

Sentencing Council

Sentencing Council meeting: 25 September 2015
Paper number: SC(15)SEP06(a) – Youths
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1 ISSUE

1.1 To consider the final revision of the Overarching Principles ensuring the amendments are complementary to existing guidelines and consistent with the overall aims of the Council in revising this document.

2 RECOMMENDATION

2.1 This is the third time that the Council has reviewed the draft Overarching Principles. There have been a number of minor amendments following discussions from the previous Council meeting, external comments from Council members and suggestions from roadtesting, but only the key amendments have been tracked (Annex A). The Council is asked to review these amendments ahead of the meeting to ensure that they are content with them.

2.2 The Council is asked to approve the draft of the Overarching Principles, paying particular attention to the approach taken in assessing the seriousness of an offence.

2.3 This will be the final time that the Overarching Principles are discussed at a Council meeting prior to the consultation sign off in November. There will however be the option to circulate the guideline outside of meetings if further drafting is required.

3 CONSIDERATION

3.1 In past Council meetings the draft Overarching Principles had incorporated a 'stepped approach' to assessing seriousness, reflecting the format taken in our other guidelines. However, in June the Council questioned whether this was the correct approach to take as this guideline is substantially different to a standard offence guideline.

3.2 Following on from this discussion the approach to assessing seriousness has been amended considerably (para 4.6 -4.9, p.12-13). There is no longer a 'stepped approach' and instead the guideline offers a broad approach to assessing culpability (para 4.6) and harm (para 4.7). It has however retained a list of aggravating and mitigating factors that could be relevant to several offences of a different nature. This reflects the approach taken in the current '*Overarching Principles: Seriousness*' and also serves to remind sentencers to consider some of the more youth specific factors, such as '*involved through bullying*'.

3.3 The aggravating factor of '*filming of the offence*' has been expanded upon and now reads '*deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intent of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups.*' This was extended to include a broader range of deliberate humiliation factors because sentencing remark transcripts and news stories suggest these are common factors present in youth crime.

Question one: Does the Council approve of the approach taken to the assessment of seriousness?

3.4 During road testing one participant suggested that the section '*Charged alongside an adult*' (para 2.12-2.14, p.6) should be extended, to include guidance on whether a youth should be committed to the Crown Court for trial, if the adult that they are charged alongside has been.

3.5 This new guidance has been incorporated at paragraphs 2.12 – 2.11 and in the new allocation flowcharts at pages 9 and 10. The original allocation flowchart (Annex B) has also been simplified (p. 8) to ensure that sentencers do not get overly distracted by the dangerousness test (which is rarely met in reality).

Question two: Does the Council agree to the simplified version of the allocation flowchart?

Question three: Does the Council agree to the inclusion of the additional information regarding a youth charged alongside an adult?

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Section one: General approach

Sentencing principles

- 1.1 When sentencing an offender aged under 18, a court must¹ have regard to:
 - the principal aim of the youth justice system (to prevent offending by children and young people);² and,
 - the welfare of the offender.³
- 1.2 While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and offender focused, as opposed to offence focused. For an offender under 18 the sentence should focus on the rehabilitation of the offender where possible. A court should also consider the effect the sentence is likely to have on the young person as well as any underlying factors contributing to the offending behaviour.
- 1.3 It is important to avoid “criminalising” young people unnecessarily; the primary purpose of the youth justice system is to foster a sense of responsibility for others and promote re-integration into society rather than to punish.
- 1.4 Young people have not reached full maturity and as such may not fully appreciate the effect their actions can have on other people. They may not be capable of understanding the distress and pain they cause to the victims of their crimes. Young people are also likely to be susceptible to peer pressure and other external influences. It is important to consider the extent to which the offender has been acting impulsively and the offender’s conduct has been affected by inexperience, emotional volatility or negative influences.
- 1.5 For these reasons young people are likely to benefit from being given an opportunity to address their behaviour and may be receptive to changing their conduct. They should, if possible, be given the opportunity to learn from their 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 hinder their re-integration into society.
- 1.6 Offending by a young person is often a phase which passes fairly rapidly and so the sentence should not result in the alienation of the young person from society if that can be avoided.

¹ 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

² Crime and Disorder Act 1998, s.37(1)

³ Children and Young Persons Act 1933, s.44(1)

- 1.7 The impact of punishment is likely to be felt more heavily by a young person in comparison to an adult as any sentence will seem longer due to their young age.
- 1.8 Any restriction on liberty must be commensurate with the seriousness of the offence and care must be taken to ensure that a more severe sentence than the offence merits is not imposed because of a risk of re-offending. 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.⁴

Welfare

- 1.9 The statutory obligation to have regard to the welfare of a young offender includes the obligation to secure proper provision for education and training, where appropriate to remove from undesirable surroundings and the need to choose the best option for the young person taking account of the circumstances of the offence.⁵
- 1.10 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 problems 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 reasons why a young person may conduct themselves inappropriately in court, e.g. due to nerves, a lack of understanding of the system, a belief that they will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc;
 - 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; and
 - the effect on young people of experiences of loss and neglect and/or abuse.
- 1.11 Additional factors regularly present in the background of young offenders include deprived homes, poor employment records, low

⁴ Criminal Justice Act 2003, s.143(1)

⁵ *ibid.*

educational attainment, early experience of offending by other family members, experience of abuse and/or neglect, negative influences from peer associates and the misuse of drugs and/or alcohol.

1.12 Evidence shows that “looked after” children are over-represented in the criminal justice system.⁶ When dealing with a young person who is “looked after” the court should also bear in mind the additional complex vulnerabilities that are likely to be present in their background. For example, looked after children may have no or little contact with their family and/or friends, they are relatively likely to have special educational needs and/or emotional and behavioural problems, they may be heavily exposed to peers who have committed crime and they are likely to have accessed the care system as a result of abuse, neglect or parental absence due to bereavement, imprisonment or desertion. The court should also bear in mind that the level of parental-type support that a looked after child receives throughout the criminal justice process may vary, and may be limited.

1.13 The court should always seek to ensure that it has access to information about how best to identify and respond to these factors and, where necessary, that a proper assessment has taken place in order to enable the most appropriate sentence to be imposed.

1.14 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.

1.15 When considering a young offender who may be particularly vulnerable sentencers should consider which available disposal is best able to support the young offender and which disposals could potentially exacerbate any underlying issues. This is particularly important when considering custodial sentences as there are concerns about the effect on vulnerable young offenders of being in closed conditions, with risks found of self harm and suicide.

1.16 The vulnerability factors that are often present in the background of young offenders should also be considered in light of the offending behaviour itself. Although they do not alone cause offending behaviour – there are many young people who have experienced these circumstances but do not commit crime – there is a correlation and any response to criminal activity amongst young people will need to recognise the presence of such factors in order to be effective.

This does not undermine the fact that the sentence must be commensurate to the seriousness of the offence. Further guidance

⁶ Department for Education (2014) Outcomes for Children Looked After by Local Authorities in England, as at 31 March 2014. Statistical First Release 49/2014. [accessed via: <https://www.gov.uk/government/statistics/outcomes-for-children-looked-after-by-local-authorities>]

on assessing the seriousness of an offence can be found at section four.

Section two: Allocation

2.1 Cases involving young offenders and in particular those under 15 years of age should, wherever possible, be tried in the youth court. It is the court which is best designed to meet their specific needs. A trial in the Crown Court with the inevitably greater formality and greatly increased number of people involved (including a jury and the public) should be reserved for the most serious cases.⁷

This section covers the exceptions to this requirement.⁸

2.2 A youth must always appear in the Crown Court for trial if:

- charged with homicide;
- charged with a firearms offence subject to a mandatory minimum sentence of three years (and is over 16 years of age at the time of the offence); or
- notice has been given to the court (under section 51B or 51C of the Crime and Disorder Act 1998) in a serious or complex fraud or child case.

Dangerousness

2.3 A case should be sent to the Crown Court for trial if the offence charged is a specified offence⁹ **and** it seems to the court that if convicted the young person would meet the criteria for a sentence under the dangerous offender provisions.

2.4 A sentence under the dangerous offender provisions can only be imposed if

- the young person is convicted 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 young person committing further specified offences **and**
- a custodial term of at least four years would be imposed for the offence.

2.5 A 'significant risk' is more than a mere possibility of occurrence. The assessment of dangerousness should take into account all the

⁷ *R on the application of H,A and O v Southampton Youth Court [2004] EWHC 2912 Admin*

⁸ Magistrates' Courts Act 1980, s.24

⁹ As listed in the Criminal Justice Act, 2003 Sch.15

available information relating to the circumstances of the offence and **may** also take into account any information regarding previous patterns of behaviour related to this offence and any other relevant information relating to the offender. In making this assessment it will normally be necessary to obtain a pre-sentence report.

2.6 Young offenders may change and develop within a shorter time than adults and this factor, along with their level of maturity, may be highly pertinent when assessing probable future conduct and whether it may cause a significant risk of serious harm.¹⁰

2.7 In anything but the most serious cases it may be impossible for the court to form a view as to whether the defendant would meet the criteria of the dangerous offender provisions without greater knowledge of the circumstances of the offence and the offender. In those circumstances jurisdiction for the case should be retained in the youth court. If, following conviction, the dangerousness criteria are met then the defendant should be committed **for sentence**.

Grave crimes

2.8 Where a child or young person is before the court for an offence mentioned in section 91(1) of the Powers of Criminal Courts (Sentencing) Act 2000 and the court considers that it ought to be possible to sentence him to more than two years detention if found guilty of the offence, then he should be sent to the Crown Court. The test to be applied by the court is whether there is a **real prospect** that a sentence in excess of two years detention will be imposed.

2.9 Before deciding whether to commit 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 for sentence the Court should no longer take the prosecution case at its highest when deciding whether to retain jurisdiction.¹¹ 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 offender. 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 offender, that its powers of sentence are insufficient.

2.10 An offence comes within section 91 where:

¹⁰ *R v Lang* [2005] EWCA Crim 2864, [2006] 1 WLR 2509

¹¹ Powers of Criminal Courts (Sentencing) Act 2000, s.3(b) (as amended)

- it is punishable with 14 years imprisonment or more for an adult (but is not a sentence fixed by law);
- it is an offence of sexual assault, child sex offences committed by a child or young person, sexual activity with a child family member or inciting a child family member to engage in sexual activity; or
- it 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.

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

A young person aged 10 or 11 should only be sent for trial or committed for sentence to the Crown Court when charged with or convicted of an offence of such 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.

A young person aged 12-17 (for which a detention and training order could be imposed) should be sent for trial or committed for sentence to the Crown Court only when charged with or convicted of an offence of such gravity that a sentence substantially beyond the two year maximum for a detention and training order is a realistic possibility.

Charged alongside an adult

- 2.11 The proper venue for the trial of any youth is normally the Youth Court. That remains the case where a youth is charged jointly with an adult. Where the decision as to the proper venue first must be taken in relation to the adult, the court then will consider where the youth should be tried. The youth must be tried separately in the Youth Court unless the adult is being sent for trial to the Crown Court and it is in the interests of justice for the youth and the adult to be tried jointly.
- 2.12 Examples of factors that should be considered when deciding whether to send the youth to the Crown Court (rather than having a trial in the Youth Court) include:
- whether separate trials will cause injustice to witnesses or to the case as a whole [(consideration should be given to the provisions of sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999)];
 - the age of the youth; the younger the youth, the greater the desirability that the youth be tried in the Youth Court;
 - the age gap between the youth and the adult; a substantial gap in age militates in favour of the youth being tried in the Youth Court;

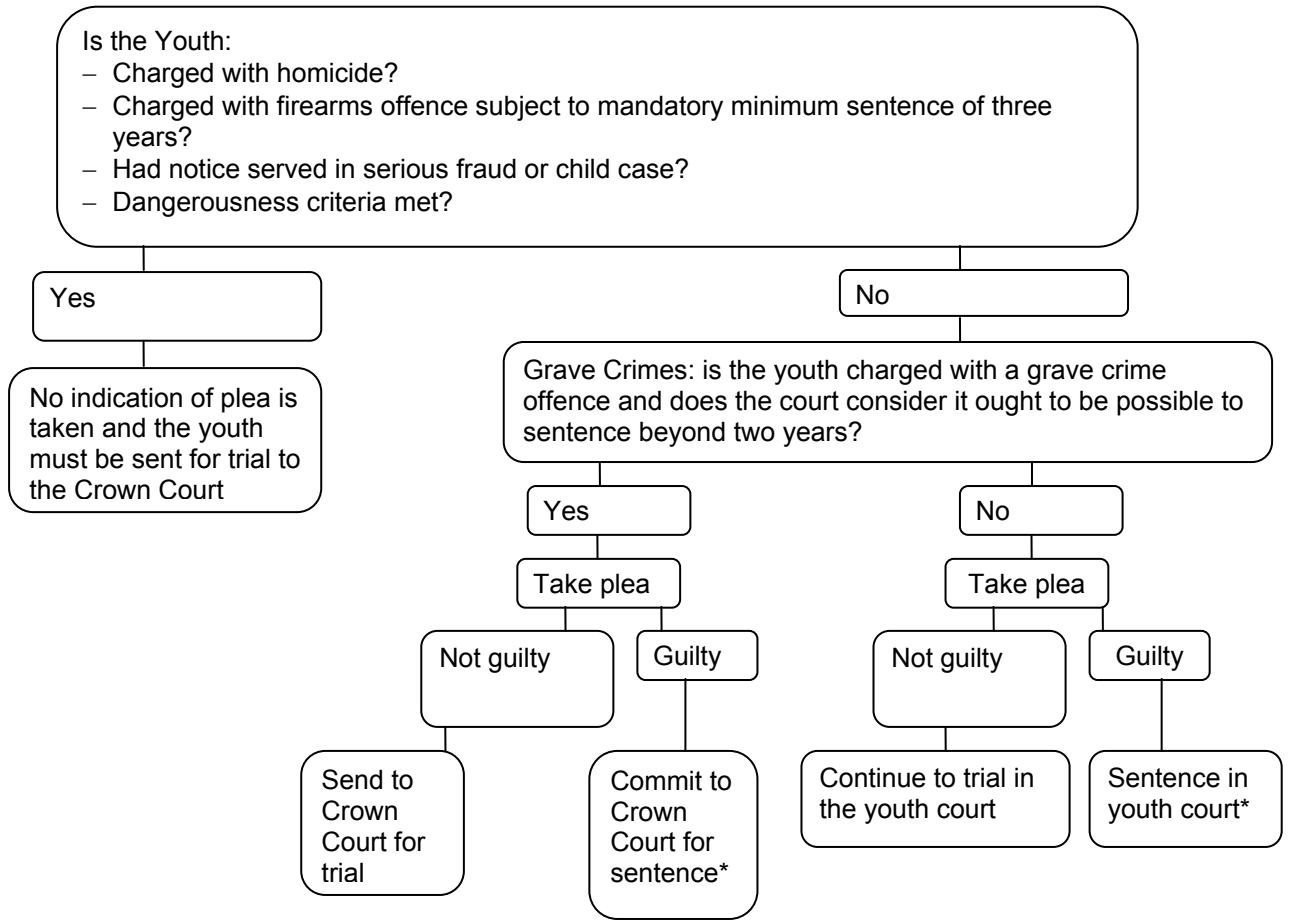
- the lack of maturity of the youth;
 - the relative culpability of the youth compared with the adult and whether the [alleged] role played by the youth was minor; and/or,
 - the lack of previous convictions on the part of the youth.
- 2.13 The court should bear in mind that the Youth Court now has a general power to commit for sentence (as discussed at paragraph 2.9); in appropriate cases this will permit sentence to be imposed by the same court on adults and youths who have been tried separately.
- 2.14 The court should follow the plea before venue procedure (paragraphs 2.6-2.11) prior to considering whether it is in the interest of justice for the youth and the adult to be tried jointly.

Remittal from the Crown Court

- 2.15 If a young person is convicted 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.¹² In considering whether remittal is undesirable a court should balance the need for expertise in the sentencing of young offenders with the benefits of the sentence being imposed by the court which had determined guilt.
- 2.16 Particular attention should be given to young offenders 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.

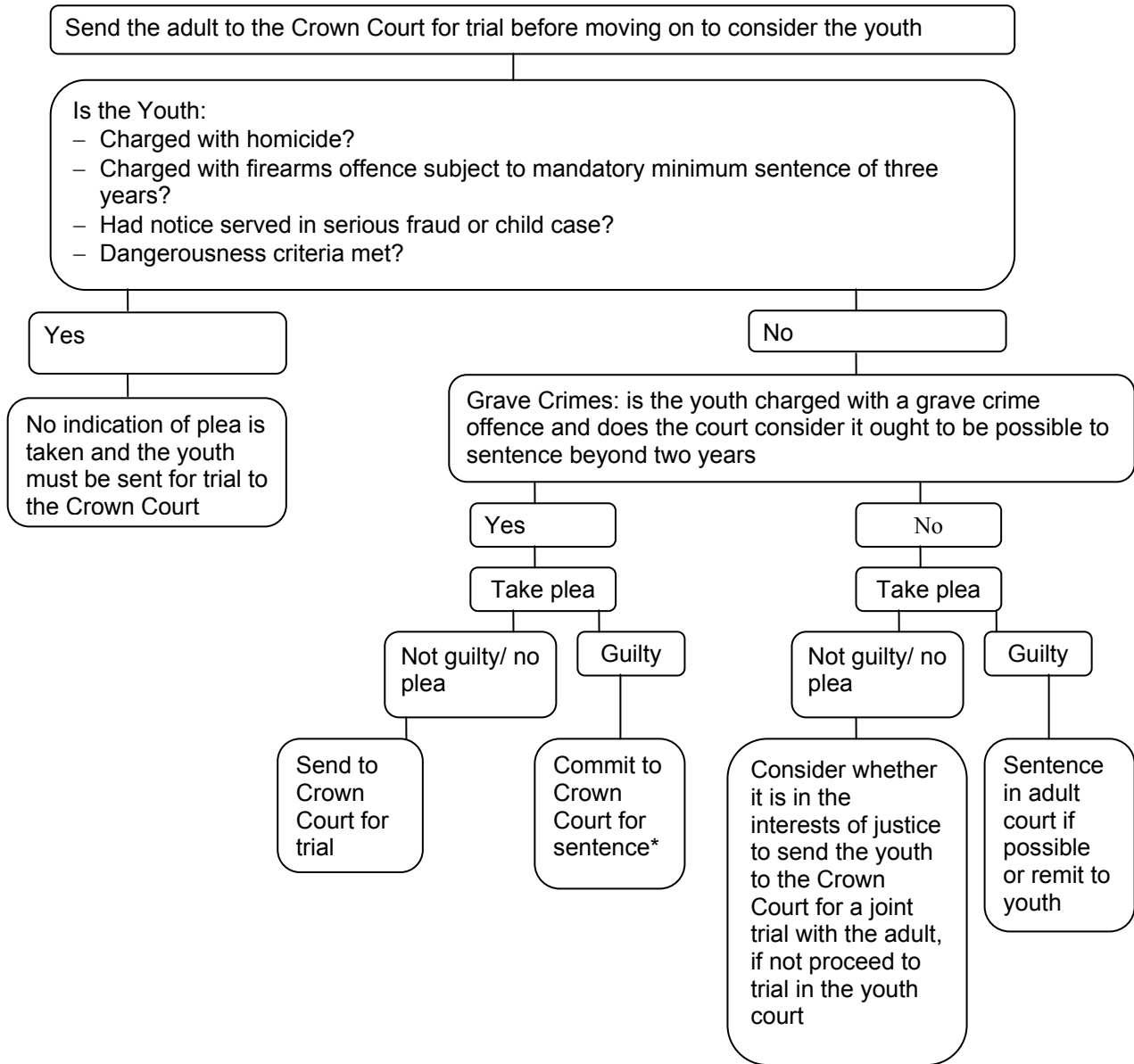
¹² Powers of Criminal Courts (Sentencing) Act 2008, s.8

Allocation Chart



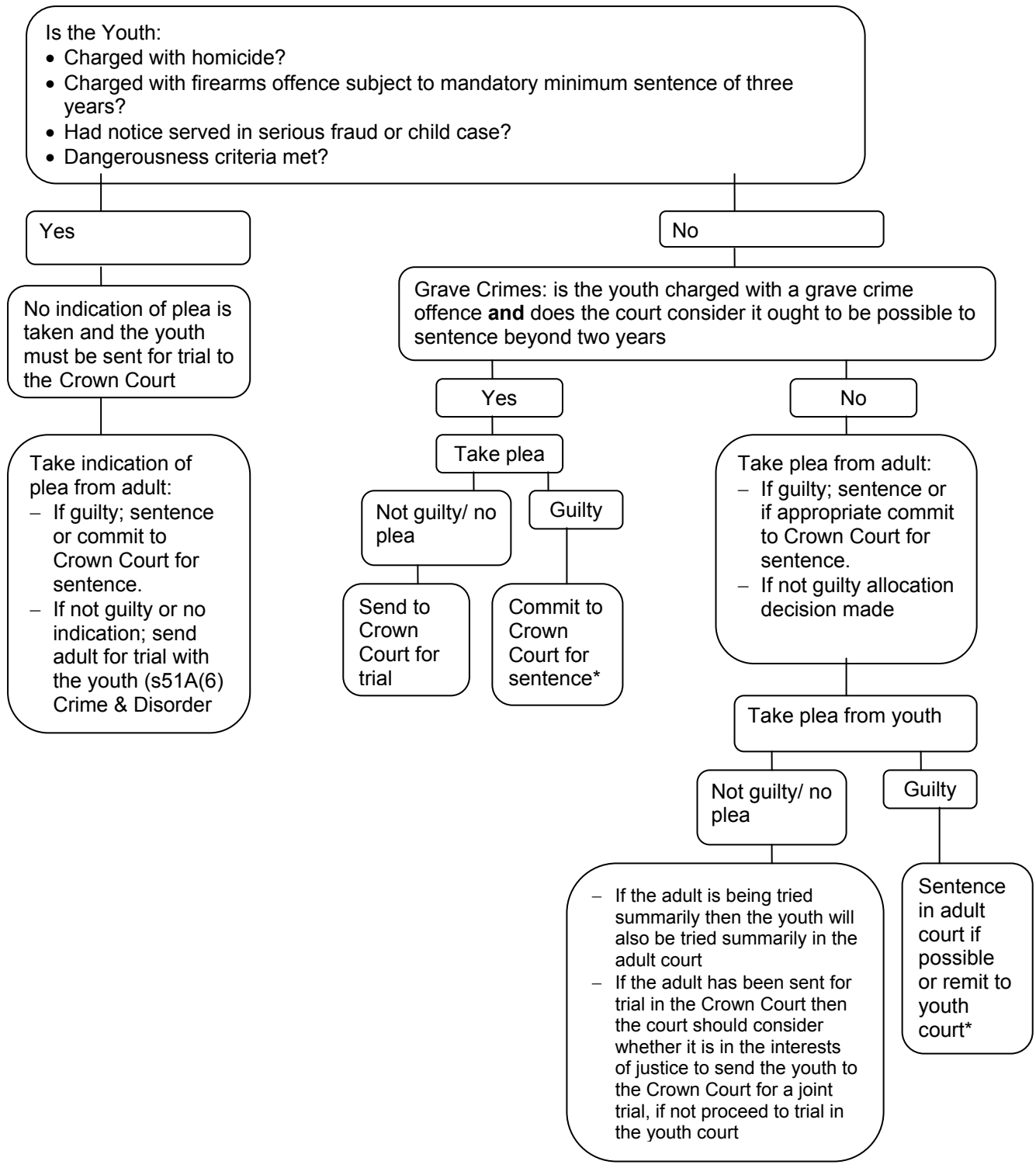
* If the dangerousness provisions are satisfied the court must commit for sentence

Youth and Adult charged as co-defendants where the adult is charged with an indictable only offence (or an offence where notice is given to the court under s51B or s51C Crime & Disorder Act 1998)



* If the dangerousness provisions are satisfied the court must commit for sentence

Youth and Adult charged as co-defendants where the adult is charged with either way offence



*If the provisions are satisfied the court must commit for sentence

Section three: Parental responsibilities

- 3.1 For any 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.¹³ The court may also enforce this requirement for a young person aged 16 and above if they deem it desirable to do so.
- 3.2 Although this requirement can cause a delay in the case before the court 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 young person.
- 3.3 In addition to this responsibility there are also orders that can be imposed on parents. If the young offender is aged under 16 then the court has a duty to make a **parental bind over** or impose a **parenting order**, if it would be desirable in the interest of preventing the commission of further offences.¹⁴ There is a discretionary power to make these orders where the offender is aged 16 or 17. If the court chooses not to impose a parental bind over or parenting order they must state their reasons for not doing so in open court. In most circumstances a parenting order is likely to be more appropriate than a parental bind over.

A court cannot make a bind over alongside a referral order.

¹³ Children and Young Persons Act 1933 s.34A

¹⁴ Powers of Criminal Courts (Sentencing Act) 2000 s.150 & Crime and Disorder Act 1998, s.8(6)

Section four: Determining the sentence

4.1 In determining the sentence, the key elements to consider are:

- the seriousness of the offence;
- the age of the offender (chronological and emotional);
- the likelihood of further offences being committed; and
- the extent of harm likely to result from those further offences.

The seriousness of the offence

4.2 The seriousness of the offence is the starting point for determining the appropriate sentence; the sentence imposed and any restriction on liberty must be commensurate with the seriousness of the offence.

4.3 The approach to sentencing young offenders should always be individualistic and the court should always have in mind the principal aims of the youth justice system.

4.4 There is an expectation that in general 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 may be less able to resist temptation, especially where peer pressure is exerted.

4.5 In order to determine the seriousness the court should assess the culpability of the offender and the harm that was caused, intended to be caused or could foreseeably have been caused.

4.6 In assessing culpability the court will wish to consider the extent to which the offence was planned, the role of the offender (if committed as part of a group), the level of force that was used in the commission of the offence and the awareness that the offender had of their actions and its possible consequences.

4.7 In assessing **harm** the court should consider the level of physical and psychological harm caused to the victim, the degree of any loss caused to the victim and the extent of any damage caused to property.

4.8 The Court should also consider any aggravating or mitigating factors that may increase or reduce the overall seriousness of the offence. **If any of these factors are included in the definition of the committed offence they should not be taken into account when considering the relative seriousness of the offence before the court.**

Statutory aggravating factors:

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors:

- Steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution
- Victim is particularly vulnerable due to factors including but not limited to age, mental or physical disability
- Restraint, detention or additional degradation of the victim
- Prolonged nature of attack
- Attempts to conceal/dispose of evidence
- Established evidence of community/wider impact
- Failure to comply with current court orders
- Attempt to conceal identity (for example, wearing a balaclava or hood)
- Involvement of others through peer pressure or bullying
- Commission of offence whilst under the influence of alcohol or drugs
- History of antagonising or bullying the victim
- Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intent of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse, particularly where evidenced by voluntary reparation to the victim
- Good character and/or exemplary conduct
- Unstable upbringing including but not limited to time spent in care, exposure to drug and alcohol abuse, lack of attendance at school, lack of familial presence or support, victim of neglect and/or abuse, exposure to familial criminal behaviour
- Involved through bullying or peer pressure
- Limited understanding of effect on victim
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Mental disorder or learning disability
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

Age of the offender

- 4.9 There is a statutory presumption that no young person under the age of 10 can be guilty of an offence.¹⁵
- 4.10 With a young offender, the consideration of age requires a different approach to that which would be adopted in relation to the age of 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 bracket, in the middle or towards the top end.
- 4.11 It is important to consider whether the young offender lacks the necessary maturity to appreciate fully the consequences of their conduct, the extent to which the offender has been acting on an impulsive basis and whether their conduct has been affected by inexperience, emotional volatility or negative influences.

Section five: Available sentences

Crossing a significant age threshold between commission of offence and sentence

- 5.1 There will be occasions when an increase in the age of an offender 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* (primarily turning 12, 15 or 18 years old).
- 5.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes offenders who attain the age of 18 between the *commission* and the *conviction* of the offence¹⁶ but when this occurs the purpose of sentencing adult offenders¹⁷ has to be taken into account, which is:
- the punishment of offenders;
 - the reduction of crime (including its reduction by deterrence);
 - the reform and rehabilitation of offenders;
 - the protection of the public; and
 - the making of reparation by offenders to persons affected by their offences.

¹⁵ Children and Young Persons Act 1933, s.50

¹⁶ *R v Ghafoor* [2002] EWCA Crim 1857, [2003] 1 Cr App R (S) 428

¹⁷ Criminal Justice Act 2003, s.142

- 5.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate.

Persistent offenders

- 5.4 Some sentences can only be imposed on young offenders if they are deemed a “persistent offender.” A youth **must** be classed as such for one of the following to be imposed:

- a YRO with intensive supervision and surveillance when aged under 15;
- a youth rehabilitation with fostering when aged under 15; and
- a detention and training order when aged 12- 14.

- 5.5 The term “persistent offender” is not defined in statute but has been considered by the Court of Appeal. In general it is expected that the young offender would have had previous contact with authority as a result of criminal behaviour. This could include previous convictions and disposals which involve an admission or finding of guilt such as reprimands, final warnings and conditional cautions.

- 5.6 A young offender who has committed one previous offence cannot reasonably be classed as a “persistent offender”, and a young offender who has committed two or more previous offences should not be assumed to be one. To determine if the behaviour is persistent the nature of the previous offences and the lapse of time between the offences would need to be considered.¹⁸

- 5.7 If convicted three times in the past 12 months for imprisonable offences of a comparable nature (or been made the subject of orders as detailed above in relation to an imprisonable offence) then the court could certainly justify classing them as a “persistent offender.”

5.8 When a young offender is being sentenced in a single appearance for a series of separate, comparable offences committed over a short space of time then the court could justifiably consider the offender to be a “persistent offender,” despite the fact that there may be no previous convictions.¹⁹

- 5.9 Even where a young person is found to be a persistent offender, a court is not obliged to impose one of the optional sentences. The approach should still be individualistic and all other considerations still apply.

¹⁸ *R v M* [2008] EWCA Crim 3329

¹⁹ *R v S* [2000] 1 Cr App R (S.)18

Custodial sentences must be a last resort for all young offenders and there is an expectation that they will be particularly rare for offenders aged 14 or less.

Sentences available by age:

Sentence	Age of youth		
	10-12	12-14	15-17
Absolute or conditional discharge or reparation order	✓	✓	✓
Financial order	✓	✓	✓
Referral order	✓	✓	✓
YRO	✓	✓	✓
Detention and training order	x	✓ For 'persistent offenders' only	✓
s91 PCC(S) Act detention (grave crime)	✓	✓	✓
Extended sentence of detention*	✓	✓	✓

*If convicted 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.

5.10 Some sentences have longer rehabilitation periods than others and so could have a longer term impact on the future of young offenders; this should be taken into account when considering if the sentence is commensurate to the seriousness of the offence. For example absolute or conditional discharges are not deemed to be treated as convictions other than for the purposes of criminal proceedings²⁰ and referral orders are spent on the last day on which the order is to have effect.²¹

Breaches and the commission of further offences during the period of an order

5.11 If a young offender is found guilty of breaching an order, or commits a further offence during the period of an order, the court will have various options available to them, depending on the nature of the order (Appendix 1). The primary aim of the court should be to encourage compliance and seek to support the rehabilitation of the offender.

²⁰ Powers of Criminal Courts (Sentencing) Act 2000, s.14 (1)

²¹ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.139

Absolute or conditional discharge and reparation orders

- 5.12 An absolute discharge is appropriate when, despite a finding of guilt, the offence is not serious enough to warrant punishment.
- 5.13 A conditional discharge is appropriate when, despite a finding of guilt, the offence is not serious enough to warrant an immediate punishment. The fixed period of conditional discharge must not exceed three years. Unless exceptional circumstances are found a conditional discharge cannot be imposed if the young offender has received one of the following in the previous 24 months: a final warning; two or more cautions; or a conditional caution followed by a caution.
- 5.14 A reparation order can require a young offender to make reparation to the victim of the offence, where a victim wishes it, or to the community as a whole. Before making an order the court must consider a written report from a relevant authority, e.g. a youth offending team, and the order must be commensurate with the seriousness of the offence.
- 5.15 If the court has the power to make a reparation order but chooses not to do so, they must give their reasons.

Financial order

- 5.16 A court may impose a fine for any offence (unless the criteria for a mandatory referral order are met). In accordance with statutory requirements, where financial orders are being considered, priority must be given to compensation orders and, when an order for costs is to be made alongside a fine, the amount of the cost must not exceed the amount of the fine. If the offender is under 16 then the court has a duty to order parents or guardians to pay the fine; if the offender is 16 or over this duty is discretionary.
- 5.17 It is important that travel costs to school, college or apprenticeships and lunch expenses are taken into account when assessing the income of a young offender.

Referral orders

- 5.18 A referral order is the mandatory sentence in a youth court or magistrates' court for most first time offenders who have pleaded guilty to an imprisonable offence. Exceptions are for offences where a sentence is fixed by law or if the court deems a custodial sentence, an absolute or conditional discharge or a hospital order to be more appropriate.

- 5.19 A discretionary referral order can also be given if the above conditions are not met but the offender has pleaded guilty to at least one connected offence. If the offender does not plead guilty to any offence then a referral order is not available to the court.
- 5.20 There is no restriction to the number of times a young offender can be sentenced to a referral order or the number of referral orders that can be imposed or the number of previous convictions a young offender receiving a referral order can have. However before a court imposes a further referral order they must be satisfied that the sentence is commensurate with the seriousness of the offence and that the imposition of such a sentence has a reasonable prospect of preventing re-offending.
- 5.21 The court determines the length of the order but a Youth Offender Panel determines the requirements of the order.

Offence seriousness	Suggested length of referral order
Low	<ul style="list-style-type: none"> • 3-5 months
Medium	<ul style="list-style-type: none"> • 5-7 months
High	<ul style="list-style-type: none"> • 7-9 months • 10-12 months

A court should be prepared to use the whole range of periods; orders of 10-12 months should be made only for the most serious offences.

Youth Rehabilitation Orders (YRO)

- 5.22 A YRO is a community sentence within which a court may include one or more requirements designed to provide for punishment, protection of the public, reducing re-offending and reparation.
- 5.23 When imposing a YRO, the court must fix a period within which the requirements of the order are to be completed; this must not be more than three years from the date on which the order comes into effect.
- 5.24 The offence must be “serious enough” in order to impose a YRO, but it does not need to be an imprisonable offence. Even if an offence is deemed “serious enough” the court is not obliged to make a YRO.
- 5.25 The requirements included within the order (and the subsequent restriction on liberty) and the length of the order must be proportionate to the seriousness of the offence and suitable for the offender.
- 5.26 The available requirements within a YRO are:
- activity requirement;
 - supervision requirement;

- unpaid work requirement;*
- programme requirement;
- attendance centre requirement;
- prohibited activity requirement;
- curfew requirement;
- exclusion requirement;
- electronic monitoring requirement
- residence requirement;*
- local authority accommodation requirement;
- fostering requirement;**
- mental health requirement;
- drug treatment requirement (with or without drug testing);
- intoxicating substance requirement;
- education requirement; and
- intensive supervision and surveillance requirement**

*These requirements are only available for offenders aged 16 or 17 years old on the date of conviction

**These requirements can only be imposed if the offence is an imprisonable one and for offenders aged under 15 they must be deemed a “persistent offender”

5.27 When determining the nature and extent of the requirements the court should primarily consider the likelihood of the young person re-offending and the risk of the young person causing serious harm.

5.28 The Youth Offending Team will assess this as part of their report and recommend an intervention level to the court for consideration.

	Offender profile	Requirements of order²²
Standard	Low likelihood of re-offending and a low risk of serious harm	<u>Primarily seek to repair harm caused through, for example:</u> <ul style="list-style-type: none"> • <u>reparation;</u> • <u>unpaid work;</u> • <u>supervision; and/or</u> • <u>attendance centre.</u>
Enhanced	Medium likelihood of re-offending or a medium risk of serious harm	<u>Seek to repair harm caused and to enable help or change through, for example:</u> <ul style="list-style-type: none"> • <u>supervision;</u> • <u>reparation;</u> • <u>requirement to address behaviour e.g. drug treatment, offending behaviour programme, education programme; and/or</u> • <u>a combination of the above.</u>

²² The examples provided here are not exclusive; the Youth Offending Team will make recommendations based upon their assessment of the young offender which may vary from some of the examples given.

Intensive	High likelihood of re-offending or a very high risk of serious harm	<p><u>Seek to ensure the control of the young person through, for example:</u></p> <ul style="list-style-type: none"> • <u>supervision;</u> • <u>reparation;</u> • <u>requirement to address behaviour;</u> • <u>requirement to monitor or restrict movement, e.g. prohibited activity, curfew, exclusion or electronic monitoring; and/or</u> • <u>a combination of the above.</u>
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5.29 If a young person is assessed as presenting a high risk of re-offending or of causing serious harm but the offence that was committed is of relatively low seriousness then the appropriate requirements are likely to be primarily rehabilitative or for the protection of the public.

5.30 Likewise if a young person is assessed as presenting a low risk of re-offending or of causing serious harm but the offence was of relatively high seriousness then the appropriate requirements are likely to be primarily punitive.

Orders with intensive supervision and surveillance or with fostering

5.31 An intensive supervision and surveillance requirement and a fostering requirement are both intended to be a community alternative to custody.

5.32 The offence must be punishable by imprisonment, cross the custody threshold and a custodial sentence must be merited before one of these requirements can be imposed.

5.33 An order of this nature may only be imposed on an offender aged below 15 (at the time of conviction) if they are a “persistent offender.”

With intensive supervision and surveillance

5.34 An order of this nature must include an extended activity requirement of between 90 to 180 days, a supervision requirement and a curfew requirement. Where appropriate, a YRO with intensive supervision and surveillance may also include additional requirements (other than a fostering requirement), 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.

5.35 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.

With fostering

- 5.36 Where a fostering requirement is included within a YRO, it will require the offender to reside with a local authority foster parent for a specified period that must not exceed 12 months.
- 5.37 In order to impose this requirement 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 Rights²³) and any interference with such rights must be proportionate.
- 5.38 The court must consult the young person's parent or guardian (unless impracticable) and the local authority before including this requirement. It can only be included if the young person was legally represented in court when consideration was being given to imposing such a requirement unless the offender, having had the opportunity to do so, did not apply for representation or that right was withdrawn because of the offender's conduct. **This requirement may be included only where the court has been notified that arrangements are available in the area of the relevant authority.**
- 5.39 A YRO with a fostering requirement must include a supervision requirement and can include other requirements when appropriate (except an intensive supervision and surveillance requirement). 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 that offence.
- 5.40 It is unlikely that the statutory criteria²⁴ 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.

Custodial Sentences

A custodial sentence should always be used as a last resort.

The available custodial sentences for a youth are:

²³ Right to respect for family and private life

²⁴ See paragraphs 5.28-30

Youth Court	Crown Court
<ul style="list-style-type: none"> • Detention and training order for the following periods: <ul style="list-style-type: none"> ○ 4 months; ○ 6 months; ○ 8 months; ○ 10 months; ○ 12 months; ○ 18 months; or ○ 24 months 	<ul style="list-style-type: none"> • Detention and training order (the same periods are available as in the youth court) • Long term detention (under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000) • Extended sentence of detention or detention for life (if dangerousness criteria is met) • Detention at Her Majesty’s pleasure (for offences of murder)

5.41 Under both domestic law and international convention, a custodial sentence must only be imposed 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 fine alone nor a community sentence can be justified.”²⁵ If a custodial sentence is imposed, a court must state its reasons for being satisfied that the offence is so serious that no other sanction would be appropriate and, in particular, why a YRO with intensive supervision and surveillance could not be justified.

5.42 The term of a custodial sentence must be the shortest commensurate with the seriousness of the offence; any case that warrants a detention and training order of less than four months must result in a non-custodial sentence. The court should take account of the circumstances, age and maturity of the offender.

5.43 In determining whether an offence has crossed the custody threshold a court will need to assess the seriousness of the offence, in particular the level of harm that was caused, or was likely to have been caused, by the offence. If youth offence specific guidelines are available then the court should consult them in the first instance. The risk of serious harm in the future must also be assessed. The pre-sentence report will assess this criterion and must be considered before a custodial sentence is imposed. A custodial sentence is most likely to be unavoidable where it is necessary to protect the public from serious harm.

The court must always bear in mind that the principal aim of any sentence is **to prevent re-offending**.²⁶

4.44 If the court is satisfied that the offence crosses the custodial threshold, and that no other sentence is appropriate, the court may as a preliminary consideration consult the equivalent adult guideline in order to decide upon the appropriate length of the sentence.

²⁵ Criminal Justice Act 2003, s.152(2)

²⁶ Crime and Disorder Act 1998, s.37

- 4.45 When considering the adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of **half to two thirds** of the adult sentence. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the offender are of the greatest importance and may present good reason to impose a sentence outside of this range.
- 4.46 The closer the young offender is to 18 the closer the sentence will be to that which would have been imposed for an adult. In most cases when making this assessment the emotional age and maturity of the offender is of at least equal importance as their chronological age.
- 4.47 There is an expectation that custodial sentences will be particularly rare for an offender aged 14 or less. If custody is imposed, it should be for a shorter length of time than that which a young offender aged 15-17 would receive if convicted of the same offence. For an offender aged 14 or under the sentence should normally be imposed in a youth court (except in cases of homicide or when the dangerous offender criteria is met).
- 5.48 The welfare of the offender must be considered when imposing any sentence but is especially important when a custodial sentence is being considered. A custodial sentence could have a significant effect on the prospects and opportunities of the young person and a young person is likely to be more susceptible than an adult to the contaminating influences that can be expected within a custodial setting. There is a high reconviction rate for young people that have had custodial sentences and there have been many studies profiling the effect on vulnerable young people, particularly the risk of self harm and suicide.

Detention and training order

- 5.49 A court can only impose a detention and training order if the offender is legally represented unless they have refused to apply for legal aid or it has been withdrawn as a result of their conduct.
- 5.50 If it is determined that the offence is of such seriousness that a custodial sentence is unavoidable then the length of this sentence must be considered on an individual basis. The court must take into account the chronological age of the offender, as well as their maturity and other relevant factors, such as their mental health or learning disabilities.
- 5.51 A detention and training order cannot be imposed on any offender under the age of 12 at the time of conviction and is only applicable to offenders aged 12-14 if they are deemed to be a “persistent offender.”

5.52 A detention and training order can be made only for the periods prescribed – 4, 6, 8, 10, 12, 18 or 24 months. Any time spent on remand in custody or on bail subject to a qualifying curfew condition should be taken into account when calculating the length of the order. The accepted approach is to double the time spent on remand before deciding the appropriate period of detention, in order to ensure that the regime is in line with that applied to adult offenders.²⁷ After doubling the time spent on remand the court should then adopt the nearest prescribed period available for a detention and training order.

Long term detention

5.53 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 if convicted of a “grave crime” and neither a community order nor a detention and training order is suitable.

5.54 These cases may be sent for trial to the Crown Court or committed for sentence only²⁸ (see section two for further information).

5.55 It is possible that, following a guilty plea a two year detention order may be appropriate, as opposed to a sentence of section 91 detention, to account for the discount.²⁹

Dangerous offenders

5.56 If a young person is found to be a dangerous offender they can be sentenced to **extended detention** or **detention for life**.

5.57 A sentence of extended detention may be imposed only where the appropriate custodial term would be four years or more. The extension period must not exceed 5 years in the case of a specified violent offence and 8 years in the case of a specified sexual offence. The term of the extended sentence of detention must not exceed the maximum term of imprisonment for an adult offender convicted of that offence.

5.58 A sentence of detention for life should be used as a last resort when an extended sentence is not able to provide the level of public protection that is necessary.³⁰ In order to determine this the court should consider the following factors in the order given:

- the seriousness of the offence;
- the offender’s previous convictions;

²⁷ *R V Eagles* [2006] EWCA Crim 2368

²⁸ Powers of Criminal Courts (Sentencing) Act 2000, s.3(b) (as amended)

²⁹ *Fieldhouse and Watts* [2001] 1 Cr App R (S) 104)

³⁰ *R. v. Saunders; R v. G.; R v. Edwards* [2014] 1 Cr.App.R.(S.) 45, CA

- the level of danger posed to the public and whether there is a reliable estimate of the length of time the defendant will remain a danger, and;
- the alternative sentences available.³¹

The court is required to set a minimum term which must be served in custody before parole can be considered.

Detention at Her Majesty's pleasure

5.59 This is the mandatory sentence for anyone convicted of committing a murder whilst aged below 18 years old. The starting point for the minimum term is 12 years.

³¹ *Att.-Gen.'s Reference (No. 27 of 2013)*

Appendix 1

Breach of a conditional discharge

- 6.1 If the young offender commits an offence during the period of conditional discharge then the court has the power to re-sentence the original offence. The offender should be dealt with on the basis of their current age and not the age at the time of conviction and the court can deal with the original offence(s) in any way which it could have if the offender had just been convicted.
- 6.2 There is no requirement to re-sentence; if a court deems it appropriate to do so they can sentence the offender for the new offence and leave the conditional discharge in place.

If the order was made by the Crown Court then the youth can be committed to that court for re-sentence.

If the young offender is convicted of committing a new offence after attaining the age of 18 but during the period of a conditional discharge made by a youth court then they may be re-sentenced for the original offence by the convicting adult magistrates' court. If the adult magistrates' court decides to take no action then the youth court that imposed the conditional discharge may summons the offender for the breach to be dealt with.

Breach of a reparation order

- 6.3 If it is proved to the appropriate court that the offender has failed to comply with any requirement of a reparation order that is currently in force then the court can:
- Order the young offender to pay a fine not exceeding £1,000; or
 - Revoke the order and re-sentence the offender in any way which they could have been dealt with him for that offence

If re-sentencing the offender the court must take into account the extent to which the offender has complied with the requirements of this order.

- 6.4 If the order was made by the Crown Court then the youth court can commit the offender in custody or release them on bail until they can be brought or appear before the Crown Court.
- 6.5 The young offender or a YOT officer can also apply for the order to be revoked or amended but any new provisions must be ones that the court would have been able to include when the original reparation order was given. There is no power to re-sentence in this situation as the offender has not been found to be in breach of requirements.

Even when an offender has attained the age of 18 breach of a reparation order must be dealt with in the youth court.

Breach of a referral order (Referral back to court)

6.6 If a young offender is found to have breached the conditions of their referral the Court can revoke the referral order and re-sentence the young offender using the range of sentencing options (other than a referral order) that would have been available to the court that originally sentenced them. If the court chooses not to revoke the referral order then it is possible to:

- allow the referral order to continue with the existing contract;
- extend the referral order up to a maximum of 12 months; or
- impose a fine up to a maximum of £2500.

If an offender has attained the age of 18 by the first court hearing then breach proceedings must be dealt with by the adult magistrates' court. If the court chooses to revoke the order then its powers are limited to those available to the court at the time of the original sentence.

Commission of further offences whilst on a referral order

6.7 The court has the power to extend a referral order in respect of additional or further offences. This applies to not only a first referral order but also to any subsequent referral orders. Any period of extension must not exceed the total 12 month limit for a referral order.

6.8 If the court chooses not to extend the existing referral order they have the power to impose a new referral order. The court may direct that the contract under the new order is not to take effect until the earlier order is revoked or discharged.

6.9 If the court sentences in any other way they have a discretionary power to revoke the referral order. Where an order is revoked, if it appears to be in the interests of justice, the court may deal with the original offence(s) in any way that the original court could have done, but may not make a new referral order. Where the referral contract has taken effect, the court shall have regard to the extent of the offender's compliance with the terms of the contract.

Breach of a YRO

6.10 Where a young person fails to comply with a YRO, the responsible officer must consider whether there was a reasonable excuse. If the officer considers that there was no reasonable excuse then a warning must be issued.

- 6.11 A warning must describe the circumstances of the failure to comply and include a statement that the failure is not acceptable and that 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 but there is a discretionary power to do so on the second failure.
- 6.12 The following options are available to the court:
- allow the order to continue in its original form;
 - impose a fine (and allow the order to continue in its original form);
 - amend the terms of the order; or
 - revoke the order and re-sentence the offender.
- 6.13 If the terms of the order are amended the new requirements must be capable of being complied with before the expiry of the overall period. 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 YRO 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.
- 6.14 A court may not amend the terms of a YRO 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 YRO revoked.
- 6.15 A court must ensure that it has sufficient information to enable it to understand why the order has been breached and should be satisfied that the Youth Offending Team and other local authority services have taken all steps necessary to ensure that the young person has been given appropriate opportunity and the support necessary for compliance. This is particularly important if the court is considering imposing a custodial sentence as a result of the breach.
- 6.16 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 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.
- 6.17 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.

A young person will almost certainly be considered to have “wilfully and persistently” breached a YRO where there have been three breaches that have demonstrated a lack of willingness to comply with the order that have resulted in an appearance before court.

6.18 The additional powers available to the court when re-sentencing an offender who has “wilfully and persistently” breached their order are:

- the making of a YRO with intensive supervision and surveillance even though the offence is non imprisonable;
- a custodial sentence if the YRO that is breached is one with an intensive supervision and surveillance requirement, which was imposed for an offence that was imprisonable; and
- the imposition of a detention and training order for 4 months for breach of a YRO with intensive supervision and surveillance which was imposed following wilful and persistent breach of an order made for a non-imprisonable offence.

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

If an offender has attained the age of 18 by the first court hearing then breach proceedings must be dealt with by the adult magistrates’ court. If the court chooses to revoke the order then its powers are limited to those available to the court at the time of the original sentence.

Commission of further offences during a YRO

6.19 If a young offender commits an offence whilst subject to a YRO the court can impose any sentence for the new matter, but can only impose a new YRO if they revoke the existing order. Where the court revokes the original order they may re-sentence that matter at the same time as sentencing the new offence.

Breach of a detention and training order

6.20 If a young offender is found to have breached a supervision requirement after release from custody then the court may:

- impose a further period of custody of up to three months or the length of time from the date the breach was committed until the end of the order **whichever is shortest**;
- impose a further period of supervision of up to three months or the length of time from the date the breach was committed until the end of the order **whichever is shortest**;
- impose a fine of up to £1,000; or

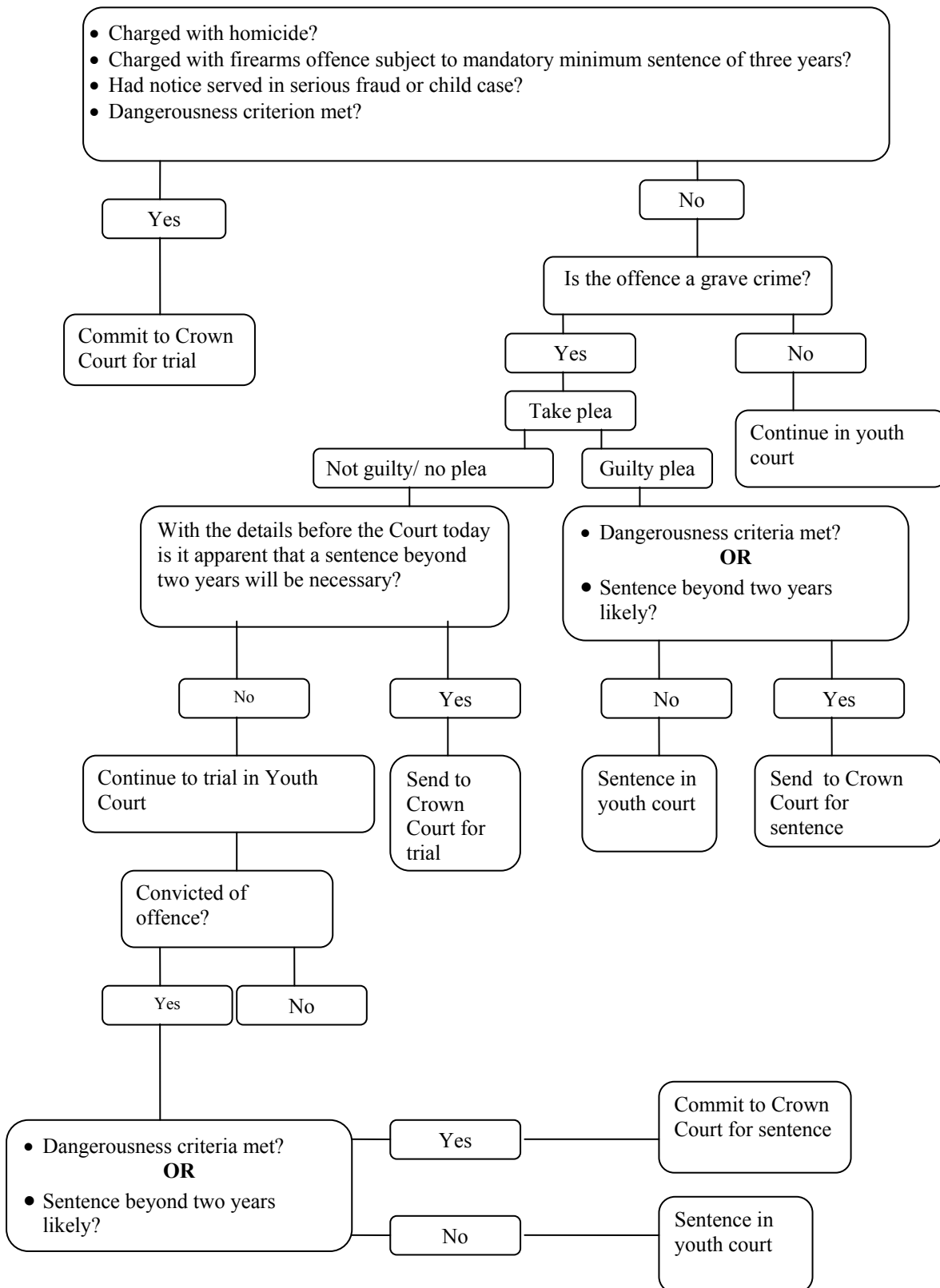
- take no action.

Even if the offender has attained the age of 18 proceedings for breach of the supervision requirements must be dealt with in the youth court.

Commission of further offences during a detention and training order

- 6.21 If a young offender is found guilty of a further imprisonable offence during the currency of the order then the court has the power to impose a further period of detention, whether or not it chooses to pass any other sentence. This period cannot exceed the period between the date of the new offence and the date of when the original order would have expired.
- 6.22 This period can be served consecutively or concurrently with any sentence imposed for the new offence and this period should not be taken into account when determining the appropriate length of the sentence for the new offence.

Allocation Chart



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