



‘A Smarter Approach to Sentencing’

White Paper

Response to the Ministry of Justice

November 2020

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.
2. On 16 September 2020, the Secretary of State for Justice brought before the House of Commons a White Paper titled 'A Smarter Approach to Sentencing' (the "White Paper"). While JUSTICE commends the aims of certain policy proposals, there nevertheless remain several points of concern which we would invite the Government to address through consultation.
3. By way of background, JUSTICE convened a working party in November 2019 to examine the causes of disproportionality in the Youth Justice System ("YJS") of England and Wales for black and minority ethnic ("BAME") children and young people.¹ It will make practical recommendations with a view to reducing that disproportionality. In addition, it will seek to ensure that children are not needlessly criminalised by improving the attitudes, processes and procedures in the YJS.
4. While the report is due to be published by the end of 2020, JUSTICE believes it can offer the Ministry of Justice, with the benefit of the experience of the working party, a number of interim recommendations on aspects of the White Paper.

Reforms to Remand and Bail in the Youth Justice System

5. JUSTICE considers remand to be a key moment in the journey of the child through the YJS. Children placed in remand may be damaged, both physically and psychologically, by the process. This is especially so given the current court backlog, meaning children can remain in custody for even longer than usual. This will place strains on their family relationships and impact their education. During the COVID-19 lockdown, many children

¹ For the Working Party's membership and scope, see - <https://justice.org.uk/our-work/criminal-justice-system/criminal-justice-system/current-work-criminal-justice/racial-disparity-in-youth-justice/>

have spent prolonged periods in their cells, sometimes for 22 hours or more a day, without access to education and family visits.² This could irreparably damage their mental health.

6. JUSTICE notes that the Ministry of Justice recognises this potential damage. In particular, the White Paper highlights that *“unnecessary exposure to custody on remand has detrimental impacts on children; it interrupts their access to education and removes them from their existing support network at home and in the community”*.³
7. While this is true for all children, BAME children appear to be disproportionately represented in the remand population. As the White Paper acknowledges, *“in 2018/19, children from a BAME background made up an average of 57% of the custodial remand population, compared to 38% in 2008/09 (33% were Black, 15% were Mixed Race, 9% were Asian and Other)”*.⁴
8. We believe that the remanding of children should be exceptional, given the stark consequences to their lives. Unfortunately, this does not appear to be the reality, with *“around two-thirds of remanded children”* not having received a custodial sentence between 2013/14 and 2018/19, indicating potential areas for improvement in courts’ decision making processes.⁵ The Government agrees, stating that *“the high proportion of seemingly unwarranted custodial remands suggest that [bail/remand] conditions are not prescriptive enough to ensure custody is truly the last resort”*.⁶
9. JUSTICE welcomes the White Paper’s sentiment that custody should not be *“used as a default for children”*, and that it should be a *“last resort”*.⁷ While this should already be the goal of any remand decision, it is clear that more can be done. We therefore support the Government in its aim to reduce the number of children remanded in custody, and welcome amendments to:

² *Separation of children in young offender institutions*, HM Inspectorate of Prisons, January 2020 - <https://www.justiceinspectores.gov.uk/hmiprison/wp-content/uploads/sites/4/2020/01/Separation-of-children-thematic-Web-2019.pdf>

³ White Paper, page 1.

⁴ White Paper, page 103.

⁵ White Paper, page 103.

⁶ White Paper, page 105.

⁷ White Paper, page 95.

- a. the real prospect of custody test, to raise the threshold when custodial remand is suitable and require courts to record their rationale;⁸ and
- b. the history conditions, so only recent and significant history of breach or offending while on bail or remand can result in a custodial remand.⁹

10. In this response, JUSTICE addresses a specific number of issues relevant to section 5 (*Youth Sentencing*) of the White Paper and sets out further measures which we believe can act to improve these underlying problems in the YJS.

Recommendations

Maximum amount of time on remand

11. JUSTICE notes the Ministry of Justice's recognition that "*there are too many children in custody awaiting sentence or trial*" and that "*where possible, children should be supervised in the community*".¹⁰
12. JUSTICE fully agrees with this assessment, and supports measures which recognise the vulnerable status of children and act to place children in a safe community setting where possible. Remand for children in youth detention accommodation ("YDA") should be exceptional, and proactive efforts must be taken to limit these instances.
13. To this end, JUSTICE recommends that the Government commit to introducing a maximum of 14 days during which children can be placed on custodial remand to YDA. Extensions beyond this period should be exceptional, and require certification by a Crown Court judge every 14 days thereafter, accompanied with written justification. We view this

⁸ White Paper, page 95 – while we understand that courts are already required to give reasons for their decision to remand a child pursuant to Criminal Procedure Rule 14.2(5), we have heard that more can be done to ensure consistency across the YJS; see also White Paper page 105:

"We also believe that requiring the courts to provide a justification for their assessment that there is a high likelihood that the child would receive a custodial sentence could make judges more accountable for their decision to remand a child to custody. There are examples throughout the criminal justice legislative framework, including in the Bail Act 1976, which provide reasons to be given to justify a certain decision."

⁹ White Paper, pages 95-96 – at present, bail may be refused for a single previous historic incident of absconding or offending while on bail or subject to custodial remand (see s.99 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"))

¹⁰ White Paper, page 81.

as a reasonable amount of time to allow the courts and local authorities to secure suitable alternative accommodation.

Pause and reflect in bail application decisions for children

14. Pursuant to the Bail Act 1976, a court may decline bail to a child on remand “*where the court is satisfied that it has not been practicable to obtain sufficient information*”.¹¹ We have heard that there are significant time pressures within the current processes, given the court must engage with multiple parties, with various responsibilities for the child in question for the preparation of a robust bail package – such as defence representatives, the youth offending team (“YOT”), and the police. While the court is required to be satisfied that sufficient time has been allowed to consider the information presented,¹² we understand that this can be challenging in practice.
15. This is clearly far from ideal, and we believe could be remedied with additional clear guidance, for example from the Youth Justice Board, that all agencies should be required to work together to produce an emergency bail package that will keep the child out of secure accommodation. If necessary, directors of children’s social care at the relevant local authority should be required to confirm what efforts have been made to achieve this before a child is remanded to custody. Where a child is remanded, a refined and bespoke bail package should be provided within the 14 days.
16. JUSTICE proposes that decisions regarding remand should be determined with the same seriousness and care as sentencing,¹³ supported by a strong breadth and quality of information, and potentially referred to district judges rather than lay magistrates. This

¹¹ Bail Act 1976, Schedule 1, Part 1, Section 5.

¹² Criminal Procedure Rule 14.2(1)(d).

¹³ See the Sentencing Council, ‘*Sentencing Children and Young People*’, (1 June 2017), section 1.2:

“While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focused on the child or young person, as opposed to offence focused. For a child or young person the sentence should focus on rehabilitation where possible. A court should also consider the effect the sentence is likely to have on the child or young person (both positive and negative) as well as any underlying factors contributing to the offending behaviour.”

would help achieve the Government's objective to make remanding in custody a last resort.

Encourage reasonable questioning of the provenance of police intelligence

17. At present, JUSTICE understands that police intelligence acts as a significant factor in the decision making process for granting bail. The quality of such evidence, therefore, is crucial, given its potentially significant impact in the decision to imprison children and young people.

18. JUSTICE considers that there should be a duty of candour evidenced by a requirement for a statement of truth, for example in a witness statement, which must accompany the police intelligence provided for a remand hearing.¹⁴ Given the importance placed on the police's assessment of suitability for bail, we consider that this requirement would act as a strong procedural safeguard to such evidence. This would increase the level of care and attention given to the relevance and accuracy of the information provided to the court. The court would then be able to make a more fully informed decision regarding bail.

19. We consider that such a certification could be modelled on the format required when the police make an application for a warrant under section 8 of the Police and Criminal Evidence Act 1984.¹⁵

Introduce a bail decision checklist

20. JUSTICE believes that the Government's aims can be further achieved by introducing a checklist for bail decisions that is tailored to children and young people. Such a checklist

¹⁴ See College of Policing advice to officers in respect of intelligence - "*Reasonable steps should be taken to check that the information is accurate, recent and not provided maliciously. The identity of an informant need not be disclosed, but the officer should be prepared to answer questions about the accuracy of previous information or intelligence they have provided, as well as any related matters*" - <https://www.app.college.police.uk/app-content/investigations/investigative-strategies/search-powers-and-obtaining-and-executing-search-warrants/#relevant-evidence-and-intelligence>

¹⁵ See question 8 on the 'Application for Search Warrant: Police and Criminal Evidence Act 1984, Schedule 1 – Second Set of Access Conditions' (April 2016), question 8:

"(8) Declaration. See Criminal Procedure Rules r.47.25(4), (5). *The Crown Court can punish for contempt of court a person who knowingly makes a false declaration to the court.*

To the best of my knowledge and belief:

(a) this application discloses all the information that is material to what the court must decide, including anything that might reasonably be considered capable of undermining any of the grounds of the application, and

could assist a court in verifying that all relevant bodies have fulfilled their duties with respect to the child in question, thereby aiding their assessment of the options available to them when making their decision.

21. The Working Party, for example, found one instance where a court felt that the only choice available to them was to place a child into custody. However, there were further options, only the court was not made fully aware of them when they made their decision. A checklist would have helped avoid this situation, and potential other situations where the mistake may not have been rectified.

22. To ensure that all the right processes have taken place prior to the decision being made, this new checklist should require the court verify that all the essential processes to ensure the welfare of the child have taken place prior to a decision to remand. We recommend that the court be required to:

- a. have sight of a report similar in depth and quality to a pre-sentence report, prepared by the YOT, prior to making a decision to remand beyond 14 days;
- b. go through each possible option, and permit the court to require information to be sought about its feasibility; and
- c. consider a local authority's obligations under the Children Act 1989 (the "Children Act") (*see below*).

Require courts to obtain an explanation from the local authority in each case where accommodation is not being offered to children

23. While the court can only remand to YDA if certain conditions are met,¹⁶ it nevertheless retains a discretion, even if these conditions are satisfied.¹⁷ We have heard that far too often, courts appear to believe that they do not have any alternative when exercising this

(b) the content of this application is true."

¹⁶ For useful checklists and flowcharts setting out the conditions, see the Youth Bench Book, (August 2017), page 39 - <https://www.sentencingcouncil.org.uk/wp-content/uploads/youth-court-bench-book-august-2017.pdf>

¹⁷ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.91(4)(a).

discretion, particularly when the relevant local authority claims that it does not have sufficient accommodation available.

24. JUSTICE understands, however, that in practice, courts sometimes do not fully appreciate a local authority's statutory obligations to provide suitable accommodation. Section 17 of the Children Act creates a general duty for every local authority to safeguard and promote the welfare of children within their area who are in need. In addition, section 20 mandates that local authorities "*provide accommodation for any child in need in their area*".¹⁸
25. Following this, section 22 of the Children Act sets out local authorities' duty to both make provision for accommodation (Section 22A); and secure sufficient accommodation (Section 22G), in relation to children looked after by them. Since there is a clear statutory duty for local authorities to make provision for children to have accommodation in these circumstances, JUSTICE considers that there should be very few reasons for children to be remanded in custody awaiting trial.
26. The court must also consider the child's welfare in making its decision, pursuant to section 44 of the Children and Young Persons Act 1933. In most circumstances and particularly during the COVID-19 pandemic, it is clear that this welfare need is not met when remanded to YDA, since there is limited education or training provision for the majority of children in custody. As previously noted, even before the pandemic, HM Inspectorate of Prisons found that many children are spending up to 22 hours a day in their cells.¹⁹
27. To ensure that children's right to accommodation is secured, JUSTICE recommends that, before a child is remanded to YDA, courts be required (a) to proactively consider the local authority's duties under the Children Act and (b) require an explanation (by summoning a

¹⁸ All children remanded to youth detention accommodation are "looked after" children. The responsible local authority will be designated by the court that remanded the child in accordance with LASPO, s.104.

¹⁹ *Separation of children in young offender institutions*, HM Inspectorate of Prisons, January 2020 - <https://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2020/01/Separation-of-children-thematic-Web-2019.pdf>

representative of the local authority if necessary) of how the local authority intends to comply with these duties, should no accommodation be forthcoming.²⁰

Data collection

28. JUSTICE welcomes the White Paper's recognition of the importance of recording a court's rationale when making a decision to place a child into custody.²¹ While this is already a requirement, we have heard that more can be done to ensure greater transparency, consistency and accountability for such an important decision which has a serious impact on the lives of children affected.

29. JUSTICE recommends that the Ministry of Justice centrally collate the reasons which courts give and make the information publicly available. This will allow for better scrutiny of decision making processes, as well as identify, with the benefit of data, patterns in reasons given – aiding analysis for underlying systemic issues, such as racial disparity.

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5 November 2020

²⁰ For further background on children on remand, see '*Ending the detention of unsentenced children during the Covid-19 pandemic: A practitioner's guide*' - Howard League for Penal Reform, (28 April 2020) - https://howardleague.org/wp-content/uploads/2020/04/Children-in-prison-during-the-Covid-19-BAIL-PACK_HL_GDNCT_2020_04_28.pdf

²¹ White Paper, page 14.