



Standing Committee for Youth Justice

## Standing Committee for Youth Justice

### Response to the Sentencing White Paper Reducing the number of children remanded to custody

#### Introduction

The Standing Committee for Youth Justice (SCYJ) is an alliance of over 60 not-for-profit organisations working to improve the youth justice system in England and Wales. SCYJ pools its members' expertise to advocate for child-focused responses that tackle underlying causes of offending, reduce criminalisation and imprisonment, and promote positive long-term outcomes. Such a system would serve the best interests of children and the wider community. Our [members](#) range from large national charities to grassroots service providers.

We welcome the overall intention of Government, set out in the 2020 [Sentencing White Paper](#), to ensure remand to Youth Detention Accommodation (YDA) is used as a last resort for children. We have long been concerned about the use of custody and custodial remands for children - see our 2020 report [Ensuring custody is the last resort for children in England and Wales](#) for more information. We are particularly concerned around the overuse of remand for children given current court backlogs<sup>1</sup> and conditions in custody<sup>2</sup>, and urge the government to take swift and aspirational action.

#### Section 98 and 99, Legal Aid, Sentencing and Punishment of Offenders Act 2012

We support proposals in the White Paper to strengthen the Sentencing Condition and History Conditions of section 98 and 99, Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, we do not believe the proposals go far enough to achieve the Government's stated aim of ensuring YDA remands for children are not used unnecessarily. We question the rationale of focussing only on the Sentencing and History conditions, and we do not believe the proposals are concrete enough to make a significant difference.

For the use of YDA remands for children to be a genuine last resort, as the Government aspires to, the core principle underpinning court decisions must be whether it is necessary for public protection. Under the proposals for reform of the current LASPO conditions, there are many cases in which sending an unsentenced child to custody would be neither necessary for public protection, nor proportionate particularly given the harms of custody.<sup>3</sup> A child may have committed a serious offence, and have a high likelihood of receiving a custodial sentence, but unless they are actually a risk to the public while awaiting trial, and there is no way of managing that risk other than a YDA, we question why remand to YDA would be justified.

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<sup>1</sup> See for example: <https://www.crestadvisory.com/post/a-perfect-storm-why-the-criminal-justice-system-is-facing-an-existential-crisis>

<sup>2</sup> See for example: <https://howardleague.org/wp-content/uploads/2020/05/Children-in-prison-during-covid-19.pdf>

<sup>3</sup> <http://scyj.org.uk/wp-content/uploads/2020/06/Ensuring-custody-is-the-last-resort-FINAL.pdf>



Where there is a risk of public protection, the other core consideration in decisions to remand children to custody must be the child's welfare. The current Government proposals would allow for the remand of children to YDA where the child's behaviour is a result of unmet welfare needs, and where clearly the primary response should be welfare-based, rather than punitive. As such, remand to LAA or other, community-based interventions rather than remand to YDA would be the necessary and proportionate response.

We therefore believe the Government's stated aim could be far better achieved by, alongside the current proposals for reform, focussing primarily on the Necessity Condition, as well as by tightening the Offence Condition.

We also believe the current conditions are overly complicated, with some redundancies and inconsistencies. This is a welcome opportunity for streamlining, and reprioritising welfare and risk of serious harm to the public, so that the spirit of LASPO may be better reflected in practice. Particularly given the Government's White Paper proposal to add the strengthened Sentencing Condition to section 98 LASPO, as well as where it currently sits in section 99, we do not believe the LASPO legislation need be framed as it currently is, split into two sets of conditions, which we believe needlessly makes the assessment more complicated. We have therefore proposed adjusting and merging the two sets of conditions (s98 and 99).

We set out our proposals for reform and our rationale below.

## **SCYJ rationale for our proposals for reform of Section 98 and 99 LASPO**

### **Necessity Condition**

In our view the Necessity Condition is the most important criteria and holds the most potential for reducing YDA remand to a last resort. The current Necessity Condition - that the court is satisfied remand to YDA is necessary to (a) protect the public from death or serious personal injury *OR* (b) to prevent the commission of an imprisonable offence – is far too broad. The latter part of the condition sets such a low threshold for meeting the Condition as to render the first threshold somewhat redundant.

We therefore propose part (b) of the Necessity Condition be removed, such that to remand a child to custody, the overriding factor is that court must be satisfied that a remand to YDA would be necessary to protect the public from death or serious personal injury.

The Necessity Condition should be expanded to provide the courts a solid framework for making this public protection assessment. The court must be satisfied that there is a significant risk that the child will cause serious harm through the commission of a further offence while awaiting trial for the alleged offence for which they are subject to the remand hearing. However, even where there is an assessed risk of serious harm, unless the court believes this risk cannot be mitigated in the community, remanding the child to YDA rather than LAA is not justified.

This risk of serious harm and exhaustion of all options for managing the risk is, for us, at the heart of ensuring remand to YDA is the last resort.<sup>4</sup> We would be happy to discuss further what this assessment of risk should cover.

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<sup>4</sup> For more information and rationale please see <http://scyj.org.uk/wp-content/uploads/2020/06/Ensuring-custody-is-the-last-resort-FINAL.pdf>



## Offence Condition

In keeping with our belief that remand to YDA will only be a genuine last resort if the decisions are based on risk of serious harm, we propose strengthening the Offence Condition such that remand to YDA is only available if a child is alleged to have committed a serious offence, such that they may present a danger to the public. The current Offence Condition - that the child is charged with (a) a violent or sexual offence OR (b) an offence punishable in the case of an adult with imprisonment of 14 years or more – is too broad and is not in keeping with a distinct and child-first approach. The first condition is so broad as to generally undermine the threshold set by the latter.

We propose streamlining and narrowing the Condition by removing (a), which even if amended to ‘serious’ instances of these crimes, for example, would remain broad and subjective, and updating (b) more in line with a child-centred system, to be offences for which a life sentence is available as a sentencing option, as proposed in our Ensuring Custody is a Last Report paper.<sup>5</sup>

### **Offences punishable with a life sentence for children**

Chapter 5 of the Criminal Justice Act 2003 sets out specifications of “*dangerous offenders*”. This includes that the person:

- Has carried out a “specified offence”: a violent, sexual or terrorist offence listed in Schedule 15 of the Act.
- Has carried out a “serious offence”: a Schedule 15 offence that is punishable in the case of an adult by life imprisonment or imprisonment for a determinate period of ten years or more.
- Is “dangerous”: the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission of further specified offences.

Section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 sets out offences referred to as *grave crimes*, which are offences punishable in the case of an adult with imprisonment for a term of 14 years or more, and other serious violent and sexual offences with long mandatory minimum sentences.

Life sentences are available to the court (under section 226, Criminal Justice Act 2003) where the child is found to be “dangerous” (this is met through our proposed Necessity Condition), and has committed:

- a “specified” “serious” offence (as per the Criminal Justice Act 2003)  
OR
- an offence for which the child could be liable to a life sentence under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000.

Adopting this set of offences as the reformed Offence Condition would ensure that only children deemed by current legislation to be “*dangerous offenders*” and to have committed “*serious*”, “*grave*” crimes are remanded to custody. This, alongside our proposed Necessity Condition, would ensure custodial remand is only used as a last resort, for public protection.

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<sup>5</sup> An alternative option offence condition could be a “grave” crime (an offence punishable in the case of an adult with imprisonment for a term of 14 years or more, and some other violent and sexual offences specified in Section 91 Powers of Criminal Courts (Sentencing) Act 2000



## **Sentencing Condition**

We welcome the Government's intention to strengthen the Sentencing Condition test that there is a 'real prospect' a child will be sentenced to custody, such that a custodial sentence must be 'highly likely'. We welcome the proposal that the Sentencing Condition must be met in all YDA remand decisions, rather than just in the section 99 conditions as it is currently.

However, we do not think amending this subjective test by itself will in practice do enough to significantly reduce custodial remand numbers, particularly if the test remains qualitative as seems to be suggested. As set out above, we believe the primary focus must be on strengthening the Necessity and Offence Conditions. Even if a child is highly likely to receive a custodial sentence for their alleged offence, a custodial remand may be unnecessary and disproportionate unless the reformed Sentencing Condition is accompanied by reformed Necessity and Offence Conditions.

The majority of children receive short sentences and with YDA remand lengths increasing, children may end up remanded to custody for longer than their eventual custodial sentence. Conditions for children in custody on remand are different than for sentenced children, stuck in limbo without access to the therapeutic interventions and rehabilitative focus that may be available for sentenced children, and with the additional burden that the uncertainty of their future places on their mental health.

We have concerns that placing too much focus on the Sentencing Condition, particularly without it being set at a very high bar, may create a sort of self-fulfilling prophecy: if the court at a remand hearing has justified custody on the basis that they believe the child will eventually be sentenced to custody anyway, this decision - often based on incomplete evidence and without proper assessment of the child and particular circumstances of the offence - will in effect need to be overruled by the sentencing court, who may see the original decision as an indication a custodial sentence is necessary. The focus must therefore be on serious harm, manageability of risk, and welfare.

We welcome the addition that courts must provide justification for their assessment under the Sentencing Condition, but believe this justification should be broader and be provided for the other criteria, as set out below.

## **History Conditions**

While we welcome the Government intention to tighten the History Conditions to ensure only a recent and significant history of breach or offending while on bail or remand can result in a YDA remand, we do not believe the History Conditions, even reformed, are justifiable criteria for sending a child to custody.

If a child who has been refused bail has a recent history of going missing or getting into trouble while on bail or remand, this is not necessarily pertinent to the question of risk of serious harm to the public; it is a welfare issue that is best responded to by addressing and managing the behaviour in the community. Such a chaotic life for a child can be an indication of an unsafe environment and possible exploitation. As set out above, remanding a child to custody is inappropriate and unnecessary unless there is a significant, unmanageable risk of serious harm to the public. Any child presenting this risk could be remanded to YDA under the other Conditions, and any child with a recent history of absconding or persistent concerning behaviour that does not meet this serious harm and risk threshold should be remanded to LAA rather than YDA.



Our preference is therefore that both the History Conditions be removed, particularly given they are unclear and needlessly complicate the legislation. The issues addressed in the History Conditions should instead be considerations for the court regarding whether the Necessity Condition is met: whether there is a risk of serious harm to the public while the child is remanded in the community, and the manageability of this risk.

If the History Conditions are not removed, in considering whether a child's 'recent' behaviour is relevant to a remand decision, our preference is that 'recent' should be confined to within the last six weeks, but at most three months. If we are to take a child-centred approach, we must consider how children experience time, and recognise the well-established principle that children change and develop in a shorter time than adults (see for example, *R v Lang and others [2005] EWCA Crim 2864*). Children's school holidays are around six weeks: these holidays feel a significant period for children, and so much can change for children within this timeframe. We are also clear that if any recent history is used to justify a remand decision, it must exclude non-proven matters, such as charges that have not resulted in a conviction.

### **Court Justification Condition**

As stated above, we welcome the addition of a requirement under the Sentencing Condition that the court record their rationale for deciding there is a high likelihood of the child receiving a custodial sentence. However, we believe this should be expanded, particularly to the Necessity Condition. This is particularly important given the recent CPS inspection report that shows decisions around remand are rarely backed up by a recorded argument or evidence, particularly for children, and youth policies are often not properly applied.<sup>6</sup> The court should be required to set out how the case meets each of the Conditions, why they decided a custodial remand was necessary: why they believe the child presents a significant risk of serious harm to others, and why they believe no option other than a custodial remand is suitable to manage that risk. This should include confirmation from the Court that all possible alternatives have been explored and proper inquiry has been made with the relevant director of children's services as to the provision of accommodation and support under section 20 of the Children Act 1989.

Furthermore, given that almost a third of children on YDA remand go on to be acquitted, and given our legal members report the initial 'evidence' considered in remand hearings is often extremely weak, we have considered proposing an Evidence Condition, for example requiring that the admissible evidence is strong, or that there are evidential statements available rather than only an Initial Details of the Prosecution Case (IDPC). However, we have concerns around the practicability of such a Condition, and the potential for creating another 'self-fulfilling prophecy', forcing the remand court to take a view on whether or not a child is guilty before their full hearing. Instead, we would like to encourage the courts to push the prosecution to improve available evidence at the initial stages by requiring that courts record what evidence it considered which formed the basis of their decision to remand a child to custody. This could simply be explicitly stated as part of the Government's proposed requirement for courts to justify their assessment that there is a high likelihood a child would receive a custodial sentence.

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<sup>6</sup> <https://www.justiceinspectorates.gov.uk/hmcp/inspections/charging-inspection-2020/>



## Court and Local Authority Duties Condition

To ensure remand to custody is a last resort and children are not unnecessarily subjected to the harms of custody, the courts should first be reminded of the presumption of remand to LAA once bail is refused.

The courts must also have their duty to promote children's welfare at the forefront of their minds. The reformed LASPO conditions for remand to YDA should explicitly set out the various duties on both courts and local authorities to protect children, that they must consider. The duties on courts and local authorities include:

- Section 44 of the Children and Young Persons Act 1933 sets out the duty of a court to have regard to the welfare of the child.
- Local authorities have a statutory duty to safeguard and promote the welfare of children, to make arrangements to improve the well-being of children, and to identify and support children with special educational needs or a disability (see for example Section 17, Children Act 1989; Part 2, Children Act 2004; and Part 3, Children and Families Act 2014).
- Local authorities have a statutory duty to prevent children suffering harm, neglect and abuse, set out in Schedule 2 of the Children Act 1989. In particular, for looked after children, paragraph 7 of Schedule 2 sets out the responsibility local authorities have to take reasonable steps to prevent children entering the criminal justice system and care system, and to avoid the need for children to be placed in secure accommodation.
- Local authorities have a duty under Section 20 of the Children Act 1989 to provide accommodation for children in need who do not have anywhere suitable to live, and for children whose welfare is likely to be seriously prejudiced if they do not accommodate them.
- Local authorities and others, including criminal justice agencies, have a duty under Section 10 and 11, Children Act 2004, to cooperate to promote the well-being and welfare of children and fulfil their safeguarding responsibilities.<sup>7</sup>
- The UNCRC and Human Rights Act set out obligations for the state to intervene to protect children from physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. Article 39 of the UNCRC sets out the state's duty to promote the recovery and reintegration of children who have been victims of such neglect, exploitation, or abuse.

Local authorities have a responsibility to have services in place that could prevent and respond to a child's offending behaviour. Children should never be remanded to custody as a result of failures by statutory bodies to fulfil their legal duties to protect children and provide such services. This LASPO Condition should therefore also set out that a child must never be remanded to custody due to a failure of the local authority to provide LAA or an adequate bail package.<sup>8</sup> Courts should also be empowered to make due inquiries of the Director of Children's Services, who have responsibilities to children in remand hearings as per sections 10 and 11 of the Children Act 2004, and set out in statutory guidance<sup>9</sup>, by making this a requirement.

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<sup>7</sup> See for more information on what this means in practice:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779401/Working\\_Together\\_to\\_Safeguard-Children.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779401/Working_Together_to_Safeguard-Children.pdf)

<sup>8</sup> In practice this may require that if any child is ever remanded to custody due to a lack of available LAA, these should be subject to strict time limits and regular review, and could require the DCS to attend in person the adjourned hearing.

<sup>9</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/271429/directors\\_of\\_child\\_services\\_-\\_stat\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271429/directors_of_child_services_-_stat_guidance.pdf)



## SCYJ proposal for reformed Section 98 and 99 LASPO

A child shall not be remanded to Youth Detention Accommodation unless ALL of these conditions are met:

- **Age condition:** the child must be at least 12 years old
- **Legal representation condition:** the child must have been legally represented, except if: representation was withdrawn, or refused because it appeared the child's financial resources meant they were not eligible, or the child refused or failed to apply
- **Offence condition:** The child is charged with an offence punishable with life imprisonment (section 226, Criminal Justice Act 2003)
- **Sentencing condition:** It appears to the court that it is highly likely that the child will be sentenced to a custodial sentence for the offence(s)
- **Necessity condition:** The court must be satisfied that a remand to YDA would be necessary to protect the public from death or serious personal injury, i.e.:
  - a) The court is satisfied that there is a significant risk of serious harm in the event of the commission by the child of further offences specified in the 'offence condition'
  - AND**
  - b) The court is satisfied that there is no mechanism for dealing with the risk specified in part (a) with a LAA remand, and as such no remand other than a YDA remand is adequate to address that risk.
- In decisions around remanding a child to YDA courts must:
  - Have consideration of the duties of the court and local authority to promote children's welfare and prevent harm, including statutory duties:
    - on local authorities to safeguard and promote the welfare of children, to make arrangements to improve the well-being of children, and to identify and support children with special educational needs or a disability (Section 17, Children Act 1989; Part 2, Children Act 2004; and Part 3, Children and Families Act 2014)
    - on local authorities to prevent children suffering harm, neglect and abuse (Schedule 2 of the Children Act 1989). In particular, for looked after children, to take reasonable steps to prevent children entering the criminal justice system and care system, and to avoid the need for children to be placed in secure accommodation (paragraph 7 of Schedule 2, Children Act 1989)
    - on local authorities, criminal justice agencies and others to cooperate to promote the welfare of children and fulfil their safeguarding responsibilities (section 11, Children Act 2004)
    - on courts to have regard to the welfare of the child (Section 44 of the Children and Young Persons Act 1933)
  - Make due inquiry of the Director of Children's Services
  - Never remand a child to YDA due to a failure by the local authority to provide LAA or an adequate bail package
- Where a decision to remand a child to YDA is made, courts must set out clearly how each of the Conditions are met, including:



- Providing a justification for their assessment that there is a high likelihood that the child would receive a custodial sentence, including setting out the admissible evidence considered.
- Providing cogent reason why remand to YDA is the only way of protecting the public: what the risks of serious harm presented by the child are, why the risks cannot be mitigated by remand to LAA, what bail package was offered and why this was not sufficient to prevent a remand.

## **Amendment to Section 91 LASPO**

We are concerned about widening applicability of remand to arrests, warrants or adjournments for a previously imposed order. However, we understand the issues currently arising for such children around the applicability of section 91 of LASPO, as set out by the Law Commission.<sup>10</sup> We are clear that a child should never be sentenced or remanded to custody as a result of a failure to comply with an Order or sentence imposed on them, rather than for a conviction or offence itself. In situations outlined by the Law Commission a child should only ever be remanded to LAA. If the LASPO conditions for remand to YDA are sufficiently strengthened as we have set out, amending section 91 LASPO as suggested would not cause concern.

## **Further considerations**

We welcome the Government's ambition to ensure YDA remand is a last resort for children. We believe tightening the conditions as we have proposed will significantly reduce unnecessary remands and hope our proposals will go some way to addressing racial disparity which is particularly concerning in remand decisions. We have considered the merits of including specific conditions such as that the court should be aware of relevant cultural, gender and ethnicity considerations, and we would welcome more information from the Government moving forward on what assessments they make as to the impact of their proposals on racial disproportionality in particular. Consideration must be given to minimising discretion and subjectivity in the wording of a reformed section 98 and 99, to reduce the possibility for racial discrimination.

We would like to refer to SCYJ member Transform Justice's report on remand for children for recommendations beyond LASPO that should be considered in improving practice around remand decisions.<sup>11</sup> There is a clear need for a programme of training and culture change to accompany reform of LASPO, to ensure courts and local authorities understand their duties and the spirit of the law. We also need to see central data collection around reasons for remand decisions, that can be disaggregated and analysed by age, ethnicity, gender and offence.

<sup>10</sup> <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/03/YOUTH-CP-FINAL-WITH-ORIGINS-1.pdf>

<sup>11</sup> [https://www.transformjustice.org.uk/wp-content/uploads/2018/12/TJ-December-2018-PRINT\\_V2-December.pdf](https://www.transformjustice.org.uk/wp-content/uploads/2018/12/TJ-December-2018-PRINT_V2-December.pdf)

