



## Representing looked-after children at the police station: a step-by-step guide for lawyers

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# Howard League for Penal Reform

## Key points

- Looked-after children are disproportionately criminalised compared to other children, particularly those living in residential care
- They are less likely to receive support from family members or another trusted adult at the police station, which can adversely affect them
- Looked-after children are generally disadvantaged but should be entitled to additional protections set out in law, policy and guidance
- This guide provides step-by-step best practice guidance to enable lawyers to advocate effectively for looked-after children at the police station
- It contains guidance on considerations for oral and written representations and advice on practical steps lawyers should take to ensure looked-after children receive the support and assistance they need and are entitled to.

## Introduction

Looked-after children are more likely than their peers to experience police contact and criminalisation. They are less likely to receive support at the police station from family or a trusted adult which can affect both their experience of custody and the criminal justice outcome.

Over 100,000 children were 'looked after' at some point during 2017/18. The number of teenagers i.e. those above the age of criminal responsibility, coming into care is rising - there has been a 21 per cent increase in the number of children aged 13 years and over coming into care since 2012 (Children's Commissioner, 2019). Around three quarters of children in care are looked after by foster carers. Eleven per cent live in residential children's homes, secure units and semi-independent living arrangements and around six per cent of children who are legally 'in care' live with their parents (Department for Education, 2018b).

Being held in police custody, particularly in a police cell, can be extremely disturbing and damaging for any child. Children's emotional and physical responses to trauma and fear can exacerbate their distress and their criminal justice outcomes, for example if they resist arrest or injure a police officer. Children may be subjected to distressing procedures such as strip searching, restraint or the taking of intimate samples. The experience of being arrested and held in police custody can be particularly acute for looked-after children who may have histories of trauma. Recent research has shown that children in care tend to have harsher and longer experiences in police custody (Bevan, 2019a). Lawyers can challenge detention and improve children's custody conditions.

### Criminalisation of looked-after children: contributing factors

Looked-after children are disproportionately criminalised compared to their non-looked-after peers. Children in residential care are most at risk, being around ten times more likely to be criminalised than other children (Howard League, 2019a). Understanding the factors that contribute to the criminalisation of children in care will enable lawyers to provide the best support and advocacy at the police station. Lawyers should bear in mind the following issues:

- Looked-after children are likely to have experienced disadvantage, trauma and abuse

- which can contribute to challenging behaviour and other difficulties.
- Multiple placement moves, frequent changes of social worker, placements far from home, disruptions to education and services and/or other poor care from their home local authority can impact on their well-being and behaviour.
- Whilst many children's homes and foster carers provide an excellent level of care which makes criminalisation less likely, some children receive unacceptable care and/or are in placements where the police are being called unnecessarily.
- Looked-after children are at risk of exploitation, including child sexual exploitation and child criminal exploitation, for example by 'county lines' drugs dealers (See Step 8 below).
- Children in care often lack the unconditional emotional investment and support of an adult who isn't paid to look after them, which can make them feel rejected and uncared for.

#### The term "looked-after children"

Under the Children Act 1989, a child is looked after by a local authority if he or she falls into one of the following:

- is provided with accommodation, for a continuous period of more than 24 hours,
- is subject to a care order, or
- is subject to a placement order.

If the child is remanded to youth detention accommodation, they will automatically receive 'looked-after' status (Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 104).

Many children dislike the phrase 'looked-after children' and its acronym 'LAC'. Language is really important in terms of respectful interaction with and about children and in order to build trusting relationships with them. We have used the phrases 'looked-after children' and 'children in care' for the sake of professional clarity in this guide.

The word 'child' is used throughout to refer to people aged 17 years and under in line with the United Nations Convention on the Rights of the Child 1989. Some teenagers may object to being referred to in this way but it is helpful for the word 'child' to be used to police officers and other professionals to highlight the special status of and legal protections available to this age group.

For more information on children's preferences see The Adolescent and Children's Trust's *Language that cares. Changing the way professionals talk about Children in Care* (2019).

## Step-by-step guidance

This guidance draws out key legal principles and practical steps that are particularly relevant to looked-after children. For a detailed guide to the law affecting the detention of any child at the police station see Aubrey-Johnson, K., Lambe, S. and Twite, J. (2019) *Youth Justice Law and Practice*. London: Legal Action Group.

This guide refers to the English law and provisions. However, the principles and advice apply to lawyers working in Wales also where different but equivalent provisions apply.

### Step 1 – First steps

Lawyers should make contact with the police station as quickly as possible after they have been notified of the child's detention. They should make enquires as to the reason and necessity of the child's arrest and detention (see Step 2) and ensure that the matter is dealt with expeditiously. It is helpful to get the details of the police officer in the case as soon as one has been assigned in order to liaise directly with them and provide them with any information that may assist. Ideally, the lawyer will attend as soon as possible, although it is recognised that in many cases the lawyer may not be able to attend until they are given more of an indication of when the child will be interviewed. It is vitally important to ensure everything is done to speed up the process for a looked-after child in police custody.

If possible, speak to the child's social worker or care home prior to the initial call to the police station so that you are able to let the Custody Officer know about any vulnerabilities. This can also help ascertain whether there is a family member the child may wish to be contacted who might be able to act as an Appropriate Adult (AA) or otherwise provide support. If the child is in residential care, check at the earliest stage whether the home has a Behaviour Management Policy and how they would like the matter to be resolved. Sometimes staff call the police to diffuse a situation but they do not want children to be criminalised.

*"Police station custody areas can be very frightening places for adults, and are all the more so for young people. Children brought into police custody may be traumatised or distressed, or under the influence of alcohol*

*or drugs (or their after-effects). A significant number have communication, learning, language or health needs, and many do not understand what is happening to them or the terminology used."*  
(HMI Constabulary *et al*, 2011)

### Step 2 - Review the decision to arrest or hold the child in custody

If the child has not been arrested yet, seek to prevent arrest and custody from taking place by requesting a voluntary police interview.

The *National protocol on reducing unnecessary criminalisation of looked-after children and care leavers* (Department for Education, 2018a) provides guidance:

*"If the decision to call the police is made, then, upon the arrival of the police at the scene, a joint view (police and carer) should inform whether arrest is necessary and proportionate. Where arrest is considered necessary there should be a presumption to interview children in voluntary reporting suites, outside of police custody, wherever possible."* (page 34)

If the child has already been arrested check that the grounds for authorisation of detention comply with section 37(3) Police and Criminal Evidence Act 1984 (PACE) which allows detention without charge only:

*"If the custody officer has reasonable grounds for believing that the person's detention without being charged is necessary to secure or preserve evidence relating to an offence for which the person is under arrest or to obtain such evidence by questioning the person, he may authorise the person arrested to be kept in police detention."*

Custody officers should authorise detention "only when it is **necessary** to detain rather than when it is convenient or expedient" (Section 3, Response, Arrest and Detention. College of Policing, 2013).

If the child is detained, make representations to the Custody Officer to ensure the following key legal principles are observed:

- The period of detention at the police station is be no longer than necessary (PACE Code C,

para. 1.1)

- Children should not routinely be placed in police cells. Custody Officers should consider if they can be supervised in another suitable safe place in the police station (PACE Code C, para. 8.8)
- Children must never be held in a police cell with a detained adult (PACE Code C, para. 8.8)
- Officers should avoid holding children overnight in police cells unless absolutely necessary (Section 2, Detention and custody: Children and young persons, College of Policing, July 2015).

Children in care can often spend longer in police custody because of the difficulties in appointing an AA or uncertainty over where they will be released to. Lawyers can assist in reducing the length of time spent in custody by making early enquiries with the child's social worker and care home.

### Step 3 – Effective communication with your client

It is essential that lawyers are able to communicate effectively with children so that children are able to understand what is happening to them, so that they are given the best opportunity to put their case across to their legal representative, to prepare them for the police interview and so that any issues and needs they have can be addressed. Advocating for a looked-after child requires excellent communication skills and a knowledge of the factors that may affect the child's ability to communicate and/or participate effectively. The following provides an overview of key considerations and practical guidance drawing on the latest research.

#### Establish rapport and trust

It is essential to establish rapport with the child and to gain their trust. This can be very difficult to do quickly at the police station and it may be particularly challenging with a looked-after child who may have a history of having been let down and/or rejected by adults. Let children know you are on their side. Don't be put off if children appear unfriendly or don't seem to care. Looked-after children in particular may be adept at hiding emotions such as anxiety or fear under a front of bravado.

*"She [my solicitor] gave the impression that she didn't want to be there and she certainly didn't*

*try to help me. As I sat in the interview room in the court house listening to her I was finding it hard to breathe and I felt like screaming."*  
Eddie, 15 years old (Howard League, 2019b)

The Howard League's *Children and sentencing* (2018b) sets out some practice points that can help lawyers establish trust with their young clients:

- Be up-front about your role, tell the child:
  - who you are;
  - what your role is;
  - how you will be working with the child and how the child can complain about you if they need to;
  - why you need to know the information you are asking them for, and that they can ask you questions too;
  - when the child should hear from you;
- Establish a positive relationship.
- Check yourself for bias and be cognisant of particular biases within the criminal justice system against looked-after and Black and Minority Ethnic (BAME) children.
- Be aware of the power imbalance.

Recent research with children being held at the police station by Dr Miranda Bevan (2019b) has highlighted the following important practice points:

- Children may not appreciate that solicitors, especially duty solicitors, are independent from the police. It is important to stress to the child the fact that you are not connected to the police in any way and that you are on their side. This may be a particularly important issue to counter for BAME children: David Lammy's *Independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (2017) identified a 'trust deficit' between BAME suspects and duty solicitors.
- Children do not usually understand legal professional privilege. Lawyers who reassured children, subject to the usual caveats, *"I won't tell the police anything you say unless you say that I can"* were really appreciated and likely to receive fuller instructions.
- It is critical that lawyers understand the power of peer relationships and carefully navigate how much that may influence what a child chooses to say.
- Lawyers should impress on children that they will give advice but that the decision is

theirs. Children should be made aware of the seriousness of the situation and the implications of the decisions they take.

Children in care have reported that they are not listened to or believed, particularly where incidents have involved care workers who children claim have lied about what happened, assaulted them, incited the incident perhaps leading to the child biting or lashing out in self-defence, exacerbated an already fraught situation or called the police out unnecessarily (Howard League, 2017b). Give children the chance to tell their side of the story, let them know that they are believed and challenge unfair and unnecessary criminalisation. If the child reveals an injury that they say was caused by someone else, take a photograph and consider what further action needs to be taken. Where children have been harmed in the home and may be at risk if they return, alert the child's social worker to the issue and ensure that they are not released to an unsafe environment.

*"Crucially, children tell us that the biggest difference we can make is to listen in order to make sure that their voice is heard, rather than assume that the child is at fault."*  
Chief Constable Olivia Pinkney, (National Police Chiefs' Council, undated)

#### Be aware of language and communication difficulties

About 60 per cent of children in the youth justice system have significant speech, language or communication difficulties; around a quarter have a learning disability (Barnardo's, 2017). It is important to try to modify your language and modes of communication according to the child's needs. Avoid jargon and use clear, simple words. Children may have learned to mask or hide their disabilities. Legal representatives should try to sensitively ask relevant questions to ascertain levels of understanding (Aubrey-Johnson et al, 2019).

#### Be alive to additional needs and mental health problems

Common conditions that affect children in the criminal justice system are attention deficit hyperactivity disorder, autism spectrum disorder and conduct disorder. Children may also be suffering from mental health problems such as

### The adolescent brain

Adolescent brains are continually changing and developing. Advances in neuroscience have revealed that the part of the brain which regulates judgement, decision-making and risk-taking is the slowest to mature. This means that teenagers are more likely to respond emotionally, they are more prone to be impulsive and take risks and it can affect their decision-making. These tendencies can be further exacerbated by abuse during childhood. Looked-after children may have experienced physical abuse that has caused brain injury; they may also have experienced other types of abuse and maltreatment which, scientific advances have shown, can cause very significant changes in brain structure and chemical activity which can have a wide variety of effects on children's behavioral, social, and emotional functioning.

For more information on the impact of abuse and maltreatment on the adolescent brain, see Child Welfare Information Gateway (2015) *Understanding the effects of maltreatment on brain development*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau

depression and post-traumatic stress disorder (Aubrey-Johnson et al, 2019). In 2016, over 70 per cent of children who received a criminal conviction whilst living in residential care had emotional and behavioural health that was of borderline or actual concern (Howard League, 2017a). Try to ascertain whether the child has any relevant additional needs or mental illnesses. These should be taken into account when taking instructions and when making representations.

The Advocates Gateway contains a number of toolkits including 'Planning to question a child or young person', 'Effective participation of young defendants' and several on how to work with clients with a range of difficulties and disabilities (see: <https://www.theadvocatesgateway.org/toolkits>).

#### Well-being and conditions of custody

The kinds of issues children have reported are particularly upsetting to them include: strip-searching, restraint, use of the toilet (children often do not know that this part of the cell image is pixelated), menstruation, being on constant watch, lack of food/drink, loneliness and boredom. Children can find it difficult to raise these sorts of problems with representatives. Children have

reported that their resulting hunger, exhaustion, and desperation to go home can seriously undermine their ability to cope with questioning and can lead to no comment responses or even false confessions in interview (Bevan, 2019b). Gaining children's trust is essential as is a knowledge of the kinds of difficulties children may be facing, so that the right questions can be sensitively asked to encourage disclosure.

Looked-after children are much less likely than other children to have a trusted adult at the police station to advocate for their needs or to whom they might disclose particular fears or problems to. Consultation time is likely to be pressured but lawyers acting for looked-after children must consider their client's well-being and the conditions of detention. Ask the child about their conditions in custody and ask to see the detention log. Raise concerns with the Custody Officer about the child's well-being. Lawyers who show concern for children in this way are more likely to gain children's trust and they can help reduce the distress and long-term harm of being in custody for their extremely vulnerable client.

#### *Providing updates and reassurance*

Not knowing what is being done about your case and what will happen to you whilst in police custody can be extremely frightening. Keeping children posted about the process and providing reassurances can be particularly important for looked-after children who are lacking other support. Check in with the child at regular intervals throughout the period of detention to make sure they understand what is happening, to answer questions and concerns and to make sure they are alright. This can be done before attendance at the police station by calling the police custody suite and asking to speak to the child. Make sure that the child is aware that they have the right to speak to their lawyer at any time.

#### **Step 4 – Advocating for children's basic rights and entitlements**

It is often incorrectly assumed that care experienced children are familiar with their rights. Research suggests that even children with considerable criminal justice contact frequently do not know their basic rights and entitlements (Bevan, 2019b). Check that children are aware of their rights and advocate on their behalf where necessary to ensure

that rights are respected and children's needs are met. In particular, check the child knows that they are entitled to ask for adequate food and drink as well as access to toilets and washing facilities, clothing, medical attention, and exercise when practicable (PACE Code C 3.2(b)(ii)). They should also be informed that they are entitled to a phone call (PACE Code C 5.6). This can be particularly important where a child in care wants to speak to a family member/sibling/friend who is unlikely to be attending as an AA.

Make sure the child is aware of their right to complain about their treatment both at point of arrest and whilst in custody. Raise any complaints with the Custody Officer in the first instance and support the child to access complaints procedures if necessary.

#### *Appropriate Adults*

All children are entitled to an AA at the police station. In the case of a looked-after child the AA can be a family member, a person representing the local authority responsible for them, a social worker or, failing that, any responsible adult over the age of 18 who is not a police officer or employed by the police (PACE Code C, para. 1.7). The role of the AA is wide-ranging and critical to the support the child receives.

An AA should ideally be an adult who is known and trusted by the child. For non-looked-after children this would usually be a parent and this may be the case for looked-after children as well. Where an AA has a prior relationship of trust with the child they are in the best position to provide emotional support, advocate on behalf of the child to ensure their rights and needs are met and know relevant background information to assist the legal representative.

Social workers, foster carers and care workers from children's homes may act as AAs for looked-after children providing they are not a suspect, a victim, a witness or otherwise involved in the investigation. Whilst in some cases these professionals may have good relationships with children and be in a good position to support the child through their knowledge and understanding of the child's background and circumstances, lawyers should be aware of potential issues. Many children don't know their social workers or carers very well or don't get on with them. Where the

#### **Children's rights**

The United Nations Convention on the Rights of the Child ("UNCRC") provides a comprehensive checklist of children's rights. Key articles relating to children in custody are Articles 3 (the child's best interests should be a primary consideration in all decisions affecting the child), 37 (detention should be a last resort and for the shortest appropriate period of time) and 40 (children should be treated with dignity).

The UNCRC rights complement many of the rights found in the European Convention on Human Rights ("ECHR") which apply to all humans, both adults and children.

Key Articles of the ECHR applicable to children worth noting include:

- Freedom from torture (Article 3)
- The right to liberty (Article 5)
- The right to a private and family life, as well as personal and social development (Article 8).

The courts have held that when interpreting the rights contained in the ECHR, it is legitimate to rely on the UNCRC to interpret and inform the extent to which the human right has been breached. For instance, in the Howard League's Children Act case (*R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin)), the court noted that the UNCRC, as well as other equivalent, non-binding international law, can be relevant to 'proclaim, reaffirm or elucidate' the scope of other fundamental rights.

incident has taken place in a children's home or involved a carer, the carer involved or a colleague should not be appointed as the AA. The child might be in an out-of-area placement and their social worker, though liked by the child, might not be able to get to the police station in time. Speak privately with children to ensure they are happy with the appointed AA.

Where an adult known to and trusted by the child cannot be appointed an AA will have to be appointed from the local AA service. In these cases, they will be unknown to the child, have no personal relationship with them and no knowledge of their background or needs. In this far from ideal situation, emphasise to the Custody Officer the importance of calling the AA down to see the child as early as possible to give them the best opportunity to establish rapport with the child before the interview and to support their understanding of their rights and entitlements. If

the AA will be delayed in getting to the station, suggest that the child be offered an initial phone call with them.

Children should be advised of their right to consult privately with their AA '*at any time*' (PACE Code C, para. 3.15). This can be a useful lever for getting the child time-out of the cell with a sympathetic and supportive adult.

Many AAs, for example family members and care workers, are unlikely to be familiar with processes or the child's legal rights or entitlements. They can greatly benefit from the support of the lawyer in this regard.

#### *Strip and intimate searches*

Looked-after children may have acquired 'markers' on their police record for self-harm or carrying blades which can lead to them being automatically strip-searched at the police station, something that is extremely distressing for children, and which may be particularly so for looked-after children who might have suffered sexual or physical abuse. As PACE Code C, Annex A, para. 1 points out, the risks associated with an intimate search must never be underestimated. This is particularly important for looked-after children for whom strip and intimate searches may cause very significant trauma or re-trauma with long-term implications.

Challenge Custody Officers to conduct proper risk assessment before resorting to strip and/or intimate searches. If they do go ahead, make children aware that they can ask for the AA to be outside the room during the search (PACE Code C, Annex A para. 5) – having a stranger watch such an event can add to children's distress.

If a child is stripped and searched inappropriately, this is susceptible to an action against the police and the child should be referred to a lawyer specialising in actions against the police.

#### *Overnight detention*

Officers should avoid holding children overnight in police cells unless absolutely necessary (Section 2, Detention and custody: Children and young persons, College of Policing, July 2015). Looked-after children are more at risk of being held in custody overnight than other children because of issues with accommodation. In order to avoid this,

it is vital to make enquiries with the care home and social workers as early as possible to ensure that there is somewhere for the child to be released to. For further guidance on police and local authorities' obligations in respect of overnight detention, refer to the government's *Concordat on Children in Custody* (updated 2019).

### Step 5 - Gather information about the child

Information should be obtained about the child that can:

- (i) Help the lawyer to communicate effectively with the child
- (ii) Ensure the child's immediate needs are being met, for example, do they need any medication?
- (iii) Allow meaningful consideration of the child's fitness for interview
- (iv) Provide relevant evidence and background information about the child to inform representations to divert the child from the criminal justice system
- (v) Enable referral to any additional support children need.

The starting point for gathering information will be the child themselves. They will be best placed to tell you who knows them well and who they trust to provide you with supportive and accurate information. If they are unable or unwilling to assist, then consider contacting the child's carer or key worker, their social worker or family members.

Be alive to the possibility that children may not have a good relationship with carers or social workers which may affect the information you are being given and that professionals may not know the child well. If obtaining documents, such as social care records, be aware that the 'paper child' (i.e. the picture of the child that appears on the records kept by the, often, myriad of professionals who have passed through their lives) can misrepresent the child and affect understanding and judgements about that child by other professionals (Howard League, 2018a). Be prepared to challenge any misrepresentations which can profoundly affect a child's criminal justice and social care outcomes.

If the child has been recently assessed by a psychologist or psychiatrist try to get hold of a copy of the report. In cases where the child has already

been charged but there are concerns that they may suffer from a mental health issue or learning difficulty, such reports can help determine whether an appropriate expert should be instructed to assess the child. This will inform any later reconsideration of the decision to charge the child.

Ask the child to sign a catch-all authorisation form so that information can be obtained as soon as possible. If the matter continues, you will need to obtain as much information as possible about the child. Further relevant guidance can be found in *Children and sentencing* (Howard League, 2018b).

#### Make sure local authorities fulfil their obligations to looked after children

Local authorities, as 'corporate parent', have wide-ranging responsibilities and duties towards the children under their care. *The Children Act 1989 guidance and regulations Volume 2: care planning, placement and case review* (Department for Education, 2015) provides the statutory guidance in respect of these. Clause 7 of Schedule 2 of Children Act 1989 specifically requires local authorities to take 'reasonable steps' to 'reduce the need ... to bring criminal proceedings' against looked-after children. The *National protocol on reducing unnecessary criminalisation of looked-after children and care leavers* (Department for Education, 2018b) additionally states that "the local authority should be pro-active in assisting the Crown Prosecution Service in reaching informed decisions when considering cases involving looked-after children."

Lawyers should push for local authorities to fulfil their obligations to looked-after children, something that can be particularly difficult when children are living in out-of-area placements. In these circumstances, the responsible local authority is the child's 'home' local authority, not the local authority where they are currently living. If local authorities fail to fulfil their legal duties to a child, the matter can be referred to a community care lawyer (for more details, see Step 10).

### Step 6 – Interview considerations

#### Fitness for interview

Fitness for interview can be an important issue for looked-after children because of the prevalence of additional needs and mental health issues and also because of the length of time some children are detained. Consider discussing with the Custody Officer whether the child has been assessed as fit

for interview in line with PACE Code C, Annex G.

The fitness for interview provisions in Code G afford healthcare professionals a significant role in the assessment of fitness for interview. Consider whether it might be helpful for your client to be assessed by a doctor or nurse. Medics in police custody suites often do not have expertise with looked-after children. When they are considering whether a child is fit to be interviewed they are likely to assess whether they are drunk or under the influence of drugs, psychotic or mentally unstable. They are likely to have very limited information about the child and to be reliant on the child telling them about pre-existing medical conditions. Where the lawyer is aware of relevant information about the child's health, they should inform the Custody Officer, with the child's consent, to assist any decisions they make and to assist medics when they assess the child's fitness.

Children may have concerns about seeing the healthcare professional, perhaps because of lack of trust of professionals or because they are concerned about confidentiality and/or partiality. Reassure children and explain to them the potential benefits.

If the child is deemed to be fit for interview, consider whether they need additional support to participate effectively. If they do, make representations for them to be bailed and attend on another date with appropriate support. Bear in mind that scheme AAs rarely have any specialist training and that they are not usually equipped to support significant participation issues. Consider whether the child would benefit from the appointment of an Intermediary. Unfortunately, there is currently no mechanism to apply for funding for an Intermediary at the police station. Lawyers can request the Officer in Charge to consider bailing the child so that an Intermediary can be instructed at a later date although generally the police are unable to provide funding for this. If you are unable to obtain specialist support for the child, make sure that any concerns about the child's ability to participate are stated at the beginning of the interview on tape.

#### Interviews

Children always want to know how long something is going to take. Talking to the officer to ask if they have a sense about how long the interview will be can reduce stress and stop the child from getting frustrated or giving up. Before the interview starts,

suggest the child goes to the toilet, as children are often too shy or embarrassed to make this request. If they haven't eaten, try to get them something, even a biscuit, before they are interviewed. These kinds of considerations can have huge bearing on how children 'perform' in the interview.

Children may not always fully comprehend the long term consequences of police interviews or may struggle to apply their full attention to the process. It may be worth asking the child if there is anything on their mind that will stop them giving the interview their 100 per cent attention. Children get tired, frustrated and overwhelmed. Regular breaks may assist. If a child is struggling with the interview process, it may be useful to consider a pre-prepared statement where the child can get the key points across with the support of his or her lawyer.

If there are any concerns that the child is being exploited they should be interviewed as a victim rather than a perpetrator and an NRM referral should be made (see Step 8). If concerns arise during the course of the interview, the interview should be stopped.

### Step 7 – Ensure that the police have followed the "10-point checklist" for children accused of committing offences in children's homes

This guide is relevant to all children who are in care. Children in residential care are, as noted above, even more likely to come into contact with the police than children in other types of care placements and many of the incidents that lead to arrest take place in residential homes. The Crown Prosecution Service (CPS) *Legal Guidance on Offending Behaviour in Children's Homes* (updated 2019) contains out a 10-point checklist setting out required information that must be obtained before a decision can be taken on prosecuting children accused of committing offences in children's homes. Failure to follow this guidance could result in proceedings for judicial review (*R v Chief Constable of Kent and Another ex parte L, R v DPP ex parte B* (1991) 93 Cr App R 416).

The checklist requires the following information to be obtained:

1. What is the disciplinary policy of the children's home?
2. Why have the police have been involved and is it as agreed in the policy?

3. Has any informal/disciplinary action already been taken?
4. Has there been an apology or reparation?
5. What are the victim's views?
6. What are the social worker's (and other key professional's) views?
7. What is the care plan for the child?
8. What is the recent behaviour of the child and have there been any other incidents in the home?
9. What information has been given by the child about the incident?
10. Are there any aggravating or mitigating features?

your concerns and make representations for them to be treated as a victim rather than a suspect.

For more information on acting for a child who is being criminally exploited and the defence under the Modern Slavery Act 2015, see the Youth Justice Legal Centre's *Guide to Child Criminal Exploitation: county line gangs, child trafficking & modern slavery defences for children* (2018).

### Step 9 - Make representations to the CPS and/or police

#### Discontinuing or diverting

The best way to reduce the unnecessary criminalisation of looked after children is for charges not to be brought or cases to be discontinued or diverted. As the *Sentencing Children and Young People Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery Definitive Guideline 2017* points out looked-after children are over-represented in the criminal justice system (para 1.16).

Consider making representations both orally and in writing reminding the police and CPS, noting the duty on both agencies to take into account the welfare and 'best interests' of the child in their decision making (Article 3(1) United Nations Convention on the Rights of the Child, s11 of the Children Act 2004 and Code for Crown Prosecutors, 4.14 (d)). Welfare based arguments will be particularly compelling for looked-after children.

Consideration should be given to the guidance that is used by the police and CPS when deciding whether a child should be diverted, the Youth Gravity Matrix (ACPO, 2013). Offences are graded between one and four based on their seriousness with the expectation that any score of three or below should always be considered for an out of court disposal. It may be appropriate to argue that the scores should be reduced or mitigated in the case of looked-after children given the multiple disadvantages they so often face.

The *National protocol on reducing unnecessary criminalisation of looked-after children and care leavers* states that prosecution of looked-after children should be avoided wherever possible (Department for Education, 2018, page 7).

This overarching principle should be borne in

mind when considering the following questions in accordance with the Code for Crown Prosecutors:

- Is there sufficient evidence to bring a prosecution?
- Is the public interest met in pursuing a prosecution?
- Is diversion possible?

Given that looked after children are often especially vulnerable as a result of their experiences, it will be vital to set out the child's background and the context to the alleged offence to argue it would not be in the public interest to prosecute or that informal diversion would be more proportionate. The police and CPS's attention should be drawn to the relevance of trauma and adverse life experiences on a child's behavior including the impact of failure of authorities to properly support the child. It should also include information in relation to any learning or communications difficulties, mental health issues and any other relevant information including from a support worker or social worker that could help.

Research shows that youth diversion is widely but variably practiced, with some areas having in place better practice than others. Consider speaking with the local youth offending team to find out what diversion schemes they have available in order to ascertain possible options. It will also be important to explain why criminalisation will have a disproportionate effect on a child's criminal record, referring to the long term implications of receiving a formal out of court disposal such as a youth caution or a criminal conviction (Sands, 2016; Stacey, 2018 and Temple, 2018).

Lawyers should also draw on guidance and principles in the government's *National protocol on reducing unnecessary criminalisation of looked-after children and care leavers* (Department for Education, 2018b) and the Crown Prosecution Service Guidance on Youth Offenders section on 'Offending Behaviour in Children's Homes' and the 10-point plan referred to above. The Protocol states that the CPS Guidance "*provides a useful way of looking at aggravating and mitigating factors when deciding whether prosecution of looked-after children is appropriate regardless of the child's type of placement*" (page 19, footnote 19).

It can often be worth reminding decision makers that a decision to prosecute a child may ultimately

be open to judicial review (*R v Chief Constable of Kent and Another ex parte L, R v DPP ex parte B* (1991) 93 Cr App R 416).

#### Challenging racial bias

BAME children are over four times more likely to be arrested than white children and more likely to get a worse criminal justice outcome than their white peers - white children are more than twice as likely to get a caution than black children (Youth Justice Board, 2019). The number of BAME children in custody now outnumbers the number of white children despite the fact that BAME children only make up about 18 per cent of the child population (HM Prisons and Probation Service, 2019). Lawyers should be alert to the potential that their client is being affected by racial bias, in addition to the bias they may also be experiencing as a looked-after child, and be robust in challenging this.

#### Challenging unnecessary continued detention

Children have complained of lengthy periods in the cell awaiting CPS decisions. Lawyers often leave when CPS advice is being sought and they may not be aware how long this can take. Be firm about challenging children's continued detention at this point. In the vast majority of cases, even if charged, bail is the likely outcome – and the grounds for detention (PACE s37(3)) have lapsed – as long as other suspects have also been interviewed. It is sometimes argued that young people prefer to get it all over and done with rather than be bailed to come back for charge in a few days. Research with young people shows that they often strongly disagree with that assertion (Bevan 2019b). Operational 'convenience' is not a basis for detention.

### Step 10 – Making sure children's community care needs are met

Looked-after children who come into contact with the criminal justice system are likely to have a range of additional needs. If you become aware of specific issues that the child requires support with, for example, if there are concerns that they are suffering exploitation or that their current placement is unsuitable, lawyers should, in the first instance, alert the child's social worker/home local authority to their concerns. If the child's social worker and/or local authority are not contactable or they do not appear to be supporting the child

The CPS Guidance contains further explanation in relation to each point: <https://www.cps.gov.uk/legal-guidance/youth-offenders>

### Step 8 - Consider whether the child is a victim of exploitation

Children in care are at increased risk of child exploitation including child criminal exploitation and child sexual exploitation. Children who have gone missing from their care placement are particularly in danger of involvement in drugs running, including county lines, trafficking, sexual exploitation and violence. Children may be suffering or at risk of more than one type of abuse and exploitation. There is growing awareness of the sexual abuse of boys who are being criminally exploited, for example, through rape (as a form of control or punishment) or being forced to carry drugs in their anus.

The *National protocol on reducing unnecessary criminalisation of looked-after children and care leavers* (Department for Education, 2018b) requires the police and CPS to consider whether a looked-after child is the victim of exploitation before charging or prosecuting them:

*"Any decision to charge and prosecute a young person should take into account whether their actions are due to such exploitation or human trafficking or modern slavery. If they are a victim of trafficking or modern slavery, the non-prosecution principle within the Modern Slavery Act 2015 should be considered and, if appropriate, applied."* (page 19)

If you are concerned that the child is the victim of exploitation, with their consent, you should raise

appropriately lawyers should consider referring the matter to a community care solicitor to challenge social services. This might be necessary even if bail is not granted if there is any chance of acquittal or a non-custodial disposal. Make sure that the community care lawyer will coordinate with the criminal solicitor.

Community care lawyers may also be consulted if criminal lawyers come across a child who they believe should be looked after but does not currently have that legal status.

Contact details for community care lawyers can be obtained through the Law Society or through the network Community Care Law for Children and Young People at <https://cccyplaw.org.uk/>. Legal aid is available for this work.

For further guidance on supporting children's resettlement and other support needs see the Howard League's *Resettlement: The legal rights of children and young people in the criminal justice system in need of accommodation and support* (2012) and *More than a roof overhead. What home means to children in trouble with the law* (2018c).

### **About the Howard League for Penal Reform**

The Howard League is a national charity working for less crime, safer communities and fewer people in prison.

We campaign, research and take legal action on a wide range of issues. We work with parliament, the media, criminal justice professionals, students and members of the public, influencing debate and forcing through meaningful change.

### **About Just for Kids Law**

Just for Kids Law is a charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted, and their voices heard and valued.

### **About The Youth Justice Legal Centre (YJLC)**

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC provides legal overviews, specialist training, a discussion forum and expert advice for barristers, solicitors and legal executives representing children in the youth justice system. We want to support a community of youth justice advocates and share good practice and expertise.

References for this report are available on our website: [www.howardleague.org](http://www.howardleague.org)

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