

Chapter 6 (Young defendants and youth court trial): Update

6.2 Youth courts

The Youth Courts (Constitution of Committees and Right to Preside) Rules 2007 (SI 2007/1611) have been revoked by the Justices of the Peace Rules 2016 (SI 2016/709), and so the rules requiring a mixed-gender bench no longer apply.

Determining the age of the defendant

In *R (M) v Hammersmith Magistrates' Court* [2017] EWHC 1359 (Admin), the accused said that he was 16. At his first appearance, the court expressed doubts about his age, based only on a visual assessment, and deemed him to be 18. Irwin LJ (at [14]) said that where there is a real issue about the age of a defendant, criminal courts should adjourn proceedings so as to conduct the 'age inquiry' permitted by s 99(1) of the Children and Young Persons Act 1933. He added (at [16]) that

In cases where there is a real doubt as to the claimed age, the proper course is to make directions for an age assessment to be conducted. The relevant local authority, through the medium of the youth offending team or service, will usually be the appropriate avenue to pursue.

6.2.1 Attendance of parent or guardian

For any child or young person aged under 16 appearing before court there is a statutory requirement that parents/guardians attend during all stages of proceedings, unless the court is satisfied that this would be unreasonable having regard to the circumstances of the case. The Sentencing Council guideline on children and young persons (at para 3.2) says that, although this requirement can cause a delay, "it is important it is adhered to. If a court does find exception to proceed in the absence of a responsible adult then extra care must be taken to ensure the outcomes are clearly communicated to and understood by the child or young person".

6.2.2 Reporting restrictions in the youth court

Section 49 of the Children and Young Persons Act 1933 is amended by schedule 2 of the Youth Justice and Criminal Evidence Act 1999. Under s 49(1), no matter relating to any child or young person concerned in youth court proceedings (or appeals from youth court proceedings) may, while he is under the age of 18, be included in any publication if it is likely to lead members of the public to identify him as someone concerned in the proceedings. For these purposes, a person is 'concerned in the proceedings' if they are the accused or a witness (subs (4)). The protected information includes the person's name and address, the identity of any school or other educational establishment they attend, and the identity of any place of work; the restriction also applies to any 'still or moving picture of him' (subs 3A)).

For these purposes, 'publication' is defined very widely, and includes 'any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public' (subs (3)).

It should be noted that the restrictions imposed by s 49 apply only while the person in question remains a juvenile.

Breach of the restrictions imposed by s 49 is a summary offence, punishable with a fine of any amount (subs (9)).

6.2.4.1 Exclusion of the public

The rules about the exclusion of the public from the youth court are unchanged but are now summarised in rule 24.2(1)(c) of the Criminal Procedure Rules.

6.2.5 Summary trial procedure

The procedure for trial in the youth court is the same as that in the adult magistrates' court and so is now set out in rule 24.3.

6.5 Crown Court trial of juveniles

6.5.2.1 The decision to commit in a s 91 case

In *R (DPP) v South Tyneside Youth Court* [2015] EWHC 1455 (Admin), the court considered the effect of the amendment of s 3B of the PCC(S)A 2000, which now enables committal for sentence to the Crown Court whether the juvenile pleads guilty or is found guilty after a trial. Sir Brian Leveson P (at [31]) observed that, because s 3B (as amended) 'means that the youth court is not making a once and for all decision at the point of allocation, the "real prospect" assessment requires a different emphasis'. One consequence is that the requirement to take the prosecution case at its highest (see *R (W) v Oldham Youth Court* [2010] EWHC 661 (Admin) at [15], per Langstaff J) is no longer necessary. His Lordship continued:

[T]here will, of course, be cases in which the alleged offending is so grave that a sentence of or excess of two years will be a "real prospect" irrespective of particular considerations in relation either to the offence or the offender's role in it: such cases are, however, likely to be rare. As the time of allocation and determination of venue, the court will doubtless take the views of the prosecution and defence into account; these views could include representations as the value of privacy of the proceedings or, alternatively, the desire for a jury trial. Subject to such submissions, however, in most cases whether there is such a "real prospect" will generally be apparent only when the court has determined the full circumstances of the offence and has a far greater understanding of the position of the offender. Since the youth court now has the option of committing a defendant for sentence after conviction if the court considers that the Crown Court should have the power to impose a sentence of detention pursuant to s 91(3) of the 2000 Act, it will generally be at that point when the assessment can and should be made. In that way, the observations in *Southampton Youth Court* (at [33]) that Crown Court trial for a youth "should be reserved for the most serious cases" remain entirely apposite.

The Sentencing Council guideline on sentencing children and young persons (at para 2.10) deals with s 91 cases (sometimes referred to as 'grave crimes'). It says that:

Before deciding whether to send the case to the Crown Court or retain jurisdiction in the youth court, the court should hear submissions from the prosecution and defence. As there is now a power to commit grave crimes for sentence the court should no longer take the prosecution case at its highest when deciding whether to retain jurisdiction. In most cases it is likely to be impossible to decide whether there is a real prospect that a sentence in excess of two years' detention will be imposed without knowing more about the facts of the case and the circumstances of the child or young person. In those circumstances the youth court should retain jurisdiction and commit for sentence if it is of the view, having heard more about the

facts and the circumstances of the child or young person, that its powers of sentence are insufficient.

Where the court decides that the case is suitable to be dealt with in the youth court it must warn the child or young person that all available sentencing options remain open and, if found guilty, the child or young person may be committed to the Crown Court for sentence.

Children and young people should only be sent for trial or committed for sentence to the Crown Court when charged with or found guilty of an offence of such gravity that a custodial sentence substantially exceeding two years is a realistic possibility. For children aged 10 or 11, and children/young people aged 12 – 14 who are not persistent offenders, the court should take into account the normal prohibition on imposing custodial sentences.

Criminal Practice Direction XIII, Annex 2, sets out the procedure to be applied in the Youth Court in all cases involving allegations of sexual offences which are capable of being sent for trial at the Crown Court under the so-called 'grave crime' provisions. The determination of venue should be carried out by an authorised District Judge. If jurisdiction is retained and the allegation involves actual, or attempted, penetrative activity, the case must be tried by an authorised District Judge. In all other cases, the authorised District Judge must consider whether the case is so serious and/or complex that it must be tried by an authorised District Judge, or whether the case can be heard by any District Judge or any Youth Court Bench.

6.5.3 Joint charge with adult to be tried in the Crown Court

The Sentencing Council guideline on sentencing children and young persons deals with cases where youths are jointly charged with adults and the court has to consider whether it is in the interests of justice for the child or young person to be tried in the Crown Court. The guideline emphasises (at para 2.11) says that the proper venue for the trial of any child or young person is normally the youth court. Subject to statutory restrictions, that remains the case where they are charged jointly with an adult. If the adult is sent for trial to the Crown Court, "the court should conclude that the child or young person must be tried separately in the youth court unless it is in the interests of justice for the child or young person and the adult to be tried jointly".

Paragraph 2.12 gives examples of factors that should be considered when deciding whether it is in the interests of justice to send the child or young person to the Crown Court (rather than having a trial in the youth court). Those factors include:

- whether separate trials will cause injustice to witnesses or to the case as a whole (consideration should be given to the provisions of ss 27 and 28 of the Youth Justice and Criminal Evidence Act 1999);
- the age of the child or young person; the younger the child or young person, the greater the desirability that the child or young person be tried in the youth court;
- the age gap between the child or young person and the adult; a substantial gap in age militates in favour of the child or young person being tried in the youth court;
- the lack of maturity of the child or young person;
- the relative culpability of the child or young person compared with the adult and whether the alleged role played by the child or young person was minor; and/or
- the lack of previous findings of guilt on the part of the child or young person.

The guideline also notes (at para 2.13) that the court should bear in mind that the youth court now has a general power to commit for sentence following conviction pursuant to s 3B of the Powers of Criminal Courts (Sentencing) Act 2000 (see below). In appropriate cases, "this will permit the same court to sentence adults and youths who have been tried separately".

6.5.4.1 Committal for sentence following plea before venue

Section 53 of the Criminal Justice and Courts Act 2015 amends s 3B of the Powers of Criminal Courts (Sentencing) Act 2000 so that the power to commit to the Crown Court for sentence, in cases which fall within the ambit of s 91 of the 2000 Act, is available whether the juvenile indicates a guilty plea at the 'plea before venue' hearing or is convicted following summary trial.

6.5.5 Dangerous offenders

The Sentencing Council guideline on sentencing children and young persons makes the point (at para 2.4) that a sentence under the dangerous offender provisions can only be imposed if:

- the child or young person is found guilty of a specified violent or sexual offence; and
- the court is of the opinion that there is a significant risk to the public of serious harm caused by the child or young person committing further specified offences; and
- a custodial term of at least four years would be imposed for the offence.

Paragraph 2.5 states that a 'significant risk' is "more than a mere possibility of occurrence" and that, in making this assessment, it will be essential to obtain a pre-sentence report. Paragraph 2.6 adds that children and young people "may change and develop within a shorter time than adults and this factor, along with their level of maturity, may be highly relevant when assessing probable future conduct and whether it may cause a significant risk of serious harm".

Paragraph 2.7 makes the important point that trial in the youth court, followed by committal for sentence to the Crown Court (if appropriate) will generally be the most appropriate course of action:

In anything but the most serious cases it may be impossible for the court to form a view as to whether the child or young person would meet the criteria of the dangerous offender provisions without greater knowledge of the circumstances of the offence and the child or young person. In those circumstances jurisdiction for the case should be retained in the youth court. If, following a guilty plea or a finding of guilt, the dangerousness criteria appear to be met then the child or young person should be committed for sentence.

6.5.7 Sentencing juveniles after Crown Court trial alongside an adult

The Sentencing Council guideline on sentencing children and young person says (at para 2.15) that, if a child or young person is found guilty before the Crown Court of an offence other than homicide the court must remit the case to the youth court, unless it would be undesirable to do so. In considering whether remittal is undesirable, "a court should balance the need for expertise in the sentencing of children and young people with the benefits of the sentence being imposed by the court which determined guilt". Paragraph 2.16 adds that particular attention should be given to children and young people who are appearing before the Crown Court only because they have been charged with an adult offender; referral orders are generally not available in the Crown Court but may be the most appropriate sentence.

6.7 Reporting restrictions in the adult courts

Section 45 of the Youth Justice and Criminal Evidence Act 1999 replaces s 39 of the Children and Young Persons Act in criminal proceedings.

Section 45 applies to criminal proceedings in any court in England and Wales (and any proceedings in a UK service court) except for youth court proceedings, to which s 49 of the Children and Young Persons Act 1933 applies (subs (2)).

Under s 45(3), the court may direct that no matter relating to any person concerned in the proceedings shall, while he is under the age of 18, be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings. For these purposes, a person is 'concerned in the proceedings' if they are the accused or a witness (subs (7)). The protected information includes the person's name and address, the identity of any school or other educational establishment they attend, and the identity of any place of work; the restriction also applies to any 'still or moving picture of him' (subs (8)).

The court may (at the time the direction is given under subs (3) or subsequently) make an 'excepting direction', which dispenses, to any extent specified, with the restrictions imposed by a direction under subs (3), if it is satisfied either that it is 'necessary in the interests of justice' to do so (subs (4)) or that the effect of the restrictions imposed under subs (3) 'is to impose a substantial and unreasonable restriction on the reporting of the proceedings', and that 'it is in the public interest to remove or relax that restriction' (subs (5)). An 'excepting direction' cannot be given under subs (5) solely on the basis that the proceedings have been determined in any way or have been abandoned.

When deciding whether to make a direction under s 45(3), or an 'excepting direction', the court must have regard to the welfare of the person in question (subs (6)).

In *R v Cornick* [2014] EWHC 3623 (QB), Coulson J (at [10]) noted that 'in the vast majority of cases, a defendant in a criminal case can be expected to be named, unless there is an absolute necessity for anonymity'. His Lordship went on to say (at [12]) that 'the onus is on the party seeking an order [for anonymity] to establish, either by way of Article 2 or by way of Article 8, that the rights of the press and public under Article 10 should be trumped by the welfare of the child'. His Lordship referred to *R v Lee* [1993] 1 WLR 103, and said that, whilst 'it was wrong to say that it would only be in rare and exceptional cases that an order for anonymity would not be made ... [t]here had to be a good reason for making an order [for anonymity]'. His Lordship added (at [14]) that it is only the child whose interests can be considered in the balancing exercise: save for any indirect impact on the child, the effect of his identification on his family is not a relevant consideration.

In *R v Markham* [2017] EWCA Crim 739, the Court of Appeal considered an appeal against the lifting of reporting restrictions in a case involving what the trial judge described as a "terrible and unnatural crime", the murder by the offenders of the mother and sister of one of them. They were both aged 15. Sir Brian Leveson noted (at [83]) that "when a juvenile is tried on indictment in the Crown Court, where there is a strong presumption that justice takes place in open, and the press may report the proceedings". His lordship said that the facts of the case (and the judge's sentencing remarks) could not be properly understood without identifying the offenders; that no material was before the court to justify the conclusion that lifting anonymity would cause harm to either offender; that there was no evidence before the court that reporting their identities would adversely affect the future rehabilitation of the offenders (and, thus, be contrary to their welfare); that the anonymity granted by s. 45 lasts only until 18 years of age and that both offenders faced a very considerable term of detention that would stretch long into their adult lives (see [88] and [89]). In the circumstances, the court held that the lifting of reporting restrictions pursued a legitimate aim

© Professor Peter Hungerford-Welch 2017

and was a reasonable and proportionate measure, properly balancing the welfare of the appellants (and other factors identified article 8 of the ECHR) against the article 10 rights of the press and the interests of the public (see [90]).

Lifelong reporting directions

Section 45A of the Youth Justice and Criminal Evidence Act 1999 applies to any criminal proceedings in any court in England and Wales (and any proceedings in a UK service court). It empowers the court to make a 'reporting direction', which relates to certain information about a person who is under the age of 18 when the proceedings commence and who is a witness (other than an accused) in the proceedings or the victim of the alleged offence. The restriction is that, during that person's lifetime, the relevant information must not be 'included in any publication if it is likely to lead members of the public to identify that person as being concerned in the proceedings' (subs (2)). The protected information is the person's name and address, the identity of any school or other educational establishment they attend, and the identity of any place of work; the restriction also applies to any 'still or moving picture of the person' (subs (4)). A reporting restriction may be made only if the court is satisfied that the quality of any evidence given by that person, or the level of co-operation given by them to any party to the proceedings in connection with that party's preparation of its case, 'is likely to be diminished by reason of fear or distress on the part of the person in connection with being identified by members of the public as a person concerned in the proceedings' (subs (5)). For these purposes, quality of evidence is defined to mean 'quality in terms of completeness, coherence and accuracy'; and 'coherence' in this content refers to a person's ability in giving evidence to give answers which address the questions put to the person and can be understood both individually and collectively (subs (16)(c)).

When deciding whether to make a reporting direction, the court has to take into account the nature and alleged circumstances of the offence to which the proceedings relate; the age of the person in question; their social and cultural background and ethnic origins; their domestic, educational and employment circumstances; any religious beliefs or political opinions of the person; any behaviour towards the person on the part of an accused, members of the family or associates of an accused, or any other person who is likely to be an accused or a witness in the proceedings (subs (6)). Additionally, the court must have regard to the welfare of that person; whether it would be in the interests of justice to make the direction; and 'the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings' (subs (8)).

The court may (at the time the reporting direction is given or subsequently) make an 'excepting direction', which dispenses, to any extent specified, with the restrictions imposed by a reporting direction (subs (10)), but may do so only if satisfied that it is satisfied either (i) that it is necessary in the interests of justice to do so, or (ii) that the effect of the reporting direction is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and it is in the public interest to remove or relax that restriction (subs (11)). An excepting direction cannot be given solely on the basis that the proceedings have been determined in any way or have been abandoned (subs (12)).