, noting the greater formality of the proceedings and the increased number of people likely to be present.⁶⁵ These factors present additional obstacles in ensuring that proceedings in the Crown Court involving young offenders are conducted in accordance with international obligations.⁶⁶

12.3 Accordingly, it is rare for a young offender to be tried or sentenced in the Crown Court and for a sentence beyond the powers of the youth court to be imposed, except where that sentence is very substantially beyond those powers.

12.4 A youth will appear in the Crown Court for trial and sentence only:

- (i) when charged with “homicide”;
- (ii) when subject to a minimum statutory sentence;
- (iii) when charged with a “grave crime” and a youth court has determined that, if convicted, a sentence beyond its powers should be available; or
- (iv) when charged together with an adult offender who has been sent to the Crown Court and it has been determined that the cases should be kept together.

12.5 Where a sentence under the “dangerous offender” provisions is likely to be needed the youth may be committed for trial or for sentence.

(i) Homicide

12.6 An exception to the presumption that a person aged under 18 should be tried summarily arises where the young person is charged with an offence of “homicide”. For a case falling within this description, there is no discretion and it must be sent to the Crown Court for trial. The meaning of “homicide” is not defined in statute.

(ii) Statutory minimum sentences

12.7 A further exception to the presumption in favour of summary trial arises where a young person is charged with an offence which has a statutory minimum custodial sentence and the criteria for that sentence would be likely to be satisfied if the young person were convicted.⁶⁷ A sentence of long term detention⁶⁸ may be imposed following committal where these mandatory sentence provisions apply; before there can be a departure from the minimum

⁶⁴ see in particular *R (H,A, and O) v Southampton Youth Court* [2004] EWHC 2912

⁶⁵ *ibid.*, [33]

⁶⁶ see, for example, *S.C. v United Kingdom* (2005) 40 E.H.R.R. 10

⁶⁷ Magistrates' Courts Act 1980, s.24

⁶⁸ imposed under Powers of Criminal Courts (Sentencing) Act 2000, s.91

sentence prescribed, a court must find that there are “exceptional circumstances”.

(iii) “Grave crimes”

12.8 A further exception to the statutory presumption in favour of summary trial arises where a young person is charged with a “grave crime” and a youth court has determined that, if convicted, a sentence beyond its powers should be available. In such circumstances, a young person may be sentenced by the Crown Court to long term detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. At present, such a sentence may be imposed only by the Crown Court and only where the offender was **convicted** in the Crown Court, and that court considers that neither a community order nor a detention and training order is suitable.

12.9 An offence comes within section 91 where:

- it is punishable with 14 years imprisonment or more for an adult (but is not a sentence fixed by law), or
- is an offence contrary to sections 3, 13, 25 or 26 of the Sexual Offences Act 2003,⁶⁹ or
- is one of a number of specified offences in relation to firearms, ammunition and weapons which are subject to a minimum term but in respect of which a court has found exceptional circumstances justifying a lesser sentence.

When this sentence is imposed, it will be for a longer period than that available to a youth court.

12.10 This general power should be used rarely since:

- i) it is the general policy of Parliament that those under 18 should be tried in the youth court wherever possible;
- ii) trial in the Crown Court under this provision should be reserved for the most serious cases, recognising the greater formality of the proceedings and the greatly increased number of people involved;
- iii) offenders aged under 15 will rarely attract a period of detention under this provision and those under 12 even more rarely.⁷⁰

12.11 Accordingly,

i) a young person aged 10 or 11 should be committed to the Crown Court under this provision only where charged with an offence of such exceptional gravity that, despite the normal prohibition on a custodial sentence for a person of that age, a sentence exceeding two years is a realistic possibility;⁷¹

⁶⁹ sexual assault, child sex offences committed by a child or young person, sexual activity with a child family member, inciting a child family member to engage in sexual activity

⁷⁰ see footnote 64; those who meet the criteria for “dangerous offenders” will be dealt with under separate provisions: see below

⁷¹ see *R(D) v Manchester City Youth Court* [2002] 1 Cr.App.R.(S) 373

ii) for a young person aged 12-17 (for which a detention and training order could be imposed), a sentence under these provisions should generally be imposed only where the shortest term commensurate with the seriousness of the offence(s) is substantially beyond the 2 year maximum for a detention and training order.

(iv) Dangerous offenders

12.12 There are rigorous statutory tests which must be satisfied before a court may conclude that a youth is a “dangerous offender” and requires sentence under the dangerous offender provisions in the Criminal Justice Act 2003 (as amended).⁷² Such a sentence may be imposed only where an equivalent determinate sentence of at least 4 years would have been imposed. Criteria relating to future offending and the risk of serious harm must be assessed in the light of the maturity of the offender, the possibility of change in a much shorter time than would apply for an adult and the wider circumstances of the young person.

12.13 At present, the provisions by which a potentially “dangerous” young offender reaches the Crown Court are overlapping to some extent as a result of the only partial implementation of the provisions of the Criminal Justice Act 2003, which introduce a new section 51A to the Crime and Disorder Act 1998. This new section requires a young offender to be sent for trial where it appears that the criteria for imposition of a sentence under the dangerous offender provisions will be met on conviction. However, the power to commit for sentence following conviction in a youth court or magistrates’ court is preserved.⁷³

12.14 The nature of the offence is likely to be very significant in determining both whether the offender meets the risk and harm criteria and, even if so, whether a sentence under the provisions is necessary (given that there is now wide discretion).

Since a young offender should normally be dealt with in a youth court, where a young person charged with a specified offence would not otherwise be committed or sent to the Crown Court for trial, generally it is preferable for the decision whether to commit under these provisions to be made after conviction.⁷⁴

(v) Jointly charged with an adult

12.15 A further exception to the presumption in favour of summary trial arises where a young person is charged jointly with a person aged 18 or over; if the court considers it necessary to commit them both for trial it will have the power to commit the young person to the Crown Court for trial.⁷⁵

⁷² see the review of statutory provisions and case law authority in *Dangerous Offenders: A Guide for Sentencers and Practitioners* at p.18 www.sentencing-guidelines.gov.uk

⁷³ Powers of Criminal Courts (Sentencing) Act 2000, s.3C

⁷⁴ see, for example, the statement that there is a strong presumption against sending young offenders to the Crown Court unless clearly required: *R(W) v Southampton Youth Court* [2002] EWHC 1640 per Lord Woolf CJ

⁷⁵ the procedures around the transfer to the Crown Court of a young person charged with an offence will change on the implementation of the relevant provisions in the Criminal Justice Act 2003, sched.3

12.16 Any presumption in favour of sending a youth to the Crown Court to be tried jointly with an adult must be balanced with the general presumption that young offenders should be dealt with in a youth court.

12.17 When deciding whether to separate the youth and adult defendants, a court must consider:

- the young age of the offender, particularly where the age gap between the adult and youth is substantial,
- the immaturity and intellect of the youth,
- the relative culpability of the youth compared with the adult and whether or not the role played by the youth was minor, and
- any lack of previous convictions on the part of the youth compared with the adult offender.

12.18 A very significant factor will be whether the trial of the adult and youth could be severed without inconvenience to witnesses or injustice to the case as a whole, including whether there are benefits in the same tribunal sentencing all offenders. In most circumstances, a single trial of all issues is likely to be most in the interests of justice.

(vi) Remittal from the Crown Court

12.19 Where a young person is convicted before the Crown Court of an offence other than homicide, there is an obligation to remit the young person to a youth court for sentence unless that is “undesirable”.⁷⁶ In considering whether remittal is “undesirable”, a court should balance the need for expertise in the sentencing of young offenders with the benefits of sentence being imposed by the court which had determined guilt.

12.20 Particular attention should be given to the presumption where a young person appears before the Crown Court only because he or she is jointly charged with an adult offender. A referral order is not available in the Crown Court for a first-time offender and such orders may now be made following a second conviction in certain circumstances.

⁷⁶ Powers of Criminal Courts (Sentencing) Act 2000, s.8(2)

Equality, human rights and areas of potential discrimination

1. These paragraphs summarise information gathered by the Sentencing Advisory Panel concerning the incidence and effect of issues relevant to equality and discrimination and the obligations regarding human rights. It is provided to assist those involved in the sentencing of young offenders. Fuller information is available in specialist documents.

General

2. A common thread running through many of the responses to the consultation undertaken by the Sentencing Advisory Panel was the high incidence amongst those coming before the court of a range of issues relating, in a broad sense, to mental health, learning disabilities and learning difficulties, physical disability and experiences of loss or abuse. Concerns were expressed about disadvantages experienced by “looked after” children and by those from communities poorly understood by the public at large.
3. Additionally, research has consistently identified a range of factors that are regularly present in the background of juveniles who commit offences. These tend to include low family income, poor housing, poor employment records, low educational attainment, early experience of violence or abuse (often accompanied by harsh and erratic discipline within the home) and the misuse of drugs.⁷⁷ Whilst it is clear that these factors do not cause delinquency (since many who have experienced them do not commit crime), nonetheless there is a strong association and any response to criminal activity amongst young people will need to recognise the presence of such factors if it is to be effective.
4. There is also some evidence that those young people who are “looked after” are more at risk of being drawn into the criminal justice system than other young people acting in similar ways⁷⁸ not least because of the risks arising from mixing with offending peers, difficulties in management of challenging behaviour (and the possibility that a strict reaction to the “offender” will be seen in part to have a deterrent effect on others) and the lack of stability in care placements. It is estimated that 50% of young people in custody have lived in care or have had previous involvement with Social Services compared with 3% in the general population.⁷⁹

Identification of issues

5. Responses to the Panel’s consultation recorded the importance not only of good quality pre-sentence reports (PSRs) and specialist reports from mental health practitioners, children’s services and addictions workers but also of a court having a good understanding of “normal” adolescent behaviour and of the influences of the changes that take place during adolescence, recognising that they can lead to experimentation and to low self esteem.

⁷⁷ See, for example, the range of approaches in the *Youth Crime Action Plan 2008* Chapter 5: www.homeoffice.gov.uk

⁷⁸ See, for example, *Care experience and criminalisation* The Adolescent and Childcare Trust, September 2008 www.tactcare.org.uk

⁷⁹ *Counting the cost, reducing child imprisonment* Nacro, 2003

6. Concerns were expressed about the significant under-reporting not only of mental health issues but also of a wide range of learning difficulties, including learning disabilities, amongst young people in custody and subject to community orders. One respondent particularly urged the Panel to make explicit “the need to secure professional screening and assessment to inform court decision making” and that this should occur at the earliest possible opportunity in the “youth justice pathway”.
7. Even where issues have not been identified by other agencies before a case comes before the court, the high level of reported incidence of these issues suggests that a court **should be on notice** that young offenders are more likely than not to present with at least one functional problem. Recognising and understanding these problems is likely to be key to understanding the causes of offending and, therefore, to the identification of a sanction that has a realistic chance of meeting the aim of preventing re-offending.
8. The Panel was also informed that speech and language difficulties are common; where they exist, they are likely to affect the ability of the young person to communicate, to understand court processes and sanctions and to complete requirements within community orders. As a matter of general principle, courts **need to be alert** to the need to ensure that the young person is able to communicate effectively within the sentencing process and understands what a court order requires; where a court is making an order aiming to reduce re-offending, this awareness will enable a court to gather sufficient information to enable a proper decision to be made and for the sanction to be appropriate in light of the limited abilities of the young offender. In particular, where a custodial sentence is likely to be imposed, a court should ensure that a full assessment, including a psychiatric report where appropriate, has been undertaken.

Incidence and effect

9. It is estimated that 83% of young people in custody have been excluded from school (compared with 6% of young people in the general population),⁸⁰ 86% have engaged in substance misuse (compared with 21%),⁸¹ 38% have been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) (compared with 6%),⁸² and 31% have a recognised mental disorder (compared with 10%).⁸³
10. In addition, it has been reported that one in five young offenders have an IQ of less than 70⁸⁴ and that this is likely to make it more difficult to complete interventions within a sentence.
11. Some young people have general communication difficulties that may affect their behaviour in court, sometimes suggesting arrogance or indifference, and which can also impact on their ability to understand what is required of them.

⁸⁰ *Juveniles in custody* HM Inspectorate of Prisons, 2004

⁸¹ *Substance misuse and the juvenile secure estate* YJB, 2004

⁸² *Youth Crime Action Plan* Home Office, 2008

⁸³ *Mental health needs and effectiveness of provision for young offenders in custody and in the community* YJB, 2005

⁸⁴ Chitsabesan et al., 2006

12. Although responses to the Panel's consultation generally noted that there is little evidence suggesting inappropriate discrimination in the sentencing of young people, one respondent pointed out that young people may believe that they will be discriminated against; this might be for any of a wide range of reasons including ethnicity and sexuality. A court will need to be alert to the fact that such a belief may result in the young person responding to the court in ways that are not helpful.
13. More specifically, one respondent drew attention to the high levels of expectation of discrimination on the part of lesbian, gay and trans-sexual people who come into contact with the criminal justice system; courts should be aware that it is likely to colour the young person's response.
14. It is also recognised that there is a greater risk of self harm than exists in relation to an adult.⁸⁵ In 2008, 9% of all juvenile offenders were assessed as being at risk of self harm or of suicide; the proportion was 15% for female juvenile offenders. This is of particular concern when vulnerable young people are held in custody.
15. Additional issues arise about the impact of custody on both the offender and her child where an offender is the primary carer of a small child or is pregnant.⁸⁶
16. Some responses pointed out that, at times, certain sentencing options can exacerbate fraught family relationships or even promote abuse (curfew orders); it was important both that good information was available and that courts are fully aware of the issue to ensure that restrictions are well informed before they are imposed. This may be particularly pertinent in relation to a parenting order or when imposing a requirement within a youth rehabilitation order that will result in a young person spending prolonged periods within a family unit.

Further information

17. Whilst the majority of responses indicated that no further guidance was needed from the Sentencing Guidelines Council on these issues (and it was clear that many considered they could rely on the PSR for relevant information), there were some requests for accessible and immediately available material. The topics on which this was sought included Attention Deficit Hyperactivity Disorder (ADHD), Asperger's and other diagnoses on the autism spectrum.
18. One response drew attention to guides being prepared by the British Dyslexia Association and the British Institute of Learning Disabilities and another believed that work was being done within HMCS to prepare a guide for the judiciary on young people and learning difficulties.

⁸⁵ Self harm by young people in custody is reported as 2,635 incidents in the year to the end of August 2008. This will include incidents where no treatment was required as well as more serious incidents. The number of young people self harming will be smaller than the number of incidents. *Data supplied by the Youth Justice Board from administrative systems through a self reporting system from secure establishments*

⁸⁶ *The Corston Report – a review of women with particular vulnerabilities in the Criminal Justice System*, March 2007, Home Office, www.homeoffice.gov.uk

19. It is widely recognised that it is not always possible for issues related to mental health or other disabilities, including poor communication skills, to be identified at an early stage in the proceedings leading to sentence. As a result, the court needs to be constantly mindful of the nature of the issues that might arise, the possibility that they may have avoided identification prior to appearance before the court and the fact that they may affect the ability of a young person to understand or complete requirements imposed by a court.

Conclusion

20. A court will wish to aim to ensure that any young person is able to take a proper part in the court proceedings, is able to understand what the court requires as a result of the sentence imposed and that that sentence properly takes account of any likely difficulties in compliance.
21. Similarly, a court needs to be alert to the possibility that an adult accompanying the offender may have similar needs to those identified above.