Judicial College

The Crown Court Compendium

Part II: Sentencing

July 2024

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Introduction

This July 2024 revision coincides with the revision of Part I.

Part II of the Compendium reflects the structure of the Sentencing Code in a way that it is hoped users of this work will find helpful. The Sentencing Compendium is not a textbook that is intended might be read from cover to cover. It is a reference work to which judges can turn as needed when dealing with discrete topics. For that reason, there is, in places, a degree of repetition. This is deliberate and is done in order to avoid the user of the Compendium having to cross refer to other parts of the book.

So far as the example sentencing remarks are concerned, they should not be considered as templates, and neither should the adoption of them be regarded as a guarantee against a successful appeal in respect of a sentence or a part of one. The examples provide a starting off point should a judge find it helpful to have a form of words to consider as part of the process of settling upon a way of expressing a particular sentence or part of one. As with every aspect of the Compendium, we are keen to refine them with every reissue and input from judges and practitioners is both welcomed and encouraged.

Passing sentence is one of the most challenging parts of being a judge – not just because of the many technical challenges (now happily somewhat reduced by reason of the implementation of the Sentencing Code) but also because of the importance attached to every word uttered by a judge on the part of all those directly engaged with a particular case, and also the public at large. What we say and how we say it is as important as the result itself, sometimes more so.

Particular care is needed when sentencing children and those that are otherwise vulnerable or face challenges engaging meaningfully with the criminal justice system – hence the inclusion of Appendix II (addressing the communication of sentences to children) written by Professor Hollingsworth[1] (Newcastle University) and Kate Aubrey-Johnson (Barrister, Garden Court Chambers). We are again very grateful to both of them for their careful review of this work (and indeed Part I). In addition to updating Appendix II, which I wholeheartedly commend to all faced with the challenge of dealing with a child appearing in court, particularly one who falls to be sentenced, they have made many helpful suggestions which have been adopted elsewhere in the text. They have also ensured that the important recent decision of the Court of Appeal in *ZA* is referenced throughout this work where it is relevant.

In terms of new material, both in respect of the previous edition and this one, the following are worthy of mention:

1. The case of *ZA*[2] in which the court recognised the challenge of sentencing children and set out the structured approach that judges are required to adopt. It is suggested that *ZA* is essential reading for any judge preparing to sentence a child. The court made specific reference to the value of Appendix II herein (although wrongly identified the publication in which it is to be found).
2. *Cookson* [2023] EWCA Crim 10 [9] and *Kamarra-Jarra* [2024] EWCA Crim 198 [59] address the issue of accounting for remand time when imposing a life sentence – the precise determination of the minimum term is a judicial function and must be pronounced by the

[1] There are two papers written by Professor Hollingsworth that are hosted on the JCL that are well worth reading: Sentencing Remarks for Children: Professor Kathryn Hollingsworth October 2019 and Sentencing Remarks for Children and Young People: Professor Kathryn Hollingsworth 2020.

[2] [2023] EWCA Crim 596

court. It is required that the court pronounces the sentence with the days on remand factored in, having discussed and agreed the figures with the parties.

3. *Swinbourne*[3] and *Blackadder*[4] on deferral of sentence – S2.4.

4. *Moore*[5] on the importance of a judge not placing improper pressure on a defendant when giving a *Goodyear* indication – S2.5.

5. In *Wright-Hadley*,[6] the court underlined the need when considering the making of a deprivation order, to have regard to s.153 (and where relevant s.155) of the Code. Such orders should not be made as a matter of routine but "should only be made when the court is satisfied, after due investigation and process, that they are both available in principle and justified as a matter of proportionality" – S3.5.

6. In *Wider*,[7] it was emphasised that in the context of a "dangerousness" life sentence when the criteria are satisfied the court must impose one – S4.7, S5.12, S5.13. In the context of life sentences generally, *Cookson*[8] explains that when passing a life sentence the accounting for days on remand must be undertaken at the point of sentence and cannot be later corrected administratively.

7. In *Lewis*,[9] the court dealt with an appeal against a judge's decision not to deduct time spent subject to a qualifying curfew. In allowing the appeal, the court stated that it must not be decided on an arbitrary basis – S5.15.

8. In *Kwake-Ampomah*,[10] the court cautioned against reliance upon intelligence reports when deployed in support of a proposed criminal behaviour order (CBO) – S6.2.

9. In *David*,[11] the court allowed an appeal against a sexual harm prevention order (SHPO) requirement that the appellant undergo a polygraph test if required to do so by an "offender manager/police". The court did not consider that such a requirement was justified and also identified the importance of having regard to s.347A, which requires the court to identify the person responsible for supervising requirements – S6.3.

10. In *McCarren*,[12] the court emphasised the procedural and evidential requirements that arise where a restraining order (RO) is sought. The consent of the subject of the application will not suffice if there has been a lack of compliance with the correct procedure or a failure to identify the evidence upon which the application is based. The judge is also required to identify the basis upon which there is a finding of "necessity" for the making of an order – S6.4.

11. *Sidat*[13] helpfully reviews the relevant principles that apply when the court is considering making a serious crime prevention order (SCPO) – S6.5.

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3 [2023] EWCA Crim 906
4 [2024] EWCA Crim 318
5 [2023] EWCA Crim 23
6 [2022] EWCA Crim 446
7 [2023] EWCA Crim 1295
8 [2023] EWCA Crim 10
9 [2023] EWCA Crim 956
10 [2023] EWCA Crim 1638
11 [2023] EWCA Crim 1561
12 [2023] EWCA Crim 1233
13 [2023] EWCA Crim 1411

12. A revised version of Appendix III dealing with the use of s.66 of the Court Act 2003 – with thanks to Matt Jackson (Barrister, Cloisters Chambers) for writing and maintaining this helpful guide to an area of the law fraught with technical challenges.

HHJ Martin Picton and Lyndon Harris
July 2024

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Preface: style and abbreviations

Unless the context indicates otherwise: any reference to a person in the masculine is to be read as including the feminine; and “judge” includes “recorder”.

References to child/children are to persons under the age of 18.[14]

Cases are usually referred to by the name of the defendant only, and by neutral citations.

The following abbreviations are used:

AJA	Administration of Justice Act 1970
CDA	Crime and Disorder Act 1998
CAJA	Coroners and Justice Act 2009
CCA	Crime and Courts Act 2013
CDDA	Company Directors Disqualification Act 1986
CJA	Criminal Justice Act 2003
CJCA	Criminal Justice and Courts Act 2015
CJPOA	Criminal Justice and Public Order Act 1994
CJIA	Criminal Justice and Immigration Act 2008
CJPA	Criminal Justice and Police Act 2001
CrimPD*	Criminal Practice Directions 2023
CrimPR*	Criminal Procedure Rules 2020
CYPA	Children and Young Persons Act 1933
D	The/a defendant
DPP	Detention for Public Protection
DTO	Detention and training order
IPP	Imprisonment for Public Protection
JRCA 2022	Judicial Review and Courts Act 2022
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LP(ECP)A	Licensed Premises (Exclusion of Certain Persons) Act 1980
MDA	Misuse of Drugs Act 1971

[14] Statutory language is not uniform in its references to persons aged under 18 (examples include child, child and young person, offenders under 18, juveniles). For consistency and alignment with the UN Convention on the Rights of the Child and more recent domestic legislation, the term “child/ren” is used here.

MHA	Mental Health Act 1983
ORA	Offender Rehabilitation Act 2014
OWA	Offensive Weapons Act 2019
PCC(S)A	Powers of Criminal Courts (Sentencing) Act 2000
PCSCA 2022	Police, Crime, Sentencing and Courts Act 2022
PoCA	Proceeds of Crime Act 2002
PSA	Psychoactive Substances Act 2016
SA	Sentencing Act 2020
SC	Sentencing Council
SGC	Sentencing Guidelines Council
SOA	Sexual Offences Act 2003
YOI	Young Offender Institution

***NOTE:**

CrimPR and CrimPD are available at – Criminal Procedure Rules 2020 and Practice Directions 2023.

S1 General

S1.1 The Sentencing Code

1. The Sentencing Code: the Sentencing Act (SA) 2020 is a consolidation act, bringing together the procedural provisions relating to sentencing from the Criminal Justice Act (CJA) 2003, the Powers of Criminal Courts (Sentencing) Act (PCC(S)A) 2000, the Criminal Justice and Immigration Act (CJIA) 2008 and many more pieces of primary and secondary legislation. Parts 2 to 13 of the Sentencing Act 2020 make up a Code called the Sentencing Code. Unless referring specifically to sections 1 or 2 of the Act, it will be perfectly proper to refer to either the Sentencing Act 2020 or the Sentencing Code.
2. The Code applies to persons convicted on or after 1 December 2020. For cases where the conviction predates 1 December 2020, the now “old” law, principally contained in the CJA 2003, PCC(S)A 2000 and CJIA 2008 will apply. The Code is now the principal source of sentencing procedure legislation, with cross references to other pieces of relevant legislation, such as the Road Traffic Offenders Act 1988 and the Proceeds of Crime Act (PoCA) 2002.
3. The Code adopts a new structure and uses new drafting devices to aid usability. As such, it will have a different look and feel to former legislation. It is hoped that the new approach will soon become familiar and will assist in aiding users’ navigation of the provisions.
4. The Code does not affect the operation of the Sentencing Council’s guidelines – the duty to follow the guidelines is contained within s.59 of the Code (formerly s.125 Coroners and Justice Act 2009) and has not changed.
5. The Code brings together provisions from more than 50 acts of Parliament that a court may need to consider for the purposes of sentencing. Additionally, it makes minor streamlining changes to aid consolidation of these provisions and so, in addition to the new look and feel of the legislation, there are minor changes which users will need to be alert to. Where these are of importance, they are indicated in the Compendium.

S1.2 Statutory principles of sentencing

1. The overarching principle for sentencing is proportionality, requiring that a sentence is proportionate to the seriousness of the offence [s.63 SA 2020].

2. When determining the proportionate sentence to be imposed, the court will have regard to the various purposes of sentencing:

   (1) In cases involving those aged 18 and over at date of conviction, the court must have regard to the following:

      (a) punishment

      (b) crime reduction (including deterrence)

      (c) reform and rehabilitation

      (d) public protection

      (e) making of reparation [s.57 SA 2020].

   (2) In cases involving children (those aged under 18), the court must have regard to the Fundamental Principles as set out in Youth Defendants in the Crown Court October 2023 at chapter 2-1, in particular the following:

      (a) The welfare of the child or young person and in a proper case take steps for removing the child or young person from undesirable surroundings and for securing that proper provision is made for their education and training [s.44 Children and Young Persons Act].

      (b) The need to prevent offending by children. [s.37 Crime and Disorder Act].

   (3) In *ZA*[15] the court recognised the challenge of sentencing children and set out the structured approach that judges are required to adopt. It is suggested that *ZA* is essential reading for any judge preparing to sentence a child. The court made specific reference to the value of Appendix II herein (although wrongly identified the publication in which it is to be found).

[15] [2023] EWCA Crim 596

S1.3 Assessing seriousness

1. Determining seriousness involves numerous components:

   (1) Assess culpability and harm. Harm includes that caused, intended to be caused or harm which the offence might foreseeably have caused [s.63 SA 2020].

   (2) Committing an offence while on bail [s.64 SA 2020] is to be treated as an aggravating factor.

   (3) Previous convictions are to be treated as an aggravating factor [s.65 SA 2020]. A previous conviction is an offence for which the conviction was obtained prior to the commission of the offence(s) before the court for sentence.[16]

   (4) Further aggravating factors:

      (a) hostility by reason of race or religion [s.66 SA 2020];

      (b) hostility by reason of disability, sexual orientation or transgender identity [s.66 SA 2020];

      (c) offence committed against an emergency worker exercising their functions as such [s.67 SA 2020];

      (d) certain offences committed against a person providing a public service, performing a public duty or providing services to the public [s.68A SA 2020];

      (e) where conduct forming part of the offence is carried out on behalf of a foreign power [s.69A SA 2020];

      (f) using a child (person aged under 18) to mind a weapon [s.70 SA 2020];

      (g) supply of controlled drug outside of a school [s.71 SA 2020];

      (h) supply of a psychoactive substance in the vicinity of school premises, using a courier who is a child (a person aged under 18) or in a custodial institution [s.72 SA 2020];

      (i) in relation to statutory aggravating factors, in *DPP v Giles*.[17] It was observed that it is difficult to conceive of a case in which the presence of such a factor would be immaterial to sentence and therefore a *Newton* hearing would not be necessary.

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16 *Darrigan* [2017] EWCA Crim 169
17 [2019] EWHC 2015 (Admin)

S1.4 Sentencing guidelines

1. Every court **must** in sentencing an offender, follow any relevant sentencing guidelines [s.59 SA 2020] unless satisfied that it would be contrary to the interests of justice to do so. Sentencing guidelines may be relevant in an individual case because they relate to an offence (eg affray, or where there is no offence-specific guideline, the general guideline), or an offender with certain characteristics (such as mental health or youth). Other guidelines relate to a function (eg the assessment of seriousness, or imposition of a custodial sentence).

   (1) For example, where the person being sentenced **is a child** (ie under 18), reference should be made to SC Guideline: Sentencing Children and Young People, as well as any offender-specific guideline. Reference should be made to offence-specific guidelines for children and young people (eg robbery).[18] The court **may** refer to adult offence-specific guidelines as a preliminary consideration **only** if the court is satisfied the offence crosses the custody threshold and that no other sentence is appropriate.[19]

   (2) Where the person **was a child** when committing the offence, reference should also be made to the same guideline: *Hobbs and DM*.[20]

   (3) Where the offence was committed by a person aged 18-25 (often described as young adults), the same guideline will continue to have relevance: *Balogun*,[21] *Clarke*,[22] and *Peters*[23] because age and/or lack of maturity can affect an assessment of responsibility and may also affect the impact of the sentence.

2. Guidelines, whether in draft or definitive, must not be used prior to their "in force" date: *Smythe*.[24]

3. Previous editions have contained links to the individual guidelines as originally published by the Sentencing Council. At the request of the Sentencing Council, however, the links have been removed as amendments made subsequently are not reflected in the versions available by that route. The correct course, and one which we endorse, is for the guidelines to be accessed via the Sentencing Council website using the links below – one for the Crown Court and one for the magistrates' court.

   Crown Court Guidelines

   Magistrates' Courts Guidelines

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18 SC Guideline: Sentencing Children and Young People, para. 4.2. p 18 & 28.
19 SC Guideline: Sentencing Children and Young People, para. 6.45 and *VT* [2021] EWCA Crim 166 and in particular paras. 31-33.
20 [2018] EWCA Crim 1003. 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. SC Guideline: Sentencing Children and Young People, para. 6-2. See also *Ahmed and Ors* [2023] EWCA Crim 281 where the Court of Appeal outlined the correct approach to sentencing an adult for an offence committed when they were a child.
21 [2018] EWCA Crim 2933
22 [2018] 1 Cr App R(S) 52
23 [2005] 2 Cr App R(S) 101
24 [2019] EWCA Crim 90

S1.5 Guilty plea

1. The seriousness of an offence may be reduced by a guilty plea [s.73 SA 2020] and see SC Guideline: Reduction in Sentence for a Guilty Plea and, for children (those aged under 18), SC Guideline: Sentencing Children and Young People, Section five: Guilty plea. To attract the maximum reduction for a guilty plea, the defendant must enter a guilty plea or indicate a guilty plea on the Better Case Management (BCM) form at the first stage of the proceedings. The following circumstances are likely to be insufficient to attract the maximum reduction:
   (1) Admitting the offence at the police station but not entering a plea at the magistrates' court: *Bold*.[25]
   (2) An entry on the BCM form to the effect that the defendant is likely to plead guilty: see *Davids*[26] and *Hodgin*.[27]
   (3) A plea entered in the Crown Court when there is doubt whether the magistrates asked for an indication of plea. The obligation to complete the BCM form is that of the parties, not the court, and the defendant should make the position clear on that form if seeking the maximum reduction: *Yasin*.[28]
   (4) Informal discussions regarding a guilty plea to a lesser offence: *West*.[29]
2. The sentencing guideline, like s.73 Sentencing Code, focuses on the time when an unequivocal guilty plea is **indicated**, not when it is **entered**: *Plaku*.[30] The guideline draws a clear distinction between pleas indicated at the first opportunity and those indicated after that point; there will be very few occasions when the sentence of a defendant who has not pleaded guilty at the first stage of the proceedings, and who cannot bring themselves within one of the exceptions in the guideline, could properly be reduced by more than one quarter: *Plaku*. Where a guilty plea was entered in circumstances of the first identified trial listing having passed (the case being re-listed for trial at a later date due to a lack of court capacity), the "trial date" for sentencing purposes is the trial date originally fixed by the court: *Carter*.[31]
3. If, exceptionally, the court considers it appropriate to depart from the SC Guideline: Reduction in Sentence for a Guilty Plea, reasons must be provided: *Delfalco*.[32]
4. The guilty plea by itself cannot be reflected in the decision to suspend a sentence: *Hussain*.[33] Its primary relevance is to sentence type and sentence length. An early guilty plea may, however, reflect true remorse which itself may be highly relevant in assessing whether there are, in the words of the SC Guideline: Imposition of Community and Custodial Sentences, "reasonable prospects of rehabilitation". Such may be the case in the context of a person who acknowledges their offending and is taking early and active steps to address it.

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25 [2019] EWCA Crim 1539
26 [2019] EWCA Crim 553
27 [2020] EWCA Crim 1388 but see *Stunell* [2020] EWCA Crim 1474 where a "likely" guilty plea was held to entitle the D to full credit in the circumstances of that particular case.
28 [2019] EWCA Crim 1729
29 [2019] EWCA Crim 497
30 [2021] EWCA Crim 568
31 [2021] EWCA Crim 667
32 [2021] EWCA Crim 725
33 [2018] EWCA Crim 780

S1.6 Thresholds for imposing custodial and community sentences

1. Discretionary custodial sentences:

   (1) The offence, or the combination of the offence and any other(s) associated with it, must be such that neither a fine alone nor a community sentence can be justified [[s.230 SA 2020] and SC Guideline: Imposition of Community and Custodial Sentences].

   (2) In the case of children (those aged under 18), a custodial sentence must only be used as a measure of last resort and, if a custodial sentence is imposed, a court must state its reasons [SC Guideline: Sentencing Children and Young Persons, para. 1.3, para. 6.42].

   (3) If the court is not imposing a minimum sentence, the sentence imposed must be for the shortest term commensurate with the seriousness of the offence/combination of offences [s.230 SA 2020].

2. Community sentences: the offence/combination of offences must be serious enough to warrant such a sentence [s.204 SA 2020].

S1.7 A practical approach to the sentencing exercise

This note seeks to assist sentencers in following the process required by statute, the Guidelines of the SC and SGC and the Court of Appeal.

1. In every case the sentencer is required to determine the seriousness of the offence (see S1.3 above).
2. Overarching guidelines must be applied where relevant to:
   (1) a court function (such as the assessment of seriousness, the imposition of a custodial sentence, or the suspension of such a sentence);
   (2) offence types (such as domestic violence);
   (3) offender groups (such as children and young people, or those with mental health disorders).
3. Offence-specific guidelines must be referred to, where relevant. In cases where there is no offence-specific sentencing guideline, reference must be made to the general guideline. Note there are some offence-specific guidelines for children and young people (eg robbery) in which case the appropriate guideline must be used. Otherwise, when sentencing children, offence-specific adult guidelines may only be relevant as a factor in deciding upon the appropriate length of sentence if the custodial threshold is passed and no other sentence is appropriate (see S1.4 above).
4. In cases in which there is an offence-specific guideline, the following language should be used:
   (1) "**Category starting point**" describes the figure provided for by the category which the sentencer determines best represents the offence.
   (2) "**Upward adjustment**" describes the increase for aggravating features.
   (3) "**Downward adjustment**" describes the reduction for mitigation (including personal mitigation).
   (4) "**Appropriate figure for sentence following a contested trial**" describes the appropriate sentence prior to a reduction for a guilty plea.[34]
5. In cases in which there is no applicable offence-specific guideline, the above language should be used, save that "**starting point**" rather than "**category starting point**" should be used. Reference should be made to the General Guideline.
6. The process to be followed[35] is:
   (1) Determine offence seriousness (ie harm and culpability).
   (2) Consider aggravating factors (ie those increasing seriousness), both statutory (eg previous relevant convictions, on bail, racial, religious, disability or sexual aggravation) and other non-statutory matters (eg alcohol, abuse of power, breach of trust).
   (3) Consider mitigating factors (ie those reducing seriousness), eg those relating to the offence, such as provocation or excessive self-defence; and those relating to the

[34] *Bush* [2017] EWCA Crim 137. For child-sensitive language to explain these terms, see Appendix II, Table 2.
[35] As endorsed in *Douglas* [2023] EWCA Crim 1709

offender, such as positive good character, offender's vulnerability, mental health,[36] remorse or other personal mitigation.

(4) Consider any assistance given to the prosecution.[37]

(5) Consider the appropriate reduction for any guilty plea by reference to the SC Guideline: Reduction in Sentence for a Guilty Plea; and for children, the additional and different considerations set out at SC Guideline: Sentencing Children and Young People, section five: Guilty Plea.

(6) Consider dangerousness in the following order (reference should be made to the relevant sections of the Compendium):

(a) If the offender is not dangerous and the "two-strikes life sentence" does not apply, a determinate sentence should be passed.

(b) If the offender is not dangerous and the conditions for the "two-strikes life sentence" are satisfied then, subject to a determination that it would be unjust to impose such a sentence, a life sentence must be imposed.

(c) If the offender is dangerous, consider whether or not the seriousness of the offence, and offences associated with it, justify a life sentence.

(d) If a life sentence is justified, then in accordance with ss.258 (under 18), 274 (18-20) or 285 (21 or over) SA 2020 a life sentence must be passed and, if ss.273 or 283 SA 2020 also applies, the judge should record that fact in open court.

(e) If a life sentence is not justified, then the sentencing judge should consider whether or not ss.273 or 283 SA 2020 applies and, if it does, then, subject to the terms of those sections, a life sentence must be imposed.

(f) If ss.274 or 283 SA 2020 does not apply, the provisions of ss.254 SA 2020 (under 18), 266 (18-20) and 279 (21 or over) should be considered although the judge must consider a determinate sentence before passing any extended sentence.

(7) Consider whether the special sentence regime for offenders of particular concern applies (under ss.265 and 278 SA 2020) where the offence is listed in schedule 13.

7. When sentencing a child (a person under 18), a "root and branch difference of approach" is required.[38] In the case of a child, or an adult who committed the offence(s) as a child, any consideration of sentence has to begin with the SC Guideline: Sentencing Children and Young People (see also *Ahmed and Ors*[39] which addresses this topic). *ZA* confirmed that the "stepped approach in the SC Children and Young People Guideline and any youth specific offence guideline should be followed".[40]

8. The guideline emphasises the core principle that sentencing should be individualistic. While seriousness of the offence will be the starting point, sentencing should focus on the child not

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36 *PS and Ors* [2019] EWCA Crim 2286 – [18] "It follows that in some cases, the fact that the offender suffers from a mental health condition or disorder may have little or no effect on the sentencing outcome. In other cases, it may have a substantial impact. Where a custodial sentence is unavoidable, it may cause the sentencer to move substantially down within the appropriate guideline category range, or even into a lower category range, in order to reach a just and proportionate sentence. A sentence or two in explanation of those choices should be included in the remarks."

37 See the guidance provided in *Royle* [2023] EWCA Crim 1311.

38 *ZA* [2023] EWCA Crim 596

39 [2023] EWCA Crim 281

40 [2023] EWCA Crim 596 at [82]

the offence.[41] This includes the importance of avoiding "criminalising" children unnecessarily, encouraging children to take responsibility for their actions and promoting re-integration into society rather than punishment (SC Guideline: Sentencing Children and Young People, paras. 1.2-1.4).

9. When the court has regard to a child's welfare, judges will be guided by SC Guideline: Sentencing Children and Young People, paras. 1.11-1.21. A non-exhaustive list of factors that the court may wish to take into consideration includes:

   (1) The factors listed in the SC Guideline at 1.12 and the fact they may have had an impact on the child's behaviour as well as reducing the child's culpability [1.21];

   (2) Children may not conduct themselves appropriately in court, the court should consider why and take this into account [1.15]. Similarly, children may find it hard to come to terms with the consequences of their actions and so the court should consider the reasons for an absence of an apology or expression of remorse and take this into account;

   (3) The fact that "looked after" children and black and minority ethnic children are overrepresented in the youth justice system and that their experience of discrimination may have had an impact on their behaviour [1.16]-[1.19];

   (4) Times of difficult transition may impact on a child's behaviour [1.17];

   (5) A court should not impose greater restrictions because of other factors in the child's life and consider whether a disposal will potentially exacerbate any underlying issues [1.19]-[1.20];

   (6) The disruption to education, training or work opportunities, and family relationships and support which are crucial stabilising factors to prevent re-offending [6.47] as well as access to interventions and mental health support;

   (7) The high reconviction rate for children who receive custodial sentences [6.49];

   (8) The impact of the sentence on the child's health, wellbeing and safety; the vulnerability of children to self-harm and suicide particularly in a custodial environment [1.20] and [6.49];

   (9) The fact a child may be more susceptible to the contaminating influences in a custodial setting [6.49];

   (10) The impact of the sentencing disposal on a child's criminal record and the effect on the child's future prospects and opportunities [6.49].

10. When the court has regard to the custody threshold and the length of any custodial sentence for children, the court should have regard to all the factors in para. 8 above, and:

   (1) Offending by children is often a phase that passes rapidly and should not result in the child's alienation from society [1.7].

   (2) Transition from the secure estate for children to the adult estate, and the likely impact on the child's rehabilitation and welfare.

   (3) The impact on the child's leaving care rights and entitlements at the point of release [1.17]. The list below sets out significant age "milestones". Sentencing a child or young

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[41] *VT* [2021] EWCA Crim 166 – [32] "[T]hose sentencing children and young persons should not regard the young offender as, so to speak, a 'cut down' version of the adult offender, or approach the case as if the offender were a mature adult and then merely make an adjustment of sentence to reflect youth."

adult to ensure that their release date is before a relevant milestone age will enable them to access the support to which they are entitled.[42]

(a) Turning 16: a child who has been "looked after" for 13 weeks or more since the age of 14 will become entitled to leaving care rights.

(b) Turning 18: a young adult will no longer be entitled to be looked after but can be accommodated if they are a care leaver and their welfare requires it, or remain in foster care under the "staying put" arrangements.

(c) Turning 21: a young adult will no longer be entitled to accommodation including foster care (unless they are in education) but can receive general support up to the age of 25 if they want it from social services.

(d) Turning 25: leaving care services will cease unless the local authority exercises its discretion to extend them. Unless the young adult is in education, in which case they will continue until the course ends.

11. Totality must be considered. This may relate to multiple offences to be sentenced and/or to a sentence the offender is already serving: the SC Guidelines: Offences taken into consideration and Totality must be followed.

12. Appropriate ancillary orders must be considered eg compensation, disqualification, forfeiture, restraining order, costs, surcharge, Criminal Courts Charge.

13. In any case where PoCA proceedings are adjourned the court may pass sentence but must not impose most financial orders (a fine, compensation, unlawful profit, forfeiture, deprivation, statutory surcharge, costs) [s.14(12) PoCA 2002]. The court is formally obliged to make a criminal courts charge albeit in the sum of £0 [s.46 SA 2020].

[42] For more information on the care experience and – see *Dare to Care: Representing Care Experienced Young People* (2023) which sets out local authority duties and other considerations when sentencing care experienced young people.

S1.8 Sentencing remarks

1. An explanation must be given to the offender, in ordinary language, of the reasons for passing the sentence and its effect [s.52 SA 2020]. This must be done in open court at the time sentence is passed. It is not permissible to pass sentence on the basis that written reasons will be given at a later date.[43]

2. So far as the style and content of sentencing remarks are concerned, consideration should be had to the guidance from the former Lord Chief Justice in *Chin-Charles and Cullen*.[44] The court criticised the length of sentencing remarks that were being delivered and suggested that they should be shorter and more focused. The court observed that arguments on appeal based upon a failure of a judge to mention a particular point "rarely prospered". It was further suggested that sentencing remarks would not normally need to reference case law.

3. The court stated that in general a court only needed to identify: (i) the category in which a count sat by reference to harm and culpability; (ii) the consequent starting point and range; (iii) the fact that adjustments had been made to reflect aggravating and mitigating factors; (iv) credit for plea where appropriate; (v) the resulting sentence. It might be necessary to identify briefly the factors relevant to culpability and harm, but only where the conclusion was not obvious or was in issue. It was stated that a court may also need to explain why it had moved from the starting point. It was suggested that findings of fact should normally be announced without supporting narrative. Contextualising facts only had to be set out if essential to understanding a finding. If the court determined that a defendant was dangerous then it should so state. Victim personal statements were suggested to have the potential for brief reference. Reference to the contents of probation and other reports would be required only if essential to an understanding of the court's decision.

4. In the later case of *Saffa*,[45] it was said that sentencing remarks should include adequate explanations as to:

   (1) the guideline category into which the offence was placed;

   (2) the reason why any upward or downward adjustment from the guideline starting point is necessary;

   (3) the reason for treating a factor as aggravating and why, for example, the aggravation exceeds the mitigation (or vice versa);

   (4) the discount for any guilty plea, and why.

5. When sentencing a child, the sentencer should take particular care to ensure the sentence and the reasons for imposing it are explained in language appropriate to the child's level of understanding.[46] See further guidance in Appendix II and the examples in chapter S4 (Disposals for Children).[47] Children are likely to benefit from being provided with a written

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43 *Billington* [2017] EWCA Crim 618

44 [2019] EWCA Crim 1140

45 [2021] EWCA Crim 661

46 *SC v United Kingdom* (2005) 40 EHRR 10 at [29]; SC Guideline: Sentencing Children and Young People, para. 1.12; *ZA* [2023] EWCA Crim 596 [88]; Rule 25.16(7)(b)(iii) Criminal Procedure Rules. See also s.52 SA – duty to give reasons and explain sentence in ordinary language.

47 The child-specific examples in this Compendium have been written with the assistance of a consultant speech and language therapist who provided advice on language, simplified explanations, and sentence and paragraph structure. They can aid communication and understanding for all children, even older teenagers – see Appendix II.

copy of the sentencing remarks. See CrimPD 9.6.1, which specifically encourages the provision of written sentencing remarks for children.

6. As to the practicalities of sentence calculation, where a determinate or extended sentence is passed, time spent on remand in custody will count towards the sentence automatically without any direction. The judge has no discretion about this [s.240ZA CJA].[48] Where a life sentence is passed (whether or not for murder), the minimum term must be adjusted to take account of time spent on remand in custody.[49] In any event, the sentencer must give credit for time spent on an electronically monitored curfew, or give reasons why it would be unjust to do so, applying the 5-step process set out in [s.325(3) SA 2020, see chapter S5.14 below]. The position so far as a child is concerned who has spent a period of remand in local authority accommodation under s.91(3) Legal Aid, Sentencing and Punishment of Offenders Act 2012 is complex and reference will need to be had to *A*.[50] The time so spent does not count automatically towards any custodial sentence subsequently imposed [see chapter S5.14 below].
7. In a case where the offender has been held in custody abroad awaiting extradition, it is necessary for the court to make a direction if such time is to count; the reduction is not automatic [s.327 SA 2020 and s.243 CJA 2003].
8. Where applicable, the court must explain the consequences of conviction (see chapter S7 below), including sexual offences notification requirement and barring requirements in qualifying cases, automatic liability to deportation where relevant, and payment of the statutory surcharge [see chapter S7.4 below].
9. The court should also explain release provisions [see chapter S8 below].

NOTE: A template for constructing sentencing remarks in accordance with guidelines appears at Appendix I below. For guidance on writing and delivering sentencing remarks to children, see Appendix II below.

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48 *Lovelace* [2017] EWCA Crim 1589

49 *Cookson* [2023] EWCA Crim 10 [9], *Kamarra-Jarra* [2024] EWCA Crim 198 [59] the precise determination of the minimum term is a judicial function and must be pronounced by the court. The court must pronounce the sentence having factored in the days on remand with those figures having been discussed and agreed with the parties.

50 [2019] EWCA Crim 106

S2 Pre-sentencing matters

S2.1 Committal for sentence

ARCHBOLD 5A-245; BLACKSTONE'S D23.29; SENTENCING REFERENCER § 22

1. Sections 14-24 Sentencing Code provide for the power of the magistrates' courts to commit an offender to the Crown Court for sentencing. The power under which the case will arrive in the Crown Court will vary depending on (a) the nature of the case (including whether the conviction offence attracts the "dangerousness" provisions) and (b) the court's decision as to whether greater sentencing powers are required to do justice to the case. For a fuller discussion where children are committed for sentence, see Youth Defendants in the Crown Court October 2023, chapter 8.
2. In summary, those provisions are as follows:
   (1) Section 14 (committal for sentence of adult or corporate offenders: offences triable either way where greater sentencing powers are required).
   (2) Section 15 (committal for sentence of adult offender where the court is of the opinion that an extended sentence or life sentence (under the dangerousness provisions) would be available).
   (3) Section 16 (committal for sentence of children for offences listed in s.249 where the court is of the opinion that the Crown Court should have the power to deal with the child by way of a sentence of detention under s.250 (so-called "grave crimes").
   (4) Section 16A (committal for sentence of young offenders on summary trial of certain terrorist offences).
   (5) Section 17 (committal for sentence of children where the court is of the opinion that an extended sentence or life sentence (under the dangerousness provisions) would be available).
   (6) Section 18 (committal for sentence of adult offenders on entering of guilty plea in case where court has sent the adult for trial in relation to related offence).
   (7) Section 19 (committal for sentence of child on entering of guilty plea in case where court has sent the child for trial in relation to related offence).
   (8) Section 20 (committal for sentence where offender has been committed for sentence in respect of another offence).
   (9) Section 24 contains a list of other committal powers, for instance, following a breach of a community order, suspended sentence order, youth rehabilitation order or for PoCA proceedings).
3. Committals for sentence under ss.14 to 17 attract the full powers of the Crown Court.[51]
4. Committals for sentence under s.20 attract the powers of the magistrates' court.[52]
5. As to s.18 and s.19 cases, these arise where either way offences are committed for sentence to accompany other matters that were committed for trial at the same time. There are two situations where the Crown Court may exercise its full powers:

[51] Sections 21 and 22
[52] Section 23

(1) where there is a conviction for one or more of the trial offences;[53] or,

(2) where there is no conviction for a trial offence **but** the magistrates' court certified that they would, but for the s.18/s.19 power, have committed those matters for sentence in any event.[54]

Apart from these two situations, the Crown Court is limited to the powers available to the magistrates' court.

[53] Sections 21(5) and 22(5)
[54] Sections 21(4) and 22(4)

S2.1A Remission to the magistrates' courts

ARCHBOLD 5A-270; BLACKSTONE'S D24.101; SENTENCING REFERENCER § 22

1. Section 11 Judicial Review and Courts Act 2022 has amended the Sentencing Act (SA) by the introduction of a new s.25A. This provision empowers the Crown Court to remit a defendant aged 18 or over who has been committed to the Crown Court for sentence, or has been convicted following a guilty plea in the Crown Court, to the magistrates' court for sentence. In making that decision the court is required to have regard to any allocation guidelines. The defendant does not have to consent and there is no appeal against the decision to remit.
2. Section 11 has also created an allied power by the insertion of s.46ZA into the Senior Courts Act 1981, whereby a defendant who consents may, in respect of an either way offence, be remitted to the magistrates' court for trial.
3. So far as children are concerned, see below.

S2.2 Factual basis for sentence: Newton hearing

ARCHBOLD 5A-306; BLACKSTONE'S D20.2; SENTENCING REFERENCER § 32

1. There are broadly two scenarios in which a Crown Court is required to determine the factual basis for sentencing: (1) following a trial; (2) upon a guilty plea.
2. Following a trial, a court may be required to make a finding regarding an issue which, although part of the Crown's case, was not an element of the offence and thus the jury were not required to make a specific finding about that issue.
3. The court's approach will vary depending on the circumstances:
   (1) if there is only one possible interpretation of the jury's verdict, the judge must pass sentence on that basis;
   (2) if more than one view of the facts was consistent with the jury's verdict(s), the sentencer, applying the criminal standard, may form their own view and pass sentence on that basis;
   (3) where there is more than one possible interpretation and the judge cannot be sure of any of them to the required standard, sentence must be imposed on the basis most favourable to the defendant.[55]
4. A defendant may plead guilty to an offence, offering a basis of plea which does not accept specified parts of the Crown's case. Where:
   (1) that basis of plea is not acceptable to the prosecution;
   (2) the dispute between the parties cannot be resolved by amending the indictment; and
   (3) the resolution of that dispute between prosecution and defence one way or the other would in the view of the sentencing judge make a material difference to sentence,

   the court may hold a hearing – referred to as a *Newton* hearing – to determine the issue.[56]
5. A *Newton* hearing takes the form of a trial without a jury, with the judge as the finder of fact. The court will hear evidence and make a determination to the criminal standard as to the factual basis for sentence.[57]
6. The Sentencing Council's guideline: Reduction in Sentence for a Guilty Plea (2017) makes provision for the reduction of sentence following a resolution of a *Newton* hearing in a manner adverse to the defendant.
7. What might be termed a "reverse *Newton*" hearing occurs when a defendant asserts mitigating factors which are irrelevant to criminal liability for the offence, but which may be highly relevant to sentence. Whereas such assertions may well be presented by advocate, on instruction, without demur, the principled position is that if they are challenged, or should be challenged in the public interest, then those facts should be proved by evidence, with the burden on the offender to establish the fact on a balance of probability. An example would be an assertion that the defendant has done some meritorious act whilst on remand – an assertion that may, if true, be relevant to sentence. Such facts are likely to be in the knowledge of the offender and capable of proof, at least to the civil standard.

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55 *King* [2017] EWCA Crim 128
56 *Newton* (1982) 4 Cr.App.R. (S.) 388
57 *Underwood* [2004] EWCA Crim 2256

Example – interpreting the jury verdict

The Crown put the case against you primarily on the basis that you and your co-defendants (co-Ds) made a joint plan to go to the witness' (W's) shop and attack W with weapons. You were the only one to engage in actual violence and it was said that you did that on behalf of others as part of that joint plan. Alternatively, said the Crown, if the jury could not be sure that there was such a joint plan, you were guilty as a principal, acting on your own behalf.

Your co-Ds were all acquitted by the jury. You alone were convicted. It does not necessarily follow that the jury came to the conclusion that there was no joint plan, but having heard the evidence I would only sentence you on the basis there was such a plan if the evidence satisfied me so I was sure that that was the case. Given the evidence I heard during the trial I am not so satisfied, and I will therefore sentence you on the basis that you were acting alone, and that you did not agree with others to commit the crime of which the jury found you guilty.

Your counsel has argued that I am bound to sentence you on the basis most favourable to you – namely that your decision to act as you did **might** have come at the latest possible stage before you inflicted violence, and **might** have been responsive to a novel situation that confronted you in the shop.

Whilst I accept that these propositions are consistent with the most minimal, if strained, basis upon which the jury could possibly have convicted, I am entitled to and must reach my own conclusions, albeit in the context of the criminal standard of proof. I listened to the evidence carefully as it was given in the trial. I have considered, in particular, the evidence of [X], [Y], [Z] to the effect that your offence was pre-planned, and all that was said about that evidence during the course of the trial, including by you and by your counsel. For my part, I accept that evidence as truthful and accurate and I am quite satisfied so that I am sure that your offence was planned several days in advance, that you obtained weapons and then stored them at your house. On the day of the attack, you brought the weapons you thought would be most useful to you from your house to the shop specifically to carry out the attack that was in your mind. Accordingly, I consider your culpability is high and I will sentence you on that basis.

Example – *Newton* hearing

You pleaded guilty to possession of a firearm and entered a basis of plea asserting that you were merely a courier who collected the item already packaged up securely, and that you delivered it, still sealed, to a nearby address. You said that you had been paid £50. That basis is not accepted. It is asserted that this was your own firearm, held by you over a period of months, and that after negotiating a sale for £5,000 you delivered the item to your customer. Accordingly, a trial of that issue has been required.

I remind myself that the burden of proving the proper basis of a sentence is on the prosecution, and the criminal standard applies, namely they must satisfy me of the relevant facts so I am sure. You do not have to prove anything, but you are entitled to, and did, give evidence in this hearing.

Certain matters are agreed…

I heard evidence from you [and from others] to the effect that […]. This evidence was challenged on the basis that […]. In assessing the evidence, I reminded myself of all the directions that would have been appropriate had I been directing a jury [eg the positive effect of your previous good character, the potential adverse conclusion from reliance on a fact not mentioned in interview etc].

Applying the criminal standard, I come to these findings of fact […] for these brief reasons […]. In short:

- I cannot rule out the proposition that on these matters you are a truthful and reliable witness. I was impressed by the content and manner of your evidence, its consistency within itself and consistency with other facts I accept (or are agreed).
- As a result, I cannot be sure that your evidence about the important facts relevant to my decision was either untruthful or unreliable. Bearing in mind the Crown's obligation to prove the contrary to the required standard I will proceed to sentence on the basis that you put forward and you will have all the credit for your guilty plea that you are entitled to, bearing in mind the stage in the proceedings where it was made.

OR

Applying the criminal standard, I come to these findings of fact […] for these brief reasons […]. In short:

- I do not accept your evidence, not least because […]. On the contrary, I am sure that […] and accordingly I will proceed to sentence on that basis.

This conclusion will have two effects. Firstly, I will assess the gravity of the offence on the basis that I have found. Secondly, some of the credit that you earned by your guilty plea will inevitably be lost, bearing in mind I have resolved this factual dispute against you.

Example – disputed mitigation hearing

As part of your advocate's submissions in mitigation of sentence, they asserted that you are in the final stages of a terminal illness, that you are a bankrupt, and nevertheless have a job starting on Monday. The Crown were sceptical about those submissions and I gave you the opportunity to give evidence about those matters if you wished to, bearing in mind the burden of proving mitigation lies upon you, and that for me to consider mitigating factors in your favour it is for you to establish that the facts are true to the civil standard, which simply means "more likely than not".

- You went into the witness box and produced a note from a doctor that indicated you had hay fever. Your doctor described that condition as an allergy rather than a terminal illness. I have no hesitation in rejecting that mitigation. I am not satisfied on the evidence that you have any terminal illness.
- You asserted that you were bankrupt, but were unable to say when that occurred, where it occurred or why. On the evidence before me I cannot be sure whether you are bankrupt or not, but I consider it is highly unlikely, so I reject that element of mitigation.

You supplied a letter from a well-respected firm which does indeed say that you have completed a formal interview process although the letter is vague as to where or when you will actually be offered work. You said that this was supplemented by a phone call which had filled in the details. I think you probably do have some kind of a job starting quite soon, and so I will take that into account in your favour.

S2.3 Remission to Youth Court

ARCHBOLD 5A-270; BLACKSTONE'S D24.104; SENTENCING REFERENCER § 22

1. Where a child is convicted before the Crown Court of an offence other than homicide,[58] the Crown Court is required to remit the case to the youth court "unless satisfied that it would be undesirable to do so" [s.25 SA].
2. Section 11 Judicial Review and Courts Act (JRCA) 2022 has introduced a new subsection in SA s.25 whereby the Crown Court may remit a child for sentence even where the defendant has been committed for sentence to the Crown Court [s.25(2A) SA].
3. In *Lewis*,[59] Lord Lane CJ identified possible, albeit non-exhaustive, reasons why it might not be desirable to remit a case to a youth court:
   (1) the trial judge would be better apprised of the facts;
   (2) there was the risk of disparity of co-defendants being sentenced in separate courts; and
   (3) remittance might result in delay, a duplication of procedures and "fruitless expense".
4. The Crown Court should usually remit the case to the youth court as was emphasised in the case of *Gould*[60]:

   > "A Crown Court judge should also be aware that Magistrates' Courts, particularly Youth Courts, may have a different approach to sentencing and a defendant who would wish to be sentenced in the lower court should not be deprived of the possibility that this may happen because of procedural failures by the prosecution. We consider that it is only in cases where it is quite clear that the case should be dealt with by the Crown Court, or where the exercise which is being contemplated is only designed to tie up loose ends and avoid hearings in the Magistrates' Court which are clearly unnecessary, that the section 66 power should be used."

5. Where a referral order is the most appropriate sentence, particularly where the criteria for a compulsory referral order would be made out in the youth court, s.66 may be used to avoid further hearings. The Court of Appeal has held that a judge in the Crown Court has the power to remit a child to the youth court for sentence (pursuant to s.25(2) SA) and can then exercise the powers of a district judge (magistrates' court) (pursuant to s.66 Courts Act 2003) sitting as a youth court to impose the order.[61]

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58 By reason of the Crime and Disorder Act 1998 s.51A(3)(a) and (12) there are no circumstances whereby an offence coming within the category of "homicide" can ever be sentenced other than in the Crown Court. Youth Defendants in the Crown Court contains at pp 37/38 a helpful table listing those cases that will, and also those that might not, come with the term "homicide" for these purposes.

59 (1984) 79 Cr. App. R. 94

60 [2021] EWCA Crim 447

61 In *S* [2021] EWCA Crim 960, Fulford LJ, Vice President of the Court of Appeal Criminal Division, who presided over both this case and that of *Gould,* found *Dillon* and *Koffi* to be incorrectly decided (these were cases that held the Crown Court was not empowered to use s.66 to impose a referral order). NB Any referral back to court would be heard by a Youth Court in the local justice area where the child resides, if the child is under 18; otherwise, a magistrates' court in that area (schedule 4 & s.108 SA 2020).

Example 1: decision to retain jurisdiction

I have thought very carefully about whether I should send your case to the youth court for you to be sentenced there. I don't think that would be the right thing to do. [eg I think it would be better for everyone, including you, if I sentence you now together with the others in this case] / [I think I am the best person to decide what sentence to give you because I heard all the evidence at trial and know your case very well].

Example 2: decision to remit

I have to send your case to the youth court because you are still a child (under 18 years old). That is the right court to sentence children.

S2.4 Deferment order

Sections 3-13 SA 2020

ARCHBOLD 5A-224; BLACKSTONE'S D20.103; SENTENCING REFERENCER § 21

1. The purpose of deferring sentence is to enable the court to have regard to D's conduct after conviction; in particular to see whether any positive change of circumstances is maintained and, if appropriate, any reparation is made. The circumstances in which such an order will be appropriate are relatively rare. The relevant factors are reviewed in *Swinbourne*[62] and *Blackadder*.[63]
   (1) The court must identify the need for, and the purpose of, a deferment of sentence.
   (2) Deferment cannot be ordered without D's consent. Before seeking D's consent the court must explain to D the purpose of deferment and any requirements that are to be made of him/her in the intervening period.
   (3) The requirements that may be made of D may include residence in a particular place and the making of reparation.
   (4) The court may also impose conditions of residence and co-operation with the person appointed to supervise D.
   (5) D must consent to deferment and undertake to comply with any requirements in the intervening period.
   (6) Sentence should not be deferred unless the sentencer is prepared to pass a sentence that does not involve immediate custody if D complies with the requirements of deferment.
   (7) The date to which sentence is deferred must be specified and be within six months of the order for deferment.
   (8) The court may appoint a probation officer or any other person the court thinks appropriate to supervise D during the period of deferment.
   (9) If D fails to adhere to the requirements or commits a further offence, D may be brought back before the court and sentenced on a date before that originally fixed.
   (10) A transcript must be ordered of the reasons given for, and the terms of, deferment; copies to be provided to D and the supervising officer.
   (11) The court should order a report upon D from the supervising officer or, in the absence of supervision, the probation service for the date of sentence.
   (12) The judge or recorder who defers sentence must make arrangements to hear the case on the date set for sentence; it is wrong for a sentencer to "release" such a case.
   (13) Imposing the deferment. The court must:
      (a) Explain the reasons for deferment.
      (b) Identify clearly the requirements with which D would be expected to comply.
      (c) Obtain undertakings and consent from D personally.
      (d) Set the date for the deferred sentence.

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62 [2023] EWCA Crim 906
63 [2024] EWCA Crim 318

(e) Direct that a short progress report should be written by the person supervising D.

(f) Explain the consequences of compliance with, or failure to comply with, the undertakings given.

(g) Direct that a transcript of the court's remarks must be prepared [within 14 days] and be served on D [via solicitor], on the court and on any person supervising D.

Example (adult)

As you have heard, I am thinking about making a deferment order: that means, in this case, delaying sentence for a period of four months. The reason I would do so is that {eg, although your offence qualifies for a custodial sentence you have eg moved away from the area where these offences were committed/ceased to associate with the people you committed this offence with/renewed your relationship with your parents/got a job/agreed to take part in the restorative justice process with your victim(s)}.

Because of this, I am thinking of putting you to the test. But, if I am to defer sentence, I need you to agree and undertake to do these things:

1. to stay away from {place – eg as shown on a map};
2. to do your best to complete the last stages of your coursework and to take your final exams next month/to do your best to keep your job at {employer};
3. to take part in the restorative justice process;
4. to raise money that could be applied to compensation.

I know that your advocate has said that you would agree to this, but I need to hear this from you. Do you undertake to do all of these things? [Answer.]

In addition, I would make it a condition firstly that you continue to live with your parents at {place} and secondly that you co-operate fully with your supervising probation officer.

Do you agree to sentence being deferred – that is put off – on these terms? [Answer.]

[Assuming D's consent] I will defer sentence for four months: that is until {date} and on that date you will either come back to this court or to another court where I shall be and I shall sentence you. In the meantime, you must do all of the things which you have agreed to do and comply with the conditions which I have imposed. If you have succeeded, then I will not sentence you to an immediate term of imprisonment. If you have not succeeded, or if you have been convicted of any further offence, I will have no alternative but to send you to prison.

Your supervising officer will prepare a short report about your progress before we meet again; and I also direct that a transcript of what I have just said to you must be prepared by {date} and provided to you (through your solicitors), to your supervising officer and to the court.

Example (child)

I am thinking about deferring your sentence. That means I will wait to sentence you for four months. That will be in {specify month}. In {specify month} I will finally decide what will happen to you. I do this to give you some time to show me that you deserve a second chance.

I am thinking of doing this (deferring your sentence) because you have been working with X and Y to change your life around. That is good. I now want to see if you can keep it up. If you keep working with X and Y, then after four months/in {specify month} you will come back to this court and I promise that you will not get a custodial sentence. This means you will not have to go to a secure place away from home.

I will defer your sentence, and give you this chance, if you say you want me to, and if you follow some rules. I have written the rules down so you can follow them while I talk.

- Rule 1 – do not get in trouble. You must not commit any crimes.
- Rule 2 – Stay away from {place – eg as shown on a map}. Can you explain to me where I mean? Is AA allowed? What about BB?
- Rule 3 – Do your best to complete the last stages of your coursework and take your final exams next month. Will you do that?
- Rule 4 – Do your best to keep your job at {employer}. This means you will have to be on time every day and do what you are required to. Can you do that?
- Rule 5 – Take part in the restorative justice programme. This will help you accept that you did something wrong, to show you are sorry and to make amends. Will you do that?
- Rule 6 – You have to continue to live with your parents at [place].
- Rule 7 – You also have to do what your YOT officer tells you.

Your advocate [insert name] has said that you would like me to wait for four months before I sentence you (that is, defer the sentence) and that you said you will do these things. Now I want to hear it from you.

Do you agree to do all of these things? [Answer]

Do you want me to wait four months to sentence you while you show me what you can do?

[Assuming D's consent] In that case I will not sentence you today. I will sentence you in four months on {date}.

You must keep to the rules and do the things we agreed for four months. If you keep to those rules, I will not sentence you to custody. But if you break any of the rules and don't do what we agreed, or you break the law, I will have to look at everything again.

In four months, your youth offending team (YOT) worker will write a short report to tell me whether you have kept to the rules.

I want you – and everybody else – to understand what you have to do. So I will give an order that what I have said to you will be written up. You will get a copy/I will give you a written copy of what I have said. This will be given to you (by your solicitor [insert name]), to your YOT worker, and to the court.

S2.5 Indication of sentence

ARCHBOLD 5A-126; BLACKSTONE'S D12.60; CrimPD 9.4.2-9.4.9; SENTENCING REFERENCER § 20

General

1. There are two scenarios where a court may give an indication of the sentence that would be imposed upon a plea of guilty:
   (1) Where the court, of its own motion, is prepared to indicate that the sentence will, or will not, take a particular form whether on a plea of guilty or upon a conviction after a trial (*Turner*);
   (2) Where the defendant formally requests an indication from the court (*Goodyear*).
2. Since the decision in *Goodyear*, the *Turner* indication is a discretionary power that has been very rarely used: *AB*.[64]

Turner indications

3. In *Turner*,[65] the Court stated concerns about indications of sentence placing pressure upon a defendant to change their plea to one of guilty. The Court provided that there was one exception to the general rule that no indication of sentence should be given, namely that where the Court was willing to state that the sentence imposed would or would not take a particular form, for example a suspended sentence order, a community order, a fine or an immediate custodial sentence. This may only be done where the Court indicates that is the position on a guilty plea and following a trial.
4. The power of the Court to provide such an indication has survived the decision in *Goodyear*, albeit that it is rarely used. The care that needs to be taken by the court in this area was recently reemphasised in *AB & Ors*[66], *Keeling*[67] and *Moore*.[68]

Goodyear indications

5. Following the case of *Goodyear*[69] a court may, subject to strict conditions, give an indication of the sentence that would be imposed on that day if the defendant were to plead guilty. The conditions and procedure are set out in Criminal Procedure Rules 2020 and Practice Directions 2023: Sentencing. In *Utton*[70] the practice and procedure relating to *Goodyear* indications was reviewed and clarified.
6. Principal matters to note are:
   (1) D must give written authority to their advocate to seek an indication of sentence.
   (2) The defence must notify the prosecution and the court of any such application in advance of the hearing.

64 [2020] EWCA Crim 1959
65 [1970] 2 Q.B. 321
66 [2021] EWCA Crim 1959
67 [2022] EWCA Crim 178
68 [2023] EWCA Crim 1685
69 [2005] EWCA Crim 888
70 [2019] EWCA Crim 1341

(3) An indication may be sought only when:

(a) the plea is entered on the full facts of the prosecution case; or

(b) a written basis of plea is agreed by the prosecution; or

(c) if there is an issue between the prosecution and the defence, this is properly identified and the judge is satisfied that the issue is not of significance and does not require a *Newton* hearing to resolve.

(4) Although the *Goodyear* process enabled an indication of maximum sentence to be imposed, it should not be thought of as a bargaining process with the court: *Almilhim*.[71]

(5) The judge must obtain the confirmation of prosecution and defence that the court has all relevant information including up to date antecedents, information as to whether the defendant is facing any other proceedings and all additional evidence.

(6) The judge should receive submissions from counsel as to the appropriate level of sentence within any relevant Sentencing Guideline or guideline case.

(7) It will not normally be appropriate to give an indication where:

(a) there are co-accused pleading not guilty;

(b) the offence is one where the issue of dangerousness arises;

(c) medical or other reports are outstanding, and the proper sentence may depend upon the content of such reports.

(8) Any indication must be given in open court and in precise terms: it should reflect the maximum sentence if a guilty plea were to be tendered at that stage of the proceedings only: not the maximum possible sentence following conviction by a jury after trial.

(9) Any indication will be valid only for a reasonable period. What constitutes a "reasonable period" will depend on the circumstances: *Utton*.[72] However, in most cases, a reasonable period will not extend beyond the day on which the indication is given. In a complex case where it is appropriate to give more time to a defendant to consider the implications of the indication, the judge should indicate the period for which the indication remains valid.

(10) An indication is binding on the judge for the period expressed.

(11) An indication expires at the conclusion of the period expressed but the fact of and, if given, the terms of an indication should remain on the court file in case there is a subsequent application for an indication.

(12) In an appropriate case the judge may remind the defence advocate of D's entitlement to seek an indication of sentence.

(13) Reporting restrictions should normally be imposed upon any *Goodyear* application: these may be lifted if the defendant pleads or is found guilty.

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71 [2019] EWCA Crim 220

72 [2019] EWCA Crim 1341

S3 Disposals (general)

S3.1 Absolute discharge

Section 79 SA 2020

ARCHBOLD 5A-417; BLACKSTONE'S E3.1; SENTENCING REFERENCER § 35

1. An absolute discharge may be imposed in a case in which the court "is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender that it is inexpedient to inflict punishment".
2. An absolute discharge may be combined with the following orders:
   (1) Compensation
   (2) Deprivation
   (3) Restitution
   (4) Any disqualification
   (5) Recommendation for deportation
   (6) Costs
   (7) Confiscation order
   (8) Exclusion order under the Licensed Premises (Exclusion of Certain Persons) Act (LP(ECP)A) 1980
   (9) Unlawful profit order

Example (adult)

You have pleaded guilty to/been convicted of the offence of {specify} but it is neither necessary nor appropriate to impose any punishment because {reason/s}. You will therefore be absolutely discharged. This means that you will hear no more about this: this case is at an end.

Example (child)

You damaged the window. But I do not need to punish you. I do not think that would be the right thing for you because [reasons]. I will release you now with no punishment. This is called an absolute discharge. It means your case is ended.

S3.2 Conditional discharge

Section 80 SA 2020

ARCHBOLD 5A-417; BLACKSTONE'S E3.3; SENTENCING REFERENCER § 35

1. A conditional discharge may be imposed in a case in which the court "is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender that it is inexpedient to inflict punishment" but wishes to reserve the power to do so, for a fixed period, if there is any further offending of any kind.
2. The maximum period for a conditional discharge is three years from the date of the order.
3. A conditional discharge may be combined with the following orders:
   (1) Compensation
   (2) Deprivation
   (3) Restitution
   (4) Any disqualification
   (5) Recommendation for deportation
   (6) A football banning order
   (7) A criminal behaviour order (for proceedings commenced after 20 October 2014)
   (8) Costs
   (9) Confiscation order
   (10) Exclusion order under LP(ECP)A
   (11) Unlawful profit order
   (12) Serious crime prevention order (see s.19(7) Serious Crime Act 2007) [s.80(7) Sentencing Act (SA) 2020].
4. A conditional discharge is **not** available in the following circumstances:
   (1) s.66ZB(6) Crime and Disorder Act 1998 (effect of youth cautions);
   (2) s.66F of that Act (youth conditional cautions);
   (3) s.103I(4) Sexual Offences Act 2003 (breach of sexual harm prevention order and interim sexual harm prevention order etc);
   (4) s.339(3) (breach of criminal behaviour order);
   (5) s.354(5) (breach of sexual harm prevention order): s.80(3) SA 2020.
5. If the defendant (D) commits a further offence during the period of the discharge they may be brought back before the court and sentenced for the original offence in any way that would have been possible if they had just been just convicted of it.[73]

[73] Save if D was under 18 at the time of the original imposition of the conditional discharge, in which case the court dealing with a breach must treat D as if still that age [s.402 SA 2020]

Example (adult)

You have pleaded guilty to/been convicted of the offence of {specify} but it is neither necessary nor appropriate to impose an immediate punishment and so I propose to discharge you conditionally for a period of {specify}months/years. That means that so long as you commit no further offence there will be no punishment, but if you commit a further offence in that period of {specify} months/years you will be brought back to court and sentenced in respect of this offence and the further offence.

Example (child)

You damaged the window. I have thought about whether I need to punish you right now. I have decided not to. But I will not end the case right now either. Instead, I will discharge you conditionally for {specify}months. This means I will see if you commit any more crimes in the next X months. If you don't commit any more crimes in {specify} months, that will be the final end of your case. You will not be punished. If you do commit another offence you will have to come to court and be punished for [damaging the window], as well as anything new you have done which breaks the law.

As sentences for children can be complicated, it will be helpful to give the child being sentenced a paper copy of your sentencing remarks, or at least the outcome (see Appendix II and CrimPD 9.6.1 which encourages the provision of written sentencing remarks for children).

S3.3 Fines

Section 120 SA 2020

ARCHBOLD 5A-465; BLACKSTONE'S E5.1; SENTENCING REFERENCER § 37

1. A fine may be imposed instead of, or as well as, dealing in another way with a D who is:
   (1) convicted of any offence, other than one for which the sentence is fixed by law; or
   (2) proved to be in breach of a requirement of a suspended sentence or community order.
2. A fine must reflect the seriousness of the offence(s) and account must be taken of D's financial circumstances.
3. The court must order the parent or guardian to pay the fine for children aged 10-15 years old, and if the child is 16 or 17 years old the court may order the parent or guardian to pay, unless they cannot be found or it would be unreasonable. s.380 SA 2020. In practice, many children will have limited financial resources and the court will need to determine whether imposing a fine will be the most effective disposal. (SC Guideline: Sentencing Children and Young People, paras. 6.17-6.18).
4. In appropriate cases, the court may impose a fine in addition to a suspended sentence order or a community order. It is particularly apt when the offending is related to a defendant's business or employment, when dealing with offenders with substantial means, or when the sentence allows an offender to continue in well-remunerated work. For many in those categories, a substantial fine coupled with a suspended sentence or community sentence will be an appropriate punishment, see *Butt*.[74]
5. Time may be given for payment either by allowing a fixed term for payment of the full amount or by setting instalments, with a date for the first payment. Payments are made through the magistrates' court.
6. A period of custody must be set in default of payment, except in the case of a child (person aged under 18), or a limited company. The period must not exceed the maximum period set out in s.129(4) SA 2020 (see table below). Consecutive terms may be set when more than one fine is imposed.
7. The court must make a collection order in every case in which a fine or compensation order is imposed unless this would be impracticable or inappropriate (schedule 5, para. 12 Courts Act 2003). The collection order must state:
   (1) the amount of the sum due, including the amount of any fine, compensation order or other sum;
   (2) whether the court considers the offender to be an existing defaulter;
   (3) whether an attachment of earnings order (AEO) or application for benefit deductions (ABD) has been made and information about the effect of the order;
   (4) if the court has not made an attachment of earnings order or application for benefit deductions, the payment terms;
   (5) if an attachment of earnings order or application for benefit deductions has been made, the reserve terms (in other words, the payment terms that will apply if the AEO or ABD fails). It will often be appropriate to set a reserve term of payment in full within 14 days.

[74] [2018] EWCA Crim 1617

Example 1: D is a limited company

For this offence the company will be fined the sum of £250,000. This will be paid through the magistrates' courts and must be paid within 28 days.

Example 2: D is an individual

For this offence you will be fined the sum of £250. This will be paid through the magistrates' court and you will receive a notice telling you where and how to make payment. The first instalment will be paid by {date}. If you fail to pay the fine, or any instalment of it, you will go to prison for 10 days.

8. Maximum periods in default

Amount	**Period**
Not exceeding £200	Seven days
Exceeding £200 but not exceeding £500	14 days
Exceeding £500 but not exceeding £1,000	28 days
Exceeding £1,000 but not exceeding £2,500	45 days
Exceeding £2,500 but not exceeding £5,000	Three months
Exceeding £5,000 but not exceeding £10,000	Six months
Exceeding £10,000 but not exceeding £20,000	12 months
Exceeding £20,000 but not exceeding £50,000	18 months
Exceeding £50,000 but not exceeding £100,000	Two years
Exceeding £100,000 but not exceeding £250,000	Three years
Exceeding £250,000 but not exceeding £1,000,000	Five years
Exceeding £1,000,000	10 years

S3.4 Compensation orders

Sections 133-146 SA 2020

ARCHBOLD 5A-427; BLACKSTONE'S E6.1; SENTENCING REFERENCER § 36

1. A compensation order may be made instead of, or in addition to, another sentence.
2. The court must consider making a compensation order in every case where it is empowered to do so: this includes most cases in which personal injury, loss or damage has been caused. There are restrictions on the circumstances in which compensation may be awarded in road traffic accident cases and it is essential to consider with care the provisions of ss.134 and 136 SA 2020.
3. The court must order the parent or guardian to pay the compensation for children aged 10-15 years old, and if the child is 16 or 17 years old the court may order the parent or guardian to pay, unless they cannot be found or it would be unreasonable: s.380 SA 2020.
4. If no order is made, the court must give reasons.
5. The prosecution and defence should be invited to make submissions as to the appropriateness and amount of the proposed order.
6. The court in *York*[75] identified principles applicable to the imposition of compensation orders:
   (1) before making a compensation order, a judge must enquire about, and make clear findings about, an offender's means, and take them fully into account;
   (2) an order should not be made against an offender without means on the assumption that the order would be paid by somebody else, for example by a relative;
   (3) an order should not be made unless it is realistic, in the sense that the court is satisfied that the offender has, or will have, the means to pay that order within a reasonable time. While a repayment period of two or three years in an exceptional case would not be open to criticism, in general, excessively long repayment periods should be avoided.
7. In making the order, the full name of the recipient should be specified.
8. Time must be set for the payment of instalments but no sentence in default can be imposed unless the order is for £20,000 or more, in which case it is enforceable as a fine of such an amount.
9. Enforcement is through the magistrates' courts. If the amount of the order exceeds £20,000 the Crown Court has power to enlarge the powers of the magistrates' court if it considers that the maximum term of 12 months is inadequate, as follows:

[75] [2018] EWCA Crim 2754

Amount	Maximum term
Not exceeding £50,000	18 months
Not exceeding £100,000	24 months
Not exceeding £250,000	36 months
Not exceeding £1,000,000	60 months
Over £1,000,000	120 months

10. A useful guide to quantum for personal injury awards may be found in the Magistrates' Court Sentencing Guideline: see Blackstone's supplement 1 SG-225.

Example: compensation and no separate penalty

For this offence of common assault, you will pay £500 compensation to your victim {name}. This is not intended to be full compensation for the injury you caused, but it is the most that you can afford to pay within a reasonable time. Because of that, I do not order any separate penalty, nor do I order you to pay any costs or statutory surcharge.[76] The compensation must be paid at the rate of £10 per week. This will be paid through the magistrates' courts and you will receive a notice telling you where to make payment. The first instalment will be paid by {date}.

[76] See s.42 SA 2020: "Where a court dealing with an offender considers— (a) that it would be appropriate to make one or more of— (i) a compensation order, (ii) an unlawful profit order, and (iii) a slavery and trafficking reparation order, but (b) that the offender has insufficient means to pay both the surcharge and appropriate amounts under such of those orders as it would be appropriate to make, the court must reduce the surcharge accordingly (if necessary to nil)." However, the practical challenge of identifying circumstances where an offender can pay one but not the other is demonstrated by *Beckford* [2018] EWCA Crim 2997 and, in particular, by reference to the addendum to the judgment.

S3.5 Deprivation orders

Sections 152-159 SA 2020

ARCHBOLD 5A-503; BLACKSTONE'S E8.1; SENTENCING REFERENCER § 41

1. The power to make a deprivation order arises where property, for example a motor vehicle, which was in D's possession at the time of committing an offence or has been seized from D, was used for the purpose of committing or facilitating any offence.
2. When considering an order, the court must have regard to the value of the property and the likely financial and other effects of the making of an order on the defendant.
3. The prosecution and defence should be invited to make submissions as to the appropriateness of the proposed order.
4. The court must make a proper enquiry into the circumstances of the property which is the subject of the application for deprivation and, where necessary, make a formal finding.[77] Where appropriate, this may take the form of a *Newton* hearing.
5. The need for appropriate rigour on the part of the court when considering making a deprivation order was emphasised in *Wright-Hadley*[78], the court having reviewed the relevant principles. In cases involving the making of indent images of children it is not unusual for the parties (and sometimes the judge) to speak of a forfeiture and destruction order, and on occasion for the Court of Appeal to have to point out that what the court should have ordered is a deprivation order under this provision.
6. It will sometimes be argued that an order is inappropriate because the property does not belong to the defendant. However, the effect of the order is merely to deprive the defendant of the property. It will then be held by police subject to any application from the purported owner made under the Police (Property) Act 1897. The procedure is spelt out under ss.157 and 158 SA 2020. The position would be different if the property was forfeit (see S3.6 below), since forfeiture is intended to change the ownership of property rather than simply deprive the defendant of it.

Example

At the time you were arrested you were in possession of a car, index number {specify} which you had used for the purpose of committing your offence(s). I direct that you be deprived of this property under s.152 Sentencing Act 2020.

***NOTE:** see also forfeiture orders in chapter S3.6 below.

[77] See for example *Jones* [2017] EWCA Crim 2192
[78] [2022] EWCA Crim 446

S3.6 Forfeiture orders

***NOTE:** see also deprivation orders in chapter S3.5 above.

Section 27 MDA 1971

ARCHBOLD 5A-525; BLACKSTONE'S E8.7; SENTENCING REFERENCER § 42

1. Where D is convicted of an offence under Misuse of Drugs Act (MDA) 1971 or a drug-trafficking offence as defined by the Proceeds of Crime Act (PoCA) the court may order forfeiture of anything (drugs, money, equipment, mobile phones etc) that it is satisfied relate to the offence, and that it/they is/are to be destroyed or dealt with in such manner as the court may order.
2. Forfeiture is intended to affect property rights by changing the ownership of the property in question. Deprivation, by contrast, (which is dealt with at S3.5 above) merely deprives the defendant of any property (regardless of its true ownership) which was in the defendant's possession and used to commit or facilitate the commission of the offence. Deprivation is without prejudice to the right of the true owner (if not the defendant) to make a claim to police for the return of the property.
3. When ordering money to be forfeited under this section, the court may direct that the sum is to be paid to a specific charity. The charity must be registered with the Charity Commission and have indicated its willingness to receive the monies. The judge must have no substantive connection with the charity awarded the monies so as to avoid the appearance of a conflict of interest.[79]
4. A forfeiture order must not be made when the court postpones PoCA confiscation proceedings.
5. The usual order in respect of money forfeit under this provision is that it be forfeit and used by the police force conducting the investigation.
6. Where items have been exhibited in the case it is helpful to the court administration and the police to identify them by reference to their exhibit numbers.

Example

I order that the {item, eg drugs, electronic scales, hydroponic equipment, money} seized by the police, exhibit numbers {specify} are forfeit under s.27 Misuse of Drugs Act 1971.

[As appropriate:]

- The drugs will be destroyed.
- The money recovered from D will be used by the {name of investigating Police Force}.
- The equipment will be sold and the proceeds used by the {name of investigating Police Force}.[80]

[79] Guidance on forfeiture of monies to specific charities, Senior Presiding Judge, 10 June 2015.

[80] The practice has developed in some courts of money forfeit under these provisions being applied for other "worthy" purposes. Views may differ as to the appropriateness or otherwise of so doing.

Other forfeiture orders

7. Other statutes give the court power to order forfeiture of items connected with crime. For example:

   (1) Firearms: s.52 Firearms Act 1968.

   (2) Offensive weapons: s.1(2) Prevention of Crime Act 1953.

   (3) Terrorism: ss.17, 23, 23A, 23B and 120A Terrorism Act 2000; ss.2-11A Terrorism Act 2006.

   (4) Crossbows: s.6(3) Crossbows Act 1987.

   (5) Knives: s.6 Knives Act.

   (6) Obscene publications : s.3 Obscene Publications Act (OPA) 1959.

   (7) Forged/Counterfeited items: ss.7 and 24 Forgery and Counterfeiting Act (FCA) 1981.

   (8) Written material (racial hatred): s.25 Public Order Act (POA) 1986.

   (9) Magazines etc. likely to fall into the hands of children: s.3 Children and Young Persons (Harmful Publications) Act 1955.

   (10) Vehicle, ship, aircraft (immigration offences): s.25C Immigration Act (IA) 1971.

   (11) Documents (incitement to disaffection offences): s.3 Incitement to Disaffection Act (IDA) 1934.

S3.7 Restitution orders

Sections 147-151 SA 2020

ARCHBOLD 5A-528; BLACKSTONE'S E7.1; SENTENCING REFERENCER § 40

1. A restitution order may be made for the return of goods that have been stolen or otherwise unlawfully removed, or the proceeds of their sale, to the person lawfully entitled to them.
2. The order should be made only where the evidence identifying the goods or the proceeds of their sale is clear and there is no issue as to title.
3. Because the order is for the return of goods, no issue arises as to the means of the defendant: cf compensation orders.
4. Orders may be made before completion of PoCA proceedings.

Example

I make a restitution order in respect of {property} the subject of count 1 of the indictment and direct that it be returned to its owner {specify name} forthwith.

S3.8 Disqualification from being company director

Section 1 CDDA 1986

ARCHBOLD 5A-954; BLACKSTONE'S E21.8; SENTENCING REFERENCER § 76

1. Under ss.1 and 2 Company Directors Disqualification Act (CDDA) 1986 the court may make a disqualification order when D has been convicted of an indictable offence in connection with the promotion, formation, management, liquidation or striking off of a company or in connection with the receivership or management of a company's property.
2. It is not necessary that D was a director of any company involved in the offence(s).
3. Disqualification has the effect that D must not act as an insolvency practitioner or, without leave of the court, be a company director or act in the promotion, formation or management or liquidation of a company.
4. The maximum period for which disqualification may be imposed is 15 years. There is no minimum period.

Example

The offences of which you have been convicted were committed while you were dishonestly involved in the management of {company}. I direct that you be disqualified from acting as a director of any company for a period of {number} years. This means that you must not, without the court's permission, be a company director or act in the promotion, formation, management or liquidation of any company during this period.

NOTE: On application to the court where D has been a director of a company which has become insolvent, where D's conduct makes them unfit to be concerned in the management of a company the court must make a disqualification order (s.6 CDDA 1986).

S3.9 Disqualification from driving and endorsement of driving licence

Road Traffic Act 1988 and Road Traffic Offenders Act (RTOA) 1988

ARCHBOLD 5A-162, 32-227 et seq.; BLACKSTONE'S C7.8 and E21.11; SENTENCING REFERENCER §§ 43 to 48

1. An order of disqualification "for holding or obtaining a driving licence" is compulsory in the case of some offences and discretionary in others.

2. **Compulsory disqualification**

   (1) Disqualification is compulsory for some more serious motoring offences. The full list of offences which attract compulsory disqualification appears in s.34 RTOA 1988. There are a variety of minimum periods: eg for causing death by dangerous driving or causing death by careless driving while under the influence of drink or drugs the minimum period is two years' disqualification.

   (2) Certain repeat offences carry longer minimum disqualifications: eg for a second offence of driving with excess alcohol within 10 years the minimum period is three years' disqualification.

   (3) In the case of certain serious offences, eg dangerous driving, the disqualification must be accompanied by an order that upon completion of the disqualification the offender pass the extended driving test. An order of disqualification until an extended retest is passed shall not be imposed on an offender already subject to such an order.[81]

> **Example**
>
> You will also be disqualified from driving for a period of two years and until you have passed an extended driving test. That means that when your disqualification of two years has expired you can apply for a driving licence but the licence you get will be provisional until you have passed the extended test.

3. **Discretionary disqualification**

   A number of less serious road traffic offences, whilst they do not attract compulsory disqualification may be met with discretionary disqualification. These are identified in schedule 2 RTOA: see Archbold 32-312 and Blackstone's C8.1.

4. **Interim disqualification**

   (1) The court has power to order an interim disqualification when adjourning or deferring sentence after conviction [s.26 RTOA].

   (2) An interim disqualification may not extend beyond a period of six months [s.26(4) RTOA].

   (3) Any period of interim disqualification is to be deducted administratively from the period of disqualification imposed under s.34 or s.35 [s.26(12) RTOA].

5. **Licence endorsement and totting up**

   (1) A wide variety of motoring offences require the sentencer to endorse any driving licence D has or may come to have with "penalty points". Disqualification is compulsory (subject

[81] Section 36(7) RTOA 1988 and see *Mahmoud* [2017] EWCA Crim 1449

to special reasons or mitigating circumstances) where 12 points have been accumulated within three years: s.35 RTOA.

(2) The list of offences where a licence must be endorsed with penalty points is set out in schedule 2 RTOA.

General powers of disqualification from driving – ss.162-170 SA 2020

6. The court has a general power to disqualify from driving as a penalty instead of or addition to any other penalty [s.163] and also a specific power on commission of a crime involving the use of a motor vehicle [s.164].

Order to take re-test

7. If the defendant is convicted of manslaughter (as the driver of a motor vehicle), causing death by dangerous driving, causing serious injury by dangerous driving, or dangerous driving and disqualified under s.34, the court must order the defendant to be disqualified until an appropriate driving test is passed [s.36(1) and (2) RTOA].

8. If the defendant is convicted of another offence involving obligatory disqualification, the court may order disqualification until an appropriate driving test is passed [s.36(4) RTOA].

9. "Appropriate driving test" means:

   (1) An extended driving test where the offence involved obligatory disqualification or where disqualification was imposed under s.35;

   (2) A test of competence to drive, other than an extended test, in any other case [s.36(5) RTOA].

10. Where an offender is convicted of an offence to which s.36 applies in circumstances where they are already subject to an order under that section, the court does not make a further order for disqualification until an appropriate driving test is passed [s.36(7) RTOA].

Disqualification in conjunction with custodial sentence

11. Where a court imposes a disqualification, the court must impose:

   (1) an "extension period" on the disqualification in respect of any time that D is to be in custody for the same offence (one half or two-thirds of the sentence as appropriate): s.35A RTOA/s.166 SA 2020;

   (2) an "adjustment" to the length of the disqualification to reflect imprisonment imposed on the same occasion for a different offence, or where the defendant is already serving a custodial sentence (again, one half or two-thirds of the relevant sentence as appropriate): s.35B RTOA/s.167 SA 2020.

12. The Court of Appeal offered a step-by-step guide to imposing disqualification in conjunction with a custodial sentence (or sentences) in *Needham*:[82]

- **Step 1** – Does the court intend to impose a "discretionary" disqualification under s.34 or s.35 for any offence?
  - **Yes** – go to Step 2.

[82] [2016] EWCA Crim 455 para. 31

- **Step 2** – Does the court intend to impose a custodial term for that **same** offence?
  - **Yes** – s.35A/s.166 applies and the court must impose an extension period for that **same** offence and consider Step 3.
  - **No** – s.35A/s.166 does not apply at all – go on to consider s.35B/s.167 and Step 4.
- **Step 3** – Does the court intend to impose a custodial term for **another** offence (which is longer or consecutive) or is the defendant already serving a custodial sentence?
  - **Yes** – Then consider what increase ("uplift") in the period of "discretionary disqualification" is required to comply with s.35B(2) and (3)/s.166(3) and (4). In accordance with s.35B(4)/s.167(2) ignore any custodial term imposed for an offence involving disqualification under s.35A.

Discretionary period + extension period + uplift = total period of disqualification

  - **No** – No need to consider s.35B/s.167 at all.

Discretionary period + extension period = total period of disqualification.

- **Step 4** – Does the court intend to impose a custodial term for **another** offence or is the defendant already serving a custodial sentence?
  - **Yes** – Then consider what increase ("uplift") in the period of "discretionary disqualification" is required to comply with s.35B(2) and (3)/s.167(2).

Discretionary period + uplift = total period of disqualification.

13. Note that the s.35A/s.166 extension is a strict calculation based on the custodial element of the sentence for the same offence. Where the defendant has spent time on remand, it may therefore be necessary to make a downward adjustment to the disqualification period to reflect that fact if it would lead to a disproportionate result (however no reduction should be made to reduce the period below the statutory minimum). Such an adjustment is not arithmetical (ie it is not merely an exercise in dividing the time on remand by two): *Needham*.[83] Where such a reduction is necessary, it will be the discretionary part of the disqualification that will be adjusted **not** the s.35A/s.166 period. See examples 2 and 3 below.

14. The anomaly identified in *Rashid*[84] has now been addressed (at least in part) by s.140(2) Police, Crime, Sentencing and Courts Act (PCSCA) which has amended s.166 SA.

Example 1: where the length of disqualification is "extended" (s.35A/s.166) because D will be serving a sentence of imprisonment in relation to the same offence and/or "uplifted" (s.35B/s.167) to reflect custody for a different offence

But for the fact that you are to serve a sentence of six months' imprisonment for the offence of dangerous driving I would have ordered you to be disqualified from driving for that offence for a period of two years. That disqualification will not serve its purpose when you are in custody so it will be extended to take your period of custody into account. Because you will serve half the sentence of imprisonment in custody, the disqualification must therefore be two years plus an extension period of three months imposed pursuant to ss.35A RTOA 1988, making two years and three months disqualification in all.

[83] [2016] EWCA Crim 455
[84] [2022] EWCA Crim 524

However, I also have to sentence you for failing to appear at court at an earlier stage in these proceedings. The least sentence I can pass for that offence will be 14 days' imprisonment to be served consecutively. Accordingly, the disqualification period will be subject to an **uplift** of a further period of seven days pursuant to s.35B of the same Act so that the total disqualification, including extension period and uplift, will be two years, three months and seven days.

Example 2: where the length of disqualification is "extended" (s.35As.166) because D will be serving a sentence of imprisonment in relation to the same offence but the discretionary period needs to be reduced because the defendant has spent a long time on remand in custody

But for the fact that you are to serve a sentence of 12 months' imprisonment for the offence of dangerous driving I would have ordered you to be disqualified from driving for that offence for a period of two years. That disqualification will not serve its purpose when you are in custody so it will be extended to take your period of custody into account. Because you will serve half the sentence of imprisonment in custody, the disqualification would therefore be of 30 months' duration comprising a two-year disqualification plus an **extension** period of six months imposed pursuant to s.35A of RTOA 1988.

However, you have spent a period of four months on remand, and that means the period which remains to be served is reduced. Since your disqualification cannot be backdated, I have therefore decided to **reduce the period** of discretionary disqualification to 20 months (ie 24 minus four). That produces a total disqualification period of 26 months, or two years and two months.

This is not intended to be a mathematical calculation, but it should ensure that upon your release, you will be subject to disqualification for a period of around two years.

Example 3: (as above, but with an additional custodial sentence)

For this combination of offences, you have received custodial sentences of 24 months for dangerous driving and 12 months for affray to run consecutively, making a total of 36 months in all. You will serve no more than half of today's sentences – namely 18 months. You have spent four months on remand and that period will be taken into account automatically when calculating your earliest release date, but it is also a factor for which I have to take into account in setting the period during which you are going to be disqualified from driving.

I intend to impose a disqualification from driving that will operate for a further two years after your eventual release. The total period of the disqualification from today's date will therefore be a combination of **extension** (s.35A) and **uplift(s)** (s.35B) to reflect the terms in custody you will serve, but with the discretionary period **reduced** to reflect your time in custody to date.

To spell this out: the period would (subject to the final point below) have comprised:

- Discretionary disqualification of **24 months**;
- PLUS **12 months** extension under s.35A representing half of the custodial term imposed for the offence to which the disqualification relates;
- PLUS **six months** uplift/uplifts under s.35B to reflect the sentence imposed on you for the other offence.

But since the disqualification cannot be backdated to the date you went into custody, I consider it right to **reduce** the discretionary period by **four months** to **20 months** to take account of time spent in custody already.

The total disqualification from today's date will therefore be **38 months**. This is not intended to be a mathematical calculation, but it should ensure that upon your release, you will be subject to disqualification for a period of around two years.

S3.10 Binding over

ARCHBOLD 5A-396; BLACKSTONE'S E9.1; SENTENCING REFERENCER § 34

To come up for judgment

1. The Crown Court has power on conviction to bind D over to come up for judgment. It is most used when a D from another jurisdiction has committed an offence, which is not the most serious, and D expresses a firm intent to return to their own country in the immediate future.
   (1) It is a common law power.
   (2) It is an alternative to a sentence.
   (3) The effect is to bind over D on a recognisance to come up for judgment and sentence in the event of breach of the condition specified in the order (usually to leave the country by a specified date).
   (4) D's consent must be obtained.

Example

I have been told that you intend to leave this country on {date} and return to {place} and have been shown confirmation of your booking. In these circumstances, as an alternative to sentencing you for this offence, I am going to bind you over to come up for judgment if, and when, you are required to.

If you do indeed leave this country on {date}, you will not be required to come back to court and this means in practice that you will receive no punishment. But if you do not leave you will be brought back before the court for sentence. Do you understand? [Answer] Do you consent? [Answer]

To refrain from specific conduct or activity

2. Where it appears that there is a real risk of harassment or causing fear of violence to another, the court is likely to consider its powers to make a restraining order rather than a bind over: see chapter S6.4 below.
3. A power to bind over to keep the peace and be of good behaviour derives from the Justices of the Peace Acts 1361 and 1968. It is not a criminal conviction and will not appear on a criminal record. However, it may have adverse consequences for a person subject to it and a court considering exercising the power will proceed with care.
4. This power does not depend on a conviction. It is a power that may be used against Ds, whether convicted or acquitted, or witnesses, but it is rarely used against anyone who is not convicted. In the absence of a conviction, the court must be satisfied to the criminal standard that a breach of the peace involving violence or an imminent threat of violence has occurred, or that there is a real risk of violence in the future.
5. On conviction, it can be used as an alternative to sentence.
6. In the absence of conviction, either D's consent must be obtained or the violence, imminent threat of violence, or real risk of violence in the future must be proved to the criminal standard. This power is very rarely used in the absence of a conviction or consent.

7. In light of the judgment of the European Court of Human Rights in *Hashman and Harrup v. UK*,[85] a binding-over order reflecting the statutory language is simply too vague to comply with the requirement set out in the Convention that it should be "prescribed by law" (violation of Article 10). The court should therefore, rather than bind a person over to keep the peace and/or be of good behaviour, identify the specific conduct or activity from which that person must refrain. A written record of the order should be given to all parties.

8. The effect is to bind over D in a sum of money, to be set according to D's means, to refrain from specific conduct or activity for a set period.

9. D must be told that if they are proved to have been in breach of the bind over they are liable to forfeit all or part of the sum in which D is to be bound.

Example

The prosecution have indicated that they are considering offering no evidence on the counts on the indictment. They remain concerned about the future, and it is a concern that I share.

You have made no admissions regarding the behaviour which is alleged against you on this indictment. However through your advocate you have acknowledged that there is a [substantial] risk that you may be drawn into committing criminal violence [disorder or criminal misconduct] in future and you further acknowledge that it is both necessary and appropriate for the court to bind you over in the manner I have discussed with your advocate in a sum proposed by you which is entirely suitable to your means. I am told you have reflected carefully on that, and that you now ask the court to take this step and are in full agreement with what is proposed.

- Do you ask the court to consider binding you over in the sum of £500 in the following specific terms – that you must refrain from unlawful violent conduct [in any public house/at your workplace/at any Premier League football fixture/at your ex-partner's address] in the course of the next 12 months?
- Do you understand that if you were ever found by a criminal court to be in breach of the specific terms of this bind over, you would be liable to pay some or all of that sum [or go to prison in default of payment] as well as face any other appropriate penalty? Very well, I will bind you over in those terms.

I understand the Crown will now offer no evidence on the counts before the court. "Not guilty" verdicts will be returned on those counts. That concludes the proceedings. You may leave the dock.

10. A witness who has given evidence may be bound over if the above criteria apply.

[85] [2011] ECHR 1658

S4 Disposals for children[86]

Where a child is being dealt with in the Crown Court, the Crown Court is required to remit the case to the youth court "unless satisfied that it would be undesirable to do so" [s.25 Sentencing Act (SA)] – see chapter S2.3. Particular attention should be given where a child would meet the compulsory referral order conditions or be eligible for a discretionary referral order.[87]

Issues arise where a child has crossed a relevant age threshold between offence and sentence, for example certain prescribed sentence may not apply. There is a very helpful table in section 15-5 of the Youth Defendants in the Crown Court bench book. Reference will also need to be had to the SC Sentencing Children and Young People Guideline (and in particular para. 6.2) as well as cases such as *Ghafoor*[88]and *Bennett*.[89] Sentencing adults for crimes committed when children also gives rise to complex sentencing issues – see *Ahmed*.[90]

S4.1 Youth rehabilitation orders

Sections 173-199 SA 2020

ARCHBOLD 5A-1110; BLACKSTONE'S E11; SENTENCING REFERENCER § 93

1. The following principles govern the imposition of a youth Rehabilitation order (YRO).
   (1) A YRO is a community sentence available for children (ie persons under the age of 18 at the date of conviction). The maximum length of a YRO is three years.
   (2) A YRO must have at least one requirement and requirements must be compatible one with another.
   (3) The court must obtain and consider information about the child and the child's family and the effect that any requirement will have on the family, attendance at work, place of education and avoid conflicts with religious beliefs.
   (4) The SC Sentencing Children and Young People Guideline sets out a recommended approach to the nature and extent of requirements to be made.
   (5) Requirements of intensive supervision and surveillance and fostering may only be made if the offence is punishable with imprisonment and the court is of the opinion that the offence is so serious that otherwise a custodial sentence would be appropriate and, if the child is under 15, they are a persistent offender.
2. Criteria for sentence
   (1) The offence or combination of offences is serious enough to warrant such a sentence.
   (2) The restrictions on liberty and/or requirements of the order must be commensurate with the seriousness of the offence.

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86 Also see Youth Defendants in the Crown Court bench book (updated October 2023)
87 In *S* [2021] EWCA Crim 960 the Court of Appeal held that where a referral order is the appropriate sentence, a judge in the Crown Court has the power to remit a child to the youth court for sentence (pursuant to s.25(2) SA), and can then exercise the powers of a district judge (magistrates' court) (pursuant to the s.66 Courts Act 2003) sitting as a youth court to impose the order. See S2.3, para. 5 above.
88 [2002] EWCA Crim 1857
89 [2019] EWCA Crim 629
90 [2023] EWCA Crim 28

(3) The order is the most appropriate to achieve the aims of the youth justice system, ie of preventing further offending while having regard to the welfare of the child [see the approach to welfare set out in S1.7, para. 8 above].

3. The Requirements [see schedule 6 SA 2020]

Full details of any proposed requirements will be in the report from the Youth Offending Service.

(1) An activity requirement [Part 1]
residential or non-residential for up to 90 days

(2) An extended activity requirement [Part 1 and s.185(1)].

(3) A supervision requirement [Part 2]
maximum three years.

(4) An unpaid work requirement [Part 3]
child must be 16 or 17 at the date of conviction; 40-240 hours; to be completed within 12 months.

(5) A programme requirement [Part 4]
only if recommended by the youth Offending team (YOT) or a probation officer.

(6) An attendance centre requirement [Part 5]
age 14 or over, 12-24 hours; age 16 or over, 12-36 hours.

(7) A prohibited activity requirement [Part 6]
court must consult member of the youth offending team or probation officer.

(8) A curfew requirement [Part 7]
2-20 hours in any 24 hours but with a maximum of 112 hours in any seven-day period; maximum term 12 months; must be electronically monitored unless the householder does not consent or the court considers it inappropriate.

(9) An exclusion requirement [Part 8]
from a specified place or area; maximum period three months: must be electronically monitored unless a person whose cooperation is necessary does not consent or the court has not been notified that arrangements for electronic monitoring are available or it is otherwise inappropriate.

(10) A residence requirement [Part 9]
to reside with a specified individual or, if 16 or over, to reside at a place specified or at a place approved by the supervising officer.

(11) A local authority residence requirement [Part 10]
maximum period six months; not to extend beyond 18th birthday; must consult local authority and parent/guardian.

(12) A fostering requirement [Part 11].

(13) A mental health treatment requirement [Part 12]
may be residential/non-residential; must be by/under the direction of a registered medical practitioner or chartered psychologist. The court must be satisfied:

(a) That the mental condition of the child is such as requires and may be susceptible to treatment but is not such as to warrant the making of a hospital or guardianship order;

(b) that arrangements for treatment have been made;

(c) that the child has expressed willingness to comply.

(14) A drug treatment requirement [Part 13]
residential or non-residential; must be recommended; must have child's consent.

(15) A drug testing requirement [Part 14]
only available within a drug treatment requirement; must have child's consent.

(16) An intoxicating substance treatment requirement [Part 15]
must be recommended; must have child's consent; cannot be imposed unless the court is satisfied that the child is dependent on, or has a propensity to misuse, intoxicating substances.

(17) An education requirement [Part 16]
must consult local education authority; not to extend beyond compulsory school age.[91]

(18) An electronic compliance monitoring requirement or an electronic whereabouts monitoring requirements [Part 17]
to secure compliance with other requirements/to monitor the offender's whereabouts otherwise than to secure compliance with other requirements.

(19) A YRO may also be made with an intensive supervision and surveillance requirement [s.175] and/or a fostering requirement [s.176] but only if:

(a) the offence is punishable with imprisonment; and

(b) the court is of the opinion that the offence is so serious that otherwise a custodial sentence would be appropriate; and

(c) if the child is under 15 they are a persistent offender.

The full conditions for and detail of each requirement are set out in schedule 6 SA 2020 and summarised in the Sentencing Referencer.

4. Passing the sentence

The court must:

(1) Complete the steps set out in chapter S1.7 above [on the use of child-sensitive language and structure see Appendix II].

(2) State that:

(a) the offence, or the combination offences, is serious enough to warrant such a sentence;

(b) the sentence is the least that is commensurate with the seriousness of the offence(s);

(c) (if it is the case) the court has had regard to time spent on remand/in secure accommodation in imposing the requirement(s) attached to the order.

(3) Specify and explain the requirement(s) attached to the order, including the requirement that the offender keep in touch with the responsible officer in accordance with such instructions as they may be given by that officer.

[91] See also s.161 and schedule 17 paras. 18 and 21 Police, Crime, Sentencing and Courts Act (PCSCA) 2022

(4) Specify whether any breach of any requirement is to be dealt with in the Crown Court or the youth court and explain the court's powers in the event of any such breach or conviction of another offence.

Example

I have to decide what is the lowest sentence that is right for you and what you have done. I have decided that the offence is serious enough to sentence you to a youth rehabilitation order. This is a type of order called a community order. It means you do **not** have to go to custody (a secure place away from home) but you do need to follow some rules that I will give you. The rules are called requirements. Your sentence will last for one year. A one-year youth rehabilitation order was the lowest sentence that I could give you after I had thought carefully about what you had done.

I have told you that your sentence is a one-year youth rehabilitation order (I will call this a YRO).

Now I will tell you the reasons why I gave you this sentence. Then I will tell you what the rules are going to be. Then I will tell you what happens if you break the rules.

I have given you this sentence – a one-year YRO – because {give reasons, including explanation of factors in SC Guidance: Sentencing Children and Young People, welfare and prevention of offending}. When I thought about these things, I decided that a one-year YRO is the right sentence for you.

I will now tell you the requirements – the rules – for your YRO. I have written these out for you. You can follow along with me now if you want to. You will also have that to look at the rules later because it is really important that you know what you have to do. It is also important that everybody else in the case knows what you have to do.

1. First, you have to do 120 hours of unpaid work. You will probably do that four hours at a time, so you will be going to do this on about 30 separate days. You have one year (12 months) to do the 120 hours of unpaid work. You will be told when and where to work by{specify} and explain who, and how the child will be told}.
2. Second, you have to meet with your YOT officer when they want you to for the next 12 months (as I said earlier, 12 months is the same as one year). Your YOT officer will tell you when you have to meet them, and where you have to meet them. This is called a supervision requirement. [Give reasons – for example the YOT worker will help you take responsibility for what you did and help you to take positive chances.]

If you break these rules, you will be brought back to this court/the youth court. Breaking the rules is called breaching the order. If you break the rules and come back to court, you may be given more rules or a different sentence. That might mean you have to go to custody.

As sentences for children can be complicated, it will frequently be helpful to give the child being sentenced a paper copy of your sentencing remarks, or at least the outcome (see Appendix II and CrimPD 9.6.1 which encourages the provision of written sentencing remarks for children).

NOTE: the example given for a community order in chapter S5.1 below may easily be adapted for a YRO but it is suggested that great care is needed in the choice of language when sentencing children.

S4.2 Detention and training orders

Sections 233-248 SA 2020

ARCHBOLD 5A-1181; BLACKSTONE'S E.15; SENTENCING REFERENCER § 94

1. Introduction

   A detention and training order is a custodial sentence available for children aged between 12 and 17 inclusive at the date of conviction.

   (1) The minimum sentence is four months. The maximum sentence is 24 months.

   (2) Only sentences of at least 4 months but no longer than 24 months may be imposed in respect of any one offence. The total of consecutive sentences must not exceed 24 months.

   (3) If the child is under the age of 15 on the date of conviction a sentence may only be imposed if they are a "persistent offender" within s.234(1)(a) and 235(3) SA 2020.

2. Criteria for sentence

   (1) The offence by itself or in combination with other offences must be so serious that neither a fine alone nor a community sentence can be justified [s.230 SA 2020] **or** (though this is very rare in practice) the child refuses to express willingness to comply with a requirement of a youth rehabilitation order for which the child's willingness to comply is necessary ie a drug treatment requirement, a drug testing requirement, an intoxicating substance treatment requirement or a mental health treatment requirement.

   (2) The sentence must be the shortest term that is commensurate with the seriousness of the offence, either by itself or in combination with others associated with it [s.231 SA 2020].

   (3) The court must have regard to the welfare of the child and shall, in proper cases, take steps to remove the child from undesirable surroundings and for securing proper provision for the child's education and training [see the approach to welfare set out at chapter S1.7, para. 8].

   (4) The court must have regard to the need to prevent offending by children. This includes the importance of avoiding "criminalising" children unnecessarily, encouraging children to take responsibility for their actions and promoting reintegration into society [SC Guideline: Sentencing Children and Young People, para. 1.4].

   (5) Time served on remand is credited automatically towards a sentence of detention and training[92] and accordingly the approach that was previously adopted whereby the sentencer was required to deduct remand time from the sentence no longer applies.

   (6) In a case sent to the Crown Court as a "grave crime" it is permissible to impose a sentence of two years' detention and training on a plea of guilty entered at the first reasonable opportunity in a case in which, but for the plea of guilty, an order would have been made for detention under s.250 SA 2020. If this situation arises it must be explained clearly.

[92] Section 160 and schedule 16 PCSCA

3. Passing the sentence

The court must:

(1) Complete the steps set out in chapter S1.7 above [on the use of child-sensitive language and structure, see Appendix II].

(2) State that it has had regard to:

(a) the welfare of the child; and, if appropriate, that it is taking steps to remove the child from undesirable surroundings and/or secure proper provision for their education and training;

(b) the need to prevent them from further offending.

(3) Also state that:

(a) the seriousness of the offence is such that a fine or a youth rehabilitation order cannot be justified; and that

(b) the sentence is the least that can be passed to mark the seriousness of the offence(s).

(4) Explain in language that the child understands that up to one-half of the sentence – the "detention" part of the sentence – will be served in custody and the remainder – the "training" part – will be served on supervision.

(5) Where the person is aged 18 or over at the half-way point of the DTO term, the term of the order is less than 24 months, and where the offence was committed on or after 1 February 2015, the person will be subject to a further period of supervision, ending on the expiry of 12 months beginning with the release from the period of detention and training [s.247 SA 2020]. Explain the consequences of:

(a) reoffending during the currency of the supervised term of the order – if the offence is punishable with imprisonment, they may be ordered to be detained for the period outstanding, and

(b) failing to co-operate with supervision, they may be taken before the youth court and either fined or ordered to serve the remainder of the order or three months, whichever is less;

(c) failing to co-operate with any further supervision period (age 18: see above) – a sentence of curfew, unpaid work or up to 14 days in a Young Offender Institution.

Example

I have to decide what is the lowest sentence that is right for you and what you have done. I have decided that I must sentence you to a 12-month Detention and training order. Twelve months is the same as one year. A detention and training order has two parts.

- The detention part means you will spend six months (this is half a year) in custody. This means that instead of going home today you will go to a secure place. You will not be allowed to leave for six months. After you have spent six months in custody you will be allowed to leave.
- Then you will have six months on supervision in the community [or 12 months if the child turns 18 by the time the requisite custodial period expires]. This is the training part. Supervision in the community means you will have to meet with your YOT worker when they tell you.

I have told you that your sentence is a 12-month (a one-year) detention and training order. Now I will tell you the reasons why I gave you this sentence.

I thought about a lot of different things to help me decide what sentence to give you. These are explained in some guidance used by judges called the SC Guidance: Sentencing Children and Young People. [**If relevant, refer to any other offence-specific guidance**].

- I have to think about how serious the crime was. In your case the crime is very serious because {specify}
- I also have to think about you and your situation and the help that you need. I have to think about what is best for you; this is because I have to have regard to your welfare.
- I also have to think about what will help prevent you – stop you – from committing more crimes and what will help you to play a positive part in your community when you are let out of custody.
- I thought carefully about all of the information I heard about you and that I read in the pre-sentence report. In particular, I thought about [**insert relevant welfare factors set out in SC: Sentencing Children and Young People paras. 1.11-1.21**]. I also thought carefully about your age and that although you are still young, what you did was very serious.

For children, custody is a last resort. This means it will only happen if there is no other choice. This was a very serious crime. I could give you a longer sentence – an 18-month detention and training order. But I have taken into account that you pleaded guilty. This means that you told the court that you did the crime. Because you pleaded guilty, the right sentence for you is one year.

Either: As I have already told you, a 12-month detention and training order means you will spend half of that time – six months (half a year) – in custody. This is the detention part. Then you will be let out of custody and you will have six months on supervision in the community. This is the training part. Supervision in the community means you will have to meet with your YOT worker when they tell you. They are there to help you and to make sure you have the support you need so that you do not commit any more crimes.

Or – if the child is 18 by the time the requisite custodial period expires: As I have already told you, a detention and training order means you will spend half of that time – six months – in custody. This is the detention part. Then you will be allowed to leave custody and you will have 12 months on supervision in the community. This is the training part. Supervision in the community means you will have to meet with your YOT worker when they tell you. They are there to help you and to make sure you have the support you need so that you do not commit any more crimes.

In any case: When you leave custody you will be supervised by a YOT worker for six months. You must do what they tell you and you must not commit any more crimes. You may have to go back to custody if you commit a serious crime during those six months.

As sentences for children can be complicated, it will be helpful to give the child being sentenced a paper copy of your sentencing remarks, or at least a note of the outcome (see Appendix II and CrimPD 9.6.1 which encourages the provision of written sentencing remarks for children).

S4.3 Detention under s.250 (formerly s.91, "Grave crimes")

Detention under **s.250 SA 2020**

ARCHBOLD 5A-1207; BLACKSTONE'S E15.4; SENTENCING REFERENCER § 95

1. Introduction

   (1) Detention under s.250 SA 2020 is a custodial sentence for children aged under 18 at the date of conviction who have been convicted of "grave crime(s)".

   (2) While there is no statutory minimum term, in practice the offence should merit a sentence of significantly more than two years. (If it merits detention of two years or less, a detention and training order is likely to be appropriate.)

   (3) The maximum is the term available for an adult for the offence.

   (4) Where the child is to be sentenced for one or more offences which qualify for a sentence under s.250 and others which do not, a term of detention commensurate with the seriousness of all of the offences should be passed under s.250 only on the/those offence/s which so qualify. The court should order "no separate penalty" on those which do not.

   (5) A detention and training order and an order for detention under s.250 cannot be ordered to run consecutively.[93]

   (6) All children are released having served no more than half their sentence [s.244(3) Criminal Justice Act (CJA) 2003].

   (7) A child sentenced to a term of 12 months or more will be subject to licence for the remainder of the sentence [s.243A CJA 2003].

   (8) In the rare instance of a child sentenced to a term of less than 12 months under s.250, they will be supervised for three months on release.

2. Criteria for sentence

   (1) The offence(s) must be listed in s.249(1) SA, namely:

      (a) offences punishable, if 21 or over, with 14 years' imprisonment or more, not being a sentence fixed by law. This includes a common law offence where the sentence is at large; or

      (b) offences under ss.3, 13, 25 or 26 Sexual Offences Act (SOA); or

      (c) various offences under the Firearms Act 1968, or the Violent Crime Reduction Act 2006 listed in schedule 20 to the SA 2020 (offences where the firearm is of a type which attracts a minimum sentence and the person being sentenced is aged 16 or over at the time of the offence (minimum term for a person under 18 at the time of conviction is three years, subject to exceptional circumstances) where the offence was committed when the person being sentenced was aged 16 or over.

   (2) The court must have regard to the welfare of the child and shall, in a proper case, take steps to remove the child from undesirable surroundings and for securing proper provision for the child's education and training. [See the approach to welfare set out at S1.7, para. 8 above].

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93 There is an exception for 18 year olds who receive detention but also are in breach of their DTO licence where the two orders can run concurrently: *McGeechan* [2019] EWCA Crim 235.

(3) The court must have regard to the need to prevent offending by children and young persons. This includes the importance of avoiding "criminalising" children unnecessarily, encouraging children to take responsibility for their actions and promoting reintegration into society [SC Guideline: Sentencing Children and Young People, paras. 1.2-1.4].

(4) The court must be of the opinion that no other form of sentence is suitable. In particular that a youth rehabilitation order (YRO) with intensive supervision and surveillance or fostering could not be justified and a detention and training order (DTO) is not suitable.

3. Passing the sentence

The court must:

(1) Complete the steps set out in chapter S1.7 above [on the use child-sensitive language and structure see Appendix II].

(2) State that it has had regard to the welfare of the child and the need to prevent the child from further offending.

(3) (In an appropriate case) state that it is taking steps to remove the child from undesirable surroundings and/or secure proper provision for their education and training.

(4) Also state that:

(a) the seriousness of the offence is such that only a sentence under SA s.250 can be justified;

(b) the reasons why a YRO with intensive supervision or surveillance or fostering could not be justified and a DTO is not suitable;

(c) the sentence is the least that can be passed to mark the seriousness of the offence(s).

(5) Explain in language that the child can understand that up to one half of the sentence will be served in custody and on release D will be on licence/supervision (as appropriate) and if D reoffends or does not cooperate with the terms of licence/supervision D will be liable to be returned to custody.

(6) If (a) the child is aged under 18 at the time of the expiry of half the sentence (the requisite custodial period) and the sentence is one for a period of less than 12 months; or (b) the offence is committed on or after 1 February 2015 and the sentence is for a period of less than 12 months, they will be subject to supervision for a period of three months [s.256B CJA 2003].

(7) Consider time spent on remand in custody or subject to a qualifying electronically monitored curfew. For a full explanation of the provisions relating to time on remand, see chapter S5.14 below.

Example

I have to decide what is the lowest sentence that is the right for you. I have decided that I must sentence you to custody for three years. This is called long-term detention under s.250.* This means that instead of going home today you will go to a secure place. You will not be allowed to leave until half-way through the three years. This means you will not be allowed to leave for one and a half years.

[It may be appropriate to take a short break to allow the child to process the information before returning to explain the reasons for the sentencing decision].

Now I will tell you the reasons why I am giving you this sentence.

I thought about a lot of different things to help me decide what sentence to give you. These are explained in some guidance used by judges called the SC Guidance: Sentencing Children and Young People. I have thought carefully about the things in that guidance. [If relevant, refer to any other offence-specific guidance].

I have to think about you and your situation and the help that you need. I have to think about what is best for you; this is because I have to have regard to your welfare.

I also have to think about what will help prevent you – stop you – from committing more crimes and what will help you to play a positive part in your community when you are let out of custody.

I thought carefully about all of the information I heard about you, and that I read in the pre-sentence report. In particular, I thought about [insert relevant welfare factors set out in SC: Sentencing Children and Young People paras. 1.11-1.21]. I also thought carefully about your age. You are still young, but what you did was very serious.

There were two other sentences I could have given you. The first is called a youth rehabilitation order. The second is called a detention and training order. But what you did was very serious and neither of those sentences would be right for you. Custody is the only sentence that I can give you.

I am now going to explain to you what this sentence means for you. Because your sentence is three years, you will have to stay in custody for half of that time, which is one and a half years. You will be [insert age] when you can leave custody. After you leave, you will be on licence until the end of the three years. Being on licence means that there are conditions – these are rules – that you will have to follow. If you break any of those rules you may have to go back to custody for the rest of your sentence, or for some of it.

*Reference to s.250 is not for the benefit of the child (although the child may already have had this possibility explained to him/her and understand what it means) but so that there is no ambiguity in the minds of all other parties, including the CACD, about the provision under which the sentence has been imposed.

As sentences for children can be complicated, it will be helpful to give the child being sentenced a paper copy of your sentencing remarks, or at least a note of the outcome (see Appendix II and CrimPD 9.6.1 which encourages the provision of written sentencing remarks for children).

4. Time spent on remand in custody or subject to a qualifying electronically monitored curfew.

   For a full explanation of the provisions relating to time on remand, see chapter S5.14 below.

S4.4 Minimum sentences (under 18s)

Sections 311-320 SA 2020

ARCHBOLD 5A-751 – 5A-670; BLACKSTONE'S E18; SENTENCING REFERENCER § 59 to 63

1. Minimum sentences for single offences apply to:

   (1) Certain firearms offences listed in schedule 20 to the SA 2020 unless there are exceptional circumstances relating to the offence or to the child being sentenced which justify the court in not doing so (D aged 16 or over at the time of offence) [s.311 SA 2020].

   (2) Bladed articles/offensive weapons for children aged 16+ at the time of conviction:

      (a) s.139AA CJA 1988 (Offence of threatening with article with blade or point or offensive weapon)

      (b) s.1A PCA 1953 (Offence of threatening with offensive weapon in public)

      The requirement to impose a minimum sentence does not apply where there are "exceptional circumstances" relating to the offence or to the child being sentenced which justify not imposing the minimum sentence.[94] [s.312 SA 2020].

2. Minimum sentences for repeat offences apply to:

   (1) Bladed articles/offensive weapons offences committed on/after 17 July 2015 where at the time of the offence the child being sentenced was aged 16+ and had a relevant previous conviction for one of the following offences:

      (a) s.139 CJA 1988 (Offence of having article with blade or point in public place)

      (b) s.139A CJA 1988 (Offence of having article with blade or point (or offensive weapon) on school premises)

      (c) s.1 PCA 1953 (Prohibition of the carrying of offensive weapons without lawful authority or reasonable excuse) [s.315 SA 2020]

   (2) The requirement to impose a minimum sentence does not apply where there are "exceptional circumstances" relating to the offence, the previous offence or to the child being sentenced which justify not imposing the minimum sentence.[95]

   (3) Where a minimum sentence must be passed this must be stated and, if the child has pleaded guilty, it must be made clear what, if any, credit has been given.

   (4) It is important not to "water down" the statutory purpose of the minimum sentence regime, see *Chaplin*.[96] But the decision in *Whyte*[97] (that there is no power to suspend a sentence imposed under the minimum sentence provisions) has now been reversed by *Uddin*.[98]

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94 Applies to offences committed on or after the 28 June 2022 s.124 PCSCA 2022. For offences committed before that date see previous edition.

95 Applies to offences committed on or after the 28 June 2022 s.124 PCSCA 2022. For offences committed before that date see previous edition.

96 [2015] EWCA Crim 1491; [2016] 1 Cr.App.R. (S.) 10

97 In *Whyte* [2018] EWCA Crim 2437 the court found that, even though the minimum term specified for a second bladed article offence was short enough to be capable of being suspended, the reference to "imprisonment" under the minimum sentencing provisions is a reference to a term of 'immediate imprisonment'. That position has now been reversed by *Uddin*.

98 [2022] EWCA Crim 751

3. General Principles relating to minimum sentence in the context of possession of a prohibited firearm: *Nancarrow*[99] where the court (albeit dealing with an adult offender) took the opportunity to endorse the following general principles, which should be adapted in the case of a child under 18:

   (1) The purpose of the mandatory minimum term is to act as a deterrent.

   (2) Circumstances are “exceptional” if to impose five years' imprisonment would be arbitrary and disproportionate.

   (3) It is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or child being sentenced are exceptional.

   (4) It is necessary to look at all the circumstances of the case together, taking a holistic approach rather than looking at the features in isolation.

   (5) The four questions set out in *Avis*[100] should always be considered, namely: (a) What sort of weapon was involved? (b) What use, if any, was made of it? (c) With what intention did the defendant possess it? (d) What is the defendant's record?

   (6) It is relevant that the child being sentenced is unfit to serve a five-year sentence or that such a sentence may have a significantly adverse effect on health.

   (7) Limited assistance is to be gained from referring the court to decisions in cases involving facts that are not materially identical.

   (8) Unless the judge is clearly wrong in identifying exceptional circumstances where they do not exist or clearly wrong in not identifying exceptional circumstances where they do exist, this Court will not readily interfere (*Rehman* at para. 14).

[99] [2019] EWCA Crim 470
[100] [1998] 2 Cr App R (S) 178

Minimum sentences and maximum credit for plea of guilty			
Offence	**Relevant age**	**Minimum**	**Minimum sentence where defendant pleads guilty**
Firearms (where child is aged 16+ at the date of the offence)	18 or over (date of offence)	Five years	Five years (no reduction for guilty plea may be made)
	16 or 17 (date of offence)	Three years	Three years (no reduction for guilty plea may be made)
Threatening with offensive weapon in public; Threatening with article with blade or point or offensive weapon in public or on school premises	18 or over (at date of conviction)	Six months	146 days (that being 80% of the 6-month minimum)
	16 or 17 (at date of conviction)	Four-month DTO	No restriction – the court may impose any available sentence where the child pleads guilty
Second offence of possession of an offensive weapon or bladed article in a public place or on school premises – offence committed on or after 17 July 2015 (where at the date of the offence the child is aged 16+ and had a relevant previous conviction)	18 or over (at date of conviction)	Six months	146 days (that being 80% of the 6-month minimum)
	16 or 17[101] (at date of conviction)	Four-month DTO	No restriction – the court may impose any available sentence where the child pleads guilty

Example 1: (firearm: minimum term where no reduction permissible for plea of guilty)[102]

The sentence I give you is three years' detention. This means that instead of going home today you will go to a secure place for three years.

I will now explain why I have given you this sentence. I had to think about the aggravating factors (these are the things that could make the sentence longer) and mitigating factors (these are the things that could make the sentence shorter). When I thought about these things, the right sentence for you would be two years. But the crime you committed is a firearms offence. It is the law that the minimum sentence I can give you – the shortest sentence you can get – is three years' detention. I had to think about whether there is anything exceptional about this offence or anything exceptional about you that justifies not imposing the minimum term of three years' detention. I do not think there is.

[101] However, it is important to note that one of the criteria for imposing the minimum sentence for this offence is that **at the time of the offence**, the defendant was aged 16 or over and had a relevant previous conviction.

[102] There is no example to cover the second knife crime minimum term provisions for a child as it is difficult to envisage a circumstance where it wouldn't be unjust to impose a four-month DTO when the appropriate sentence would be a non-custodial disposal.

You pleaded guilty to this offence at the first reasonable opportunity. This means you told the court that you did the crime as soon as you could. But I am not allowed to make your sentence shorter even though you pleaded guilty. This means the sentence is three years' detention.

[Explain release on licence etc using child-sensitive language, adapting the examples at chapter S8.]

Example 2: (firearm: sentence after trial would have been above the minimum term but reduced to minimum term for plea of guilty)

The sentence I give you is three years' detention. This means that instead of going home today you will go to a secure place for three years.

I will now tell you why I have given you this sentence. I thought about the seriousness of the crime you committed. I also thought about the aggravating factors (the things that could make the sentence longer) and the mitigating factors (the things that could make the sentence shorter).

I decided the shortest sentence I could give you if there had been a trial would have been four years' detention. But you pleaded guilty at the first reasonable opportunity. This means you told the court that you did the crime as soon as you could. That will make a big difference to the sentence. It will reduce the sentence to three years' detention. It might have reduced it by more, but the crime you committed was a firearm offence. This means that the minimum sentence I can give you – the shortest sentence you can get – is three years' detention. I had to think about whether there is anything exceptional about this offence or anything exceptional about you that, justifies not imposing the minimum term of three years' detention. I do not think there is. This means the sentence is three years' detention.

[Explain release on licence etc using child-sensitive language, adapting the examples at chapter S8.]

As sentences for children can be complicated, it will be helpful to give the child being sentenced a paper copy of your sentencing remarks, or a note of the outcome (see Appendix II and CrimPD 9.6.1 which encourages the provision of written sentencing remarks for children).

S4.5 Dangerousness (under 18s)

ARCHBOLD 5A-661 (dangerousness) 5A-1220 (extended sentences), 5A-1230 (life sentences); BLACKSTONE'S E16.1-41; SENTENCING REFERENCER § 99 (life sentences), 98 (extended sentences)

1. The following sections cover life sentences (other than the mandatory life sentence for murder) and extended determinate sentences and are divided into three parts:
   (1) the criteria for making a finding of dangerousness;
   (2) "dangerousness" life sentences (s.258 SA 2020) – see S4.7;
   (3) "dangerousness" extended sentences (EDS) (s.254 SA 2020) – see S4.6.
2. These sections reflect the order in which a judge should approach sentencing:[103]
   (1) Consider the question of dangerousness. (See: **Dangerousness**).
   (2) If the offender is dangerous under Part 10 Chapter 6 SA 2020:
      (a) Consider whether the seriousness[104] of the offence and offences associated with it justify a life sentence, in which case the judge must pass a life sentence in accordance with s.258 SA 2020. (See: **Dangerousness – life**.)
      (b) If no life sentence is imposed the judge should consider whether a determinate sentence alone would suffice. (See: **Determinate sentences**.)
      (c) If a determinate sentence would not suffice, the judge should consider an extended sentence pursuant to s.254 SA 2020. (See: **Extended Determinate Sentence**.)
      (d) If the offender is not dangerous under the SA 2020 and if a custodial sentence is necessary, a determinate sentence should generally be passed. (See: **Determinate sentence**.)

Criteria for a finding of dangerousness (under 18s)

3. The offence must be listed in either Schedule 18 (extended sentences) or Schedule 19 offence (life sentences).
4. The court must find that there is a significant risk that:
   (1) D will commit further specified offences; and
   (2) by doing so D will cause serious physical or psychological harm to one or more people.
5. Additional provisions concerning the finding of dangerousness are found in s.308 SA 2020.
6. When assessing whether there is a "significant risk" to the public of serious harm caused by a child committing further specified offences, the court should take into consideration:
   (1) Children may change and develop within a shorter time than adults and this factor, along with their level of maturity, may be highly relevant when assessing probable future conduct and whether it may cause a risk of serious harm [SC Guideline: Sentencing Children and Young People, para. 2.6].[105]

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[103] Adapted from the step-by-step guide provided in the case of *AG's Reference (No. 27 of 2013) (Burkinskas)* [2014] EWCA Crim 334; [2014] 1 W.L.R. 4209
[104] Ibid, para. 22
[105] *Lang* [2005] EWCA Crim 2864, para. 17(vi)

(2) This may mean that an indeterminate sentence is inappropriate for a child even where a serious offence has been committed and there is a significant risk of serious harm from further offences.[106]

(3) Children are more likely to act impulsively, affecting the nature of the offence itself and are also more responsive to positive change when sentenced to a determinate sentence.[107]

(4) In making the assessment of dangerousness it will be essential to obtain a pre-sentence report. [SC Guideline: Sentencing Children and Young People, para. 2.5].

7. For a child, the dangerous offender provisions can only be imposed if a custodial term of at least four years would be imposed for the offence [SC Guideline: Sentencing Children and Young People, para. 2.4].

8. A sentence of detention for life for a child should be used as a last resort when an extended sentence is not able to provide the level of public protection that is necessary. In order to determine this, the court should consider the following factors in the order given [SC Guideline: Sentencing Children and Young People, para. 6.59]:

(1) the seriousness of the offence;

(2) previous findings of guilt against the child;

(3) the level of danger posed to the public and whether there is a reliable estimate of the length of time the child will remain a danger; and

(4) the alternative sentences available.

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106 *Lang* [2005] EWCA Crim 2864, para. 17(vii); *D* [2005] EWCA Crim 2282

107 *Woodhouse* [2020] EWCA Crim 970, para. 12. Also see *Chowdhury* [2016] EWCA Crim 134 and *JW* [2009] EWCA Crim 390

S4.6 Extended sentences (under 18s)

1. An extended sentence is available where:

   (1) the child is convicted of an offence listed in SA 2020 schedules 18 and 20 (whenever the offence was committed);

   (2) the test for dangerousness is satisfied;

   (3) the court is not required to impose a life sentence under ss.250 and 258 SA 2020; and

   (4) if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least four years [s.254 SA 2020].

2. Where those four steps are met, there is a **discretion** to impose an extended sentence. Extended sentences for children should be approached with care. Children should be treated differently to adults in relation to the court's approach to the assessment of dangerousness (see chapter S4.5 paras. 6-8 above).[108] The court should consider whether a determinate sentence would be a sufficient sentence to protect the public. It is important to bear in mind the child's age and lack of maturity and the potential for increasing maturity to reduce the risk posed by the child at the time of sentence and the fact that children may be more receptive to the rehabilitating potential represented by the sentence being imposed – see *Lang*[109] at [17], *Chowdhury*[110] at [22], *Miller*[111] at [38], *Mariano*[112] at [20] and *Woodhouse*[113] at [12]. If imposing an extended determinate sentence, the sentencer should explain its reasons for concluding that a determinate sentence was not appropriate.[114]

Fixing the custodial term and the length of the licence

3. Where the court passes such a sentence, it must set the custodial term and the (licence) extension period. These must not, in total, exceed the maximum sentence permitted for the offence.

4. In setting the custodial term the usual principles of sentencing apply. The extension period is a further period of licence which is imposed if necessary to protect members of the public from the significant risk of serious harm caused by D's commission of further specified offences.

5. Maximum and minimum periods: the minimum extension period is one year; the maximum extension periods are five years for a violent offence, eight years for a sexual or terrorism offence unless the offence is a serious terrorism offence, in which case the maximum is 10 years [s.256 SA 2020]. Within these parameters, the length of the extension period is a matter for the discretion of the sentencer. The extended licence period is not tied to the seriousness of the offending; its purpose is protective. Like all sentences, it should not be longer than necessary and should be just and proportionate, see *Phillips*.[115]

6. Any extended sentence must be expressed to be imposed in relation to an individual offence or individual offences for which the criteria are satisfied. It cannot be imposed as a global

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108 *Woodhouse* [2020] EWCA Crim 970.
109 [2005] EWCA Crim 2864
110 [2016] EWCA Crim 1341
111 [2018] EWCA Crim 500 and see also "Difficulties with dangerousness: determining the appropriate sentence – Part 2" [2018] Crim. L.R. 782-807
112 [2019] EWCA Crim 1718
113 [2020] EWCA Crim 970
114 *Bourke* [2017] EWCA Crim 2150
115 [2018] EWCA Crim 2008

sentence. It is not possible to make multiple extended sentences partly consecutive and partly concurrent, eg by imposing the custody consecutively but the licence periods concurrently, see *Francis*;[116] *DJ*.[117]

7. Consecutive extended determinate sentences may exceed the limitation on the length of the licence period imposed under a single extended determinate sentence (five years in the case of a violent offence, eight years in the case of a sexual offence) in exceptional cases. However, this should not be used to impose what is in effect a life licence, see *Thompson and Others*.[118]

8. Where imposing an extended sentence consecutively with a determinate sentence it is considered better sentencing practice for the determinate sentence to be imposed first with the extended sentence to run consecutively to it.[119]

Passing an extended sentence

9. The court must:

   (1) Set out findings in relation to those matters described in paragraphs 1-3 of chapter S1.7 above.

   (2) Set out the reasons for finding that D is dangerous within the meaning of Part 10 Chapter 6 SA 2020.

   (3) Set out the reasons for passing an extended sentence.

   (4) Explain that the sentence is an extended sentence of detention in a Young Offender Institution, which has two parts: a custodial term and an extended licence period.

   (5) Fix the custodial term. In doing so, credit should (almost invariably) be given for any plea of guilty and this should be spelt out clearly. The credit for pleading guilty is deducted from the custodial term only and not the extended licence period.

10. Give credit for time spent on remand subject to a qualifying electronically monitored curfew and consider any time remanded to local authority accommodation: time spent on remand in custody counts automatically. For a full explanation of the provisions relating to time on remand, see chapter S5.14 below.

11. Where the court makes a direction in relation to time spent on remand subject to a qualifying electronically monitored curfew it should also state that if the calculation of days is not correct, a correction will be made administratively without the need for a further hearing.

12. Fix the extension period. This is to be such period as the court thinks appropriate having regard to the risk posed.

13. Explain the consequences:

   (1) Every D subject to an extended sentence will serve at least two-thirds of the custodial term in custody before their case is referred to the Parole Board for them to consider

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116 [2014] EWCA Crim 631
117 [2015] EWCA Crim 563
118 [2018] EWCA Crim 639
119 As *Ulhaqdad* [2017] EWCA Crim 1216 made clear, the Prison Service is able to make a proper sentence calculation whichever order is used. Notwithstanding this, the guidance from the Court of Appeal (Criminal Division) remains that in such cases, the determinate sentence should be imposed first, with the extended sentence to run consecutively.

their release. D will not serve more than the whole of the custodial term (unless they are recalled once on licence).

(2) On release D will be on licence, which will last until the end of the custodial term (if any of this period remains), and D will then serve the extended period of licence: this begins when the custodial term expires and lasts until the end of the extended licence period.

(3) D's licence will be subject to conditions; and if any of the conditions are broken, D would be liable to have the licence revoked and be returned to custody to serve the rest of the total sentence in custody.

Example

You are {specify} years old now. The crime you committed was so serious that I have decided that I must pass a sentence which will affect you for 10 years from today. That is until you are {insert age}. The sentence is called an extended sentence**.** There are two parts to this sentence. The first part is a custodial sentence. This means that instead of going home today you will go to a secure place. The longest time you will be in custody is six years. After those six years, you will be on extended licence for four years. This means that there are rules, or conditions, that you will have to follow for those four years. If you break those rules you may have to go back into custody. This means the total length of your sentence – the custody part and the licence part – is 10 years.

[It may be appropriate to take a short break to allow the child to process the information before returning to explain the reasons for the sentencing decision].

Please listen carefully as I explain how I decided what sentence to give you and also how you will be released into the community.

As I have told you, the crime you committed was very serious. The law calls it a **specified** offence. Because it is a specified offence, I have to think about whether it is likely that you will do similar crimes again in the future. I have decided that this is likely. As I have already told your lawyer {**insert name**}, this means that I think there is a significant risk that you will cause serious harm by committing further similar offences. The reasons I think this are {specify}

[If this is also a **Schedule 19** offence and a life sentence is not considered necessary or appropriate, explain why.]

I have thought about whether I can give you what is called a standard determinate sentence. This is where everyone knows from the start how long you will be in custody. To decide whether I could give you a standard determinate sentence, I have to think about the offence and how serious it is. [**identify category/starting point**]. I thought about your age, your situation, and what you did [**reference to aggravating and mitigating factors in child-specific language**]. I thought about the help you need and what is best for you. This is because I have to have regard to your welfare. I also thought about what will help prevent you – stop you – from committing more crimes and what will help you to play a positive part in your community when you are let out of custody.

Thinking about all of those things, if I had been sentencing you to a standard determinate sentence, the shortest sentence would have been a nine-year sentence. You pleaded guilty. This means you told the court you did the crime and have taken responsibility for this behaviour. Because you pleaded guilty, I would have reduced the sentence to six years.

I have thought whether that sentence would be right for you. But I do not think it would be long enough to protect people from the harm that you might do. This is why I have decided to give you an extended sentence so that the public are protected for longer into the future.

As I said earlier, an extended sentence has two parts. The first part is the custodial period – the time you will be in custody. I have decided the longest you will be in custody is six years. The second part is called an extended licence period. I have decided the extended licence period is four years. This means your extended sentence in total is 10 years.

It is important that you understand what this means. You will go to custody today. The longest time you will be in custody is six years. You may be released before that. The Parole Board are a group of people who decide if it is safe or not for a person to leave custody. After you have spent four years in custody (this is two-thirds of the six years you have to be in custody), they will decide if it is safe for you to leave. If it is safe for you to leave, you will be on licence until the end of the 10-year sentence. Being on licence means that there are rules, or "conditions" that you will have to follow. If you break those rules, you may have to go back into custody for the rest of your sentence, or some of it.

If the Parole Board decide it is not safe, you will stay in custody for longer, but not longer than six years. When you do leave custody, you are on licence until the end of the full 10 years of your sentence. Both parts of your sentence – the custody part and the licence part – will end when you are {Insert age}.

[Where time spent on remand in custody]: You have already spent {specify} days in custody before you came to court today. This is called being on remand. These days will be taken off the time you have to spend in custody. This makes the time in custody shorter. It is now X years and X days.

[Where time spent on qualifying electronically monitored curfew]: You have already spent {47} days with an electronic tag and curfew (this is called being on bail)/staying with [insert name of foster carer or residential home] (this is called remand to local authority accommodation). You had to stay inside for nine hours or more each day. Because of that, the amount of time you have to be in custody is reduced (made less) by {24} days. The custodial part of your sentence is now {three years and 342 days} [**state also in years and months**]. If this number is wrong, we can correct it later without another hearing.

[Mention notification requirements if the offence is a sexual offence to which the notification regime under the SOA 2003 or a terrorism offence to which the Counter-Terrorism Act 2008 applies.]

As sentences for children can be complicated, it will be helpful to give the child being sentenced a paper copy of your sentencing remarks, or a note of the outcome (see Appendix II and CrimPD 9.6.1 which encourages the provision of written sentencing remarks for children).

S4.7 Detention under s.250 for life (under 18s)

"Dangerousness" life sentence (under 18)

1. The court must[120] impose a life sentence under ss.250 and 258 SA 2020 where:
   (1) the child is convicted of a Schedule 19 offence;
   (2) the court considers that the criteria for a finding of dangerousness are met [see chapter S4.5];
   (3) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of detention for life.

Required life sentence for manslaughter (aged under 18 at conviction) s.274A SA 2020

2. Where:
   (1) an offender aged under 18;
   (2) is convicted of an offence listed in s.258A(4) SA 2020;
   (3) the offence was committed on or after the 28 June 2022;
   (4) the offender was aged at least 16, and
   (5) the offence was committed against an emergency worker acting in the exercise of functions of such a worker;

   the court must impose detention for life sentence [s.250 SA 2020] unless there are exceptional circumstances relating to the offence or the offender which justify not doing so [s.258A(2)].
3. A sentence imposed under s.258A is not a sentence fixed by law [s.258A(6) SA 2020].

Fixing the minimum term

4. If a sentence of detention for life is passed it is necessary to fix a minimum term to be served in custody before the Parole Board may consider the child's release on licence. The court must consider the seriousness of the offence(s), following any applicable guidelines, to determine what would have been the notional determinate term. Where a child-specific guideline does not exist, the sentencer may use the relevant adult guideline and should reduce the sentence to reflect the child's reduced culpability. "The court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15." [SC Guideline: Sentencing Children and Young People, para. 6.46].[121]
5. Credit should then (except in the most exceptional circumstances) be given for any guilty plea, in accordance with the Sentencing Council's guilty plea guideline and SC Guideline: Sentencing Children and Young People, Section five: Guilty plea.

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120 The sentence is not discretionary, where the criteria are met: *Wilder* [2023] EWCA Crim 1295
121 This reduction to the relevant adult guideline should take place **before** any guilty plea reduction.

6. This term should almost always be two-thirds[122] to reflect the time that would have been served in custody on a determinate sentence. If the court takes any other course, it must explain its reasons [s.323 SA 2020].

7. Time spent on remand in custody or the proportion of time spent on qualifying electronically monitored curfew calculated by reference to the 5-step test [see chapter S5.14 below] should then (except in the most exceptional circumstances) be deducted. Consideration should also be given to any time spent remanded to local authority accommodation [see chapter S5.14 below]. This must be done notwithstanding the fact that in the case of all other custodial sentences time spent on remand in custody is automatically deducted from the sentence.

Passing a life sentence

8. The court must:

   (1) Set out findings in relation to those matters described in paras. 1-3 of chapter S1.7 above.

   (2) State that the sentence is one of detention for life because no lesser sentence is appropriate.

   (3) EITHER state that because of the [extreme] seriousness of the offence/combination of offences, the early release provisions will not apply and that the sentence is a whole life order.

   OR (in any other case) state the minimum term by explaining:

   (a) what the determinate sentence would have been after a trial (taking account of any aggravating and mitigating factors);

   (b) any reduction which would have been given for a guilty plea;

   (c) that the minimum term is almost always two-thirds of that notional sentence (explaining that this would have been the custodial element of a determinate term); and

   (d) the deduction made for days spent on remand in custody and/or on qualifying electronically monitored curfew and/or after consideration of remand to local authority accommodation. Any errors in the calculation of the days to be deducted cannot be amended administratively and must be dealt with by the sentencing judge in open court as a variation of sentence.[123]

   (4) Explain the consequences:

   (a) The minimum term will be served in full before D is eligible to be considered for release by the Parole Board.

   (b) The decision about whether or when D will be released will be taken by the Parole Board.

   (c) If D is released, then they will be on licence for the rest of their life.

   (d) The licence will be subject to conditions, which will be set at the time of D's release, and if D were to break any condition, they would be liable to be returned to prison to continue to serve their sentence and might not be released again.

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122 Section 129 PCSCA 2022 which inserts a new s.323(1A-C) SA 2020.
123 *Cookson* [2023] EWCA Crim 10

Example

The crime you committed was so serious that I have decided that I must sentence you to detention for life. This is a custodial sentence. This means that instead of going home today you will go to a secure place. It is important that you understand that even though the sentence is called detention for life, you will be able to leave custody one day. But you will not be allowed to leave until you are told you can. I have decided that the minimum term – the shortest length of time you must stay in custody – is five years and 294 days [also include this in years and months for the child's understanding. Once you have told the child the minimum term, refer only to this number. Any further reference to "detention for life" is likely to be confusing].

[It may be appropriate to take a short break to allow the child to process the information before returning to explain the reasons for the sentencing decision.]

Please listen carefully as I explain how I decided what sentence to give you and also how you will be released into the community.

I now have to tell you the reasons for this sentence. You will hear me say a lot of numbers and calculations. The number for you to remember – the shortest time you will be in custody – is five years and 294 days, and this will take you to age {specify}.

I have already told your lawyer [**insert name**] that I have decided that there is a significant risk that you will cause serious harm by committing further similar offences. That means that I think it is very likely that you will do similar things again. I also think that this risk is likely to carry on for a long time into the future. This is why I had to give you this long sentence.

There are a number of things that I have to think about when deciding your sentence. These are explained in some guidance used by judges called the SC Guidance: Sentencing Children and Young People. I have thought carefully about the things in that guidance. [**If relevant, refer also to any other offence-specific guidance**]. First, I have to decide what sentence I would have given you if I was sentencing you to a determinate sentence – this means a sentence that has a fixed amount of time in custody. To do that, I have to think about the offence and how serious it is [**identify offence category/starting point**]. I then had to think about the aggravating factors. These are the things that make the offence more serious and mean the sentence should be longer. I also had to think about the mitigating factors. These are the things that make the offence less serious and mean your sentence should be shorter. If there had been a trial, the sentence for an adult would have been 27 years but I reduced that as you were 16 years old when the offence was committed, so the sentence would have been detention for 13 years and six months.

But the minimum term for you – the shortest time you will be in custody – is less than 13 years and six months. I will now explain why.

First, you told the court that you did the crime. This means you pleaded guilty. Because you pleaded guilty as soon as you could, I give you full credit. This means I make your sentence shorter than 13 years six months. I make 13 years and six months shorter by a third, to nine years.

Second, the shortest time you have to spend in custody for this type of sentence is two-thirds of what it would be if it was a fixed sentence. Two-thirds of nine years is six years.

You have already spent 71 days in custody before you came to court today. Those days count as part of your sentence. So, I have taken 71 days away from the total, which means your minimum term is five years and 294 days [**also provide in years and months**].

It is important that you and everyone else understands what this means. This does **not** mean that you will be automatically let out of custody after five years and 294 days. The Parole Board are a group of people who decide if it is safe or not for a person to leave custody. After you have spent five years and 294 days in custody they will decide if it is safe for you to leave. If they decide it is not safe, you will stay in custody for a longer time.

When you do leave custody, you are on licence for the rest of your life. This means that there are rules, or "conditions" that will be decided when you leave custody. You will have to follow those rules for the rest of your life. If you break those rules you may have to go back into custody.

As sentences for children can be complicated, it will be helpful to give the child being sentenced a paper copy of your sentencing remarks (see Appendix II and CrimPD 9.6.1 which encourages the provision of written sentencing remarks for children).

S4.8 Offenders of particular concern (terrorism offences)

Section 252A and schedule 13 SA 2020

1. By virtue of s.252A and schedule 13 additional restrictions are placed upon "offenders of particular concern", ie those convicted of certain terrorism offences. The full list of offences is set out in schedule 13 Part 1 SA 2020.
2. These provisions apply if:
   (1) D is convicted of a Part 1 Schedule 13 offence when a child (under 18);
   (2) D was aged under 18 at the commission of the offence;
   (3) the offence was committed on or after the commencement of s.22 Counter-Terrorism and Sentencing Act 2021;
   (4) the court does not impose a sentence of detention for life (s.250) or an extended sentence of detention (s.254), and
   (5) the court would otherwise impose an immediate custodial sentence.
3. In determining for whether it would impose a custodial sentence, the court must disregard any restriction on its power to impose such a sentence by reference to the age of the offender.
4. Where the criteria listed above apply, the court must impose a sentence of detention under s.252A.
5. The Court of Appeal gave guidance in *LF*[124] to the effect that if the court would otherwise have proposed to impose a suspended sentence order, then it should impose a community order instead to avoid conflict between the suspended sentence order and the "offender of particular concern order".
6. Once the court has decided to impose a sentence of detention, the term of the "offender of particular concern order" must be equal to the aggregate of the "appropriate custodial term" and an additional period of one year during which the offender will be subject to licence. The "appropriate custodial term" is the term which the court considers will ensure that the sentence is appropriate.
7. The term of the overall sentence must not exceed the statutory maximum applicable at the date of the commission of the offence.
8. The appropriate custodial term will usually be the term commensurate with the seriousness of the offence.
9. When the offender has served the custodial term[125] they will be released on licence to serve the additional licence period of one year.
10. This means that there is always a minimum period of one year to be served on licence after the offender has served the entire custodial term in custody.

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[124] [2016] EWCA Crim 561
[125] This means the **whole** of the custodial term – see s.247A CJA 2003 as amended.

Example 1

I have to make an order called an offender of particular concern order. It will be five years altogether. You will serve some of this five years in detention. Detention means you will live in a secure place. Then you will leave detention and you will finish the sentence in the community. This means when you are living at home.

You will spend four years in detention.

When you do leave detention, you will be on licence until the end of the full five-year sentence. Being on licence means that there are rules, or "conditions" that you will have to follow. If you break those rules, you might have to go back to detention and be there until the end of the order. This means until the end of the full five years.

Example 2

I have to sentence you for two offences. The sentence overall is called an offender of particular concern order. The sentence will be 10 years altogether. You will serve some of this 10 years in detention. Detention means you will live in a secure place. Then you will leave detention and you will finish the sentence in the community.

The sentence on the first count will be six years' detention in a young offender institution. A young offender institution is a secure place that you cannot leave until you are told you can. The sentence on the second count will be two years' detention in a young offender institution. The two years detention starts after the six years is finished. That makes a total of eight years' detention in the young offender institution altogether. After those eight years, you will leave detention. You will then be on an extended licence period for two years. It is two years in total because it is one extra year for each offence. Being on extended licence means you have to follow some rules.

It is important that you understand that the longest time you will be in detention is eight years. But you may be able to leave before the eight years is up. The Parole Board are a group of people who look carefully at your case and decide if it is safe for you to leave detention. After you have spent half of the eight years in detention, the Parole Board will decide if it is safe for you to leave. Half of eight years is four years. If they decide it is not safe for you to leave, you will stay in detention for longer. The longest you will have to stay is eight years.

When you leave detention, you will have to follow some rules. You have to follow these rules right up to the end of your sentence – the full 10 years. If you break the rules you might have to go back to detention and be there until the end of the Order (the full 10 years). You will be {specify} years old when the order ends.

S4.9 Mandatory life sentence (under 18)

See below at S5.13 for mandatory life sentences generally.

S5 Disposals for adults

S5.1 Community orders

Sections 200-220 and schedule 9 SA 2020

ARCHBOLD 5A-573; BLACKSTONE'S E12.1-12.35; SENTENCING REFERENCER § 49

1. A community order is a community sentence for offenders who are aged 18 or over on the date of conviction.
   (1) The maximum length of a community order is three years.
   (2) A community order must have at least one requirement, including a punitive element unless a fine is imposed or there are exceptional circumstances that would make it unjust (s.208 (10)-(11) Sentencing Act (SA) 2020).
   (3) Multiple requirements must be compatible one with another.
   (4) Requirement(s) must avoid conflict with the offender's religious beliefs and/or interference with the offender's times of work and/or education.
   (5) The court may have regard to any period spent on remand, or qualifying electrically monitored curfew, when determining the restrictions/s on liberty which such a sentence imposes.
2. Criteria for sentence [ss.202 and 204 SA 2020]
   (1) The offence is punishable by imprisonment in the case of an offender aged 21+.
   (2) The offence, or combination offences, is serious enough to warrant such a sentence.
   (3) The requirement(s) must be the most suitable for the offender.
   (4) The restriction(s) on liberty imposed by the requirement(s) must be commensurate with the seriousness of the offence(s).
3. The requirements [schedule 9 to the SA 2020]
   (1) An unpaid work requirement [Part 1]
   40-300 hours to be completed within 12 months.
   (2) A rehabilitation activity requirement [Part 2]
   The supervising officer (who may not be a probation officer) may require the offender to attend for appointments and for any appropriate activity.
   (3) A programme requirement [Part 3]
   Must specify the number of days on which the offender (D) must participate.
   (4) A prohibited activity requirement [Part 4]
   Can only be imposed after consultation with the Probation Service.
   (5) A curfew requirement [Part 5]
   2-20 hours and not more than 112 hours in a seven-day period; maximum term 12 months; must consider those likely to be affected; must be electronically monitored unless a person whose cooperation is necessary does not consent or it is otherwise inappropriate.
   (6) An exclusion requirement [Part 6]
   From a specified place/places; maximum period two years: may be continuous or only during specified periods; must be electronically monitored unless a person whose

cooperation is necessary does not consent or the court has not been notified that arrangements for electronic monitoring are available or it is otherwise inappropriate.

(7) A residence requirement [Part 7]
To reside at a place specified or as directed by the supervising officer.

NOTE: in the absence of a specific residence requirement, the offender must not change residence without the permission of the responsible officer or the court. This obligation is enforceable as if it were a requirement imposed by the order: Offender Rehabilitation Act (ORA) s.18.

(8) A foreign travel prohibition requirement [Part 8]
Not to exceed 12 months.

(9) A mental health treatment requirement [Part 9]
May be residential/non-residential; must be by/under the direction of a registered medical practitioner or chartered psychologist. The court must be satisfied:

(a) that the mental condition of the offender is such as requires and may be susceptible to treatment but it not such as to warrant the making of a hospital or guardianship order;

(b) that arrangements for treatment have been made;

(c) that the offender has expressed willingness to comply.

(10) A drug rehabilitation requirement [Part 10]
The court must be satisfied that the offender is dependent on or has a propensity to misuse drugs which requires or is susceptible to treatment; residential or non-residential; must have offender's consent; reviews, which the offender must attend (subject to application for amendment) at intervals of not less than a month (discretionary on requirements of up to 12 months, mandatory on requirements of over 12 months).

(10A) Drug testing requirement [Part 10A]
Provision of samples for the purposes of drug testing during the currency of the order; to check for the presence of any drug or psychoactive substance; the court must be satisfied that there is a misuse condition and the arrangements are available.

(11) An alcohol treatment requirement [Part 11]
Residential or non-residential; must have offender's consent; court must be satisfied that the offender is dependent on alcohol and that the dependency is susceptible to treatment.

(12) An alcohol abstinence monitoring requirement [Part 12]
Available where the consumption of alcohol was an element of/contributed to the offence (or an associated offence).
Cannot be for more than a period of 120 days;
Cannot be imposed with an alcohol treatment requirement.

(13) An electronic monitoring requirement [Part 14]
Two types of order: (a) compliance monitoring; (b) whereabouts monitoring.
Consent of householder (if someone other than the defendant) is required. Compliance monitoring requirement is mandatory, unless inappropriate, for curfew and exclusion; and is discretionary for unpaid work, rehabilitation activity, programme, prohibited activity, residence, foreign travel prohibition, mental health treatment, drug rehabilitation, alcohol treatment, attendance centre. Not available for alcohol abstinence monitoring (but is

available for monitoring compliance with another requirement, where alcohol abstinence and monitoring requirement is also imposed).

4. Section 153 and schedule 14 Police, Crime, Sentencing and Courts Act (PCSCA) 2022 introduce ss.217(A-C) and 395A SA 2020 which provide for the review of community orders that qualify for "special procedures". Regulations identifying the relevant criteria are yet to be made.

5. In appropriate cases, the court may impose a fine in addition to a community order. It is particularly apt when the offending is related to a defendant's business or employment, when dealing with offenders with substantial means, or when the sentence allows an offender to continue in well-remunerated work. For many in those categories, a substantial fine coupled with a suspended sentence or community sentence will be an appropriate punishment, see *Butt*.[126]

6. Passing the sentence

   The court must:

   (1) Complete the steps set out in chapter S1.7 above.

   (2) State that:

      (a) the offence, or the combination of offences, is serious enough to warrant such a sentence;

      (b) the sentence is the least that is commensurate with the seriousness of the offence(s);

      (c) (if it is the case) the court has had regard to time spent on remand in imposing the requirement(s) attached to the order.

   (3) Specify and explain the requirement/s attached to the order including the requirement that the offender keep in touch with the responsible officer in accordance with such instructions as the offender may be given by that officer.

   (4) Specify that it is a requirement of the order that the offender obtains the consent of their supervising officer or the court before any change of residence.

   (5) Specify whether any breach of any requirement is to be dealt with in the Crown Court or the magistrates' court and explain the court's powers in the event of any such breach or conviction of another offence (see chapter S10.2 below).

Example

Your offence is serious enough to require a community order – and you will be subject to these requirements:

1. You will complete 120 hours of unpaid work within the next 12 months, working when and where you are directed by your supervising officer.
2. You will be subject to – and cooperate with – supervision/a rehabilitation activity requirement {of X days} for 12 months. That means you must meet your supervisor when and where you are told to, and you must cooperate fully with any instructions that your supervisor gives you.

[126] [2018] EWCA Crim 1617

If you fail to complete the unpaid work or to do it properly, or fail to cooperate with supervision/the rehabilitation activity requirement you will be in breach of the order: that means you will be brought back to court and may be given further requirements, fined or even resentenced for this offence; and that could result in the imposition of custody.

NOTE: If there is any reason to suppose the offender has comprehension difficulties the approach to explaining sentences for children may provide assistance (See Appendix II).

S5.2 Determinate sentences of detention in a young offender institution (aged 18-20)

Section 262 SA 2020; ss.256AA and 256AB CJA

ARCHBOLD 5A-739; BLACKSTONE'S E13.23; SENTENCING REFERENCER § 57

1. Detention in a young offender institution (DYOI) is the custodial sentence for offenders aged 18-20 (inclusive) at the date of conviction where the sentence is not an extended or life sentence.

   (1) The minimum sentence is 21 days.

   (2) The maximum is the term available for the offence.

   (3) Release provisions relating to sentences of detention in a young offender institution in respect of offences committed on or after 1 February 2015 are the same as those relating to determinate sentences of imprisonment [s.237 Criminal Justice Act (CJA) 2003 (see chapter S5.3 below)].

   (4) In respect of offences committed before 1 February 2015, on release, offenders serving a sentence of less than 12 months, are subject to a supervision period of three months [s.256B CJA 2003].

2. Criteria for sentence

   (1) The offence by itself or in combination with other offences must be so serious that neither a fine alone nor a community sentence can be justified [s.230 SA 2020] **or** the offender refuses to express willingness to comply with a requirement of a community order proposed by the court for which the offender's willingness to comply is necessary ie a drug rehabilitation requirement, an alcohol treatment requirement or a mental health treatment requirement.

   (2) The sentence must be the shortest term that is commensurate with the seriousness of the offence, either by itself or in combination with others [s.231 SA 2020].

3. Passing the sentence

   The court must:

   (1) Set out findings in relation to those matters described in paragraphs 1-3 of chapter S1.7 above.

   (2) State that:

      (a) the seriousness of the offence is such that neither a fine alone nor a community order can be justified. (These are the words of the statute but are commonly expressed in sentencing remarks as "**the offence is so serious that only a custodial sentence can be justified**");

      (b) the sentence is the least that can be imposed having regard to the seriousness of the offence.

4. Explain the effect of the release provisions. Criminal Justice Act 2003: Changes over time for: Section 244.

Example

The offence is so serious that only a custodial sentence can be justified. The shortest possible sentence I can impose having regard to the seriousness of the offence is one of {specify} months'/years' detention in a young offender institution. You will serve up to half in custody, namely {specify} months/years.

NOTE: here explain the effect of the release provisions, examples of which, dependent on length of sentence, are to be found in chapter S8.1 below.

NOTE: if there is any reason to suppose the offender aged 18-20 has comprehension difficulties the approach to explaining sentences for children may provide assistance (See Appendix II).

S5.3 Determinate sentences of imprisonment (offenders aged 21 or over)

Sections 230 and 231 SA 2003; ss.256AA and 256AB CJA 2003 – licence and supervision provisions

ARCHBOLD 5A-718 AND 5A-737; BLACKSTONE'S E13.1; SENTENCING REFERENCER § 50 AND 55

1. Criteria for sentence

   (1) The offence by itself or in combination with other offences must be so serious that neither a fine alone nor a community sentence can be justified [s.230 SA 2020] **or** the offender refuses to express willingness to comply with a requirement of a community order proposed by the court for which the offender's willingness to comply is necessary ie a drug rehabilitation requirement, an alcohol treatment requirement or a mental health treatment requirement.

   (2) The sentence must be the shortest term that is commensurate with the seriousness of the offence, either by itself or in combination with others [s.231 SA 2020].

2. Passing the sentence

   The court must:

   (1) Set out findings in relation to those matters described in paragraphs 1-3 of chapter S1.7 above.

   (2) State that:

      (a) the seriousness of the offence is such that neither a fine alone nor a community order can be justified. (These are the words of the statute but are commonly expressed in sentencing remarks as "**the offence is so serious that only a custodial sentence can be justified**");

      (b) the sentence is the least that can be imposed having regard to the seriousness of the offence.

   (3) Explain the effect of the release provisions.

> **Example**
>
> The offence is so serious that only a custodial sentence can be justified.
>
> {Explain application of relevant guideline(s) etc and make allowance for credit for plea} The least possible sentence I can impose having regard to the seriousness of the offence is one of {specify} months'/years' imprisonment.
>
> **NOTE:** here explain the effect of the release provisions, examples of which, dependent on length of sentence, are to be found in chapter S8.1 below.

3. Spelling out the effect of the sentence.

   (1) Unconditional release applies to:

      (a) a prisoner serving a sentence of one day;

      (b) a prisoner serving a term of less than 12 months who is aged under 18 on the last day of the requisite custodial period; and

(c) a prisoner serving a sentence of less than 12 months imposed for an offence committed before 1 February 2015 [s.243A CJA 2003].

Example

You will serve up to half of your sentence in custody and then you will be released.

(2) **Licence and post-sentence supervision** will generally apply for sentences under two years. First, there will generally be a licence period (the second half of the custodial sentence) and second, there will be a post-sentence supervision period which in combination will run for 12 months from the offender's release. This is to ensure that there is an appropriate period of engagement with probation services on the expiry of the custodial element of a short sentence.

The period of licence plus post-sentence supervision will be **12 months** from release if an offender sentenced between one day and less than two years is:

(a) aged 18+ on the last day of the requisite custodial period;

(b) not serving extended sentences or sentences for offenders of particular concern;

(c) not serving sentences for offences committed before 1 February 2015 [s.256AA CJA 2003].

The period of licence plus post-sentence supervision will be **three months** from release if an offender sentenced between one day and less than two years is:

(a) aged under 18 on the last day of the requisite custodial period, serving a sentence under s.250 of less than 12 months;

(b) serving a sentence of detention under s.250 of less than 12 months for an offence committed before 1 February 2015 [s.256B CJA 2003].

Release on licence with post-sentence supervision

Example

You will serve up to one half of your 12-month sentence in custody before you are released on licence. When you are released, you will be on licence and then post-sentence supervision for a total of 12 months after that. You must comply with the terms of the licence and supervision and commit no further offence or you will be liable to serve a further period in custody.

(3) Release on licence applies to prisoners serving determinate sentences of two years' duration or longer, other than extended sentences or sentences for offenders of particular concern.

(4) An offender will serve two-thirds of their determinate sentence before being automatically released, where the sentence is not one to which s.244A (offenders of particular concern), s.246A (extended determinate sentence) or s.247A (certain terrorist offenders) CJA 2003 applies, and:

(a) they are convicted of an offence listed in schedule 15 CJA 2003, which has a maximum sentence of life imprisonment and they receive a sentence of seven years or more;

(b) they are convicted of an offence listed in s.244ZA(7) CJA 2003 (certain violent and sexual offences with a maximum sentence of life imprisonment) and they receive a sentence of at least four years but less than seven years [s.244ZA CJA 2003].

(5) Offenders serving other determinate sentences will be released after serving no more than one half of their custodial term.

Release on licence with no post-sentence supervision

Example – s.244ZA CJA 2003 applies

You will serve up to two-thirds of your five-year sentence in custody. You will serve the remainder on licence. You must keep to the terms of your licence and commit no further offence, or you will be liable to be recalled and you may then serve the rest of your sentence in custody.

Example – s.244ZA CJA 2003 does not apply

You will serve up to one-half of your five-year sentence in custody. You will serve the remainder on licence. You must keep to the terms of your licence and commit no further offence, or you will be liable to be recalled and you may then serve the rest of your sentence in custody.

(6) Concurrent and consecutive sentences

(a) Where D is to be sentenced for more than one offence, sentences should be imposed in respect of each offence of which D has been convicted (unless the offence is to be marked with "no separate penalty").

(b) Sentences may be ordered to run concurrently or consecutively. In the absence of express order, sentences will be served concurrently.

(c) A determinate sentence of imprisonment may be ordered to run consecutively to any other custodial sentence (including a minimum term of an indeterminate sentence): s.384 SA 2020.

(d) A sentence cannot be ordered to be served consecutively to a sentence from which D has already been released and this is so even if D has been recalled on that sentence: s.225 SA 2020.

(e) When passing consecutive sentences, the sentencer must have regard to the principle of totality, applying the SC Guidelines: Offences taken into consideration and Totality.

Example: Court has to sentence for two offences

On count 1 of this indictment, the charge of wounding {name} on {date}, the sentence will be two years' imprisonment. On count 2, the charge of assaulting {name} occasioning actual bodily harm on {date}, the sentence will be one year's imprisonment. The sentence on count 2 will run consecutively to the sentence on count 1, making a total sentence of three years in all. That is the least sentence that I can impose to mark the totality of your offending. You will serve up to half of your total sentence in custody and then…

Example: where D is already serving a life sentence with a minimum of 10 years

For this offence of wounding you will serve a sentence of 18 months' imprisonment. You will serve no more than half of this sentence in custody – ie nine months. However, this sentence will be served consecutively to the minimum term of 10 years, which you are currently serving.

This means that when you have completed the minimum term of 10 years you will then serve the custodial portion of this sentence – namely nine months – and you will not be eligible to be considered for parole until you have served that additional period.

S5.4 Suspended sentence order (aged 18-20 at conviction)

Section 264 and ss.286-305 SA 2020

ARCHBOLD 5A-690; BLACKSTONE'S E14; SENTENCING REFERENCER § 56

1. The power to order that a custodial sentence be suspended applies to sentences of detention in a young offender institution and must be not less than 21 days and not more than two years.
2. Where consecutive suspended sentences are passed, the aggregate sentence must not exceed two years.
3. Criteria for sentence:
   (1) The offence(s) is/are so serious that neither a fine alone nor a community sentence can be justified: ie the sentence passes the "custody threshold".
   (2) The length of that sentence is the least that can be imposed to mark the seriousness of the offence.
   (3) Defendant aged 18-20 at conviction.
   (4) There are factors which make it appropriate to suspend the sentence.

   NOTE: the SC: Imposition of Community and Custodial Sentences Definitive Guideline provides guidance on when it might be appropriate to suspend a sentence.
4. The absence of a guilty plea **may** provide a justification for not suspending a sentence where it bears upon the judicial assessment of whether there is a realistic prospect of rehabilitation: *Evans*.[127]
5. Where the sentence is of two years' custody or less and thus could be suspended but the court has concluded that an immediate custodial sentence is the only appropriate sentence, the reason for so concluding should be identified. A failure so to do will make the sentence more susceptible to a successful appeal and an absence of reasoning will result in the court having to reach its own conclusions on the issue. Where reasons are given then the Court of Appeal should be slow to interfere with the decision, see for example *Robinson*.[128]
6. When considering the factors listed in the SC's Imposition of Community and Custodial Sentences Definitive Guideline, the exercise to be performed is a balancing exercise in which one factor may outweigh a number of other factors on the other side of the scales: *Middleton*.[129]
7. In appropriate cases, the court may impose a fine in addition to a suspended sentence order. In the case of *Butt*,[130] the Court of Appeal considered health and safety offences by an individual in relation to the letting of a residential property which had a substantial capital value and generated significant income. The Court indicated that the imposition of a fine together with suspended sentence was particularly apt when the offending is related to a defendant's business or employment, when dealing with offenders with substantial means, or when the sentence allows an offender to continue in well-remunerated work.
8. Where an offender has spent time on remand equal to, or in excess of, the appropriate sentence, there may be no circumstances in which additional punishment in the form of a

[127] [2019] EWCA Crim 606
[128] [2019] EWCA Crim 1619
[129] [2019] EWCA Crim 663
[130] [2018] EWCA Crim 1617

suspended sentence order could be justified and the court may consider imposing a conditional discharge: *Dawes*.[131] The court held that it is illogical to impose a suspended sentence that, if breached, would not result in the offender serving any of the sentence in custody given that the remand time would be automatically deducted.

9. Passing the sentence

The court must:

(1) Complete the steps set out in chapter S1.7 above.

(2) State that:

(a) the seriousness of the offence or the combination of offences is such that neither a fine alone nor a community order can be justified;

(b) the sentence of [XX] months is the least that can be imposed to mark the seriousness of the offence(s);

(c) direct that the sentence will be suspended (for a period of not less than six months or more than two years): the "operational period".

(3) Consider whether any requirement(s) from the list specified in s.287 SA 2020 (identical to community order requirements: see chapter S5.1) should be attached to the order to be completed within, or complied with for, a period of not less than six months or more than two years: the "supervision period". It is no longer mandatory to impose any requirement on a suspended sentence.

(4) Explain the consequences of any further offending and/or breach of a requirement if one or more have been imposed and at which court any breaches will be considered (usually breaches of suspended sentences are retained by the Crown Court).

(5) Specify whether any breach of any requirement is to be dealt with in the Crown Court or the magistrates' courts and explain the court's powers in the event of any such breach or conviction of another offence.

(6) If the court is ordering reviews, specify the date of the first review.[132]

Example: with requirement for rehabilitation activity requirement

For the offence of {specify} there will be a suspended sentence order of two years' duration.

There will be a custodial term of {specify} which will be suspended for two years. If in the next two years you commit any offence, whether or not it is of the same type for which I am sentencing you today, you will be brought back to court and it is likely that this sentence will be brought into operation either in full or in part.

Also, for the next 12 months you will be subject to a rehabilitation activity requirement. That means that you must meet with the officer supervising this requirement as and when required and you must attend and co-operate fully with any activities that are arranged. If you fail to comply with this requirement you will be in breach of this order. That would mean that you will be brought back to court and you will be liable to serve the sentence.

[If reviews are ordered: … and you must return to court at {specify} on {date} when your progress will be reviewed. At that review the court will have a short report on your progress from

131 [2019] EWCA Crim 848

132 And see also new power introduced by s.153 and schedule 14 PCSCA referred to in S5.1(4)

your supervising officer. If you are doing well the order will continue, but if you are failing to comply with it, you will be in breach of this order and liable to serve the sentence.]

NOTE:

1. The original stipulation that a suspended sentence had to be expressed only in weeks no longer applies.
2. The possible consequences of reoffending/breach are simplified in the above example with a view to D being able to understand them. The court's full powers are set out in chapter S10.3.

NOTE: If there is any reason to suppose the offender aged 18-20 has comprehension difficulties the approach to explaining sentences for children may provide assistance (See Appendix II and CrimPD 9.6.1 which encourages the provision of written sentencing remarks for children).

S5.5 Suspended sentence orders (aged 21 or over at conviction)

Section 277 and ss.288-305 SA 2020

ARCHBOLD 5A-690; BLACKSTONE'S E14; SENTENCING REFERENCER § 56

1. The power to order that a custodial sentence be suspended applies to sentences of imprisonment:
   (1) For those aged 21 or over at conviction, the term of imprisonment must be not less than 14 days and not more than two years.
   (2) Where consecutive suspended sentences are passed the aggregate sentence must not exceed two years.
2. Criteria for sentence:
   (1) The offence(s) is/are so serious that neither a fine alone nor a community sentence can be justified: ie the sentence passes the "custody threshold".
   (2) The length of that sentence is the least that can be imposed to mark the seriousness of the offence.
   (3) Defendant aged 21 or over at conviction.
   (4) There are factors which make it appropriate to suspend the sentence.

   NOTE: the SC: Imposition of Community and Custodial Sentences Definitive Guideline provides guidance on when it might be appropriate to suspend a sentence.
3. The absence of a guilty plea **may** provide a justification for not suspending a sentence where it bears upon the judicial assessment of whether there is a realistic prospect of rehabilitation: *Evans*.[133]
4. Where the sentence is of two years' custody or less and thus capable of being suspended but the court has concluded that an immediate custodial sentence is the only appropriate sentence, the reason for so concluding should be identified. A failure so to do is going the make the sentence more susceptible to a successful appeal and an absence of reasoning will result in the court having to reach its own conclusions on the issue. Where reasons are given then the Court of Appeal Criminal Division should be slow to interfere with the decision, see for example *Robinson*.[134]
5. When considering the factors listed in the SC's Imposition of Community and Custodial Sentences Definitive Guideline, the exercise to be performed is a balancing exercise in which one factor **may** outweigh a number of other factors on the other side of the scales: *Middleton*.[135]
6. In appropriate cases, the court may impose a fine in addition to a suspended sentence order. In the case of *Butt*,[136] the Court of Appeal considered health and safety offences by an individual in relation to the letting of a residential property which had a substantial capital value and generated significant income. The Court indicated that the imposition of a fine together with suspended sentence was particularly apt when the offending is related to a

[133] [2019] EWCA Crim 606
[134] [2019] EWCA Crim 1619
[135] [2019] EWCA Crim 663
[136] [2018] EWCA Crim 1617

defendant's business or employment, when dealing with offenders with substantial means, or when the sentence allows an offender to continue in well-remunerated work.

7. Where an offender has spent time on remand equal to, or in excess of, the appropriate sentence, there may be no circumstances in which additional punishment in the form of a suspended sentence order could be justified and the court may consider imposing a conditional discharge: *Dawes*.[137] The court held that it is illogical to impose a suspended sentence that, if breached, would not result in the offender serving any of the sentence in custody given that the remand time would be automatically deducted.

8. Passing the sentence

   The court must:

   (1) Complete the steps set out in chapter S1.7 above.

   (2) State that:

      (a) the seriousness of the offence or the combination of offences is such that neither a fine alone nor a community order can be justified;

      (b) the sentence of [XX] months is the least that can be imposed to mark the seriousness of the offence(s).

      (c) Direct that the sentence will be suspended (for a period of not less than six months or more than two years): the "operational period".

   (3) Consider whether any requirement(s) from the list specified in s.287 SA 2020 (identical to community order requirements: see chapter S5.1 above) should be attached to the order to be completed within, or complied with for, a period of not less than six months or more than two years: the "supervision period". It is no longer mandatory to impose any requirement on a suspended sentence.

   (4) Explain the consequences of any further offending and/or breach of a requirement if one or more have been imposed and at which court any breaches will be considered. (Usually breaches of suspended sentences are retained by the Crown Court.).

   (5) If the court is ordering reviews, specify the date of the first review.[138]

Example: with requirement for rehabilitation activity requirement

For the offence of {specify} there will be a suspended sentence order of two years' duration.

There will be a custodial term of {specify} which will be suspended for two years. If in the next two years you commit any offence, whether or not it is of the same type for which I am sentencing you today, you will be brought back to court and it is likely that this sentence will be brought into operation, either in full or in part.

Also, for the next 12 months you will be subject to a rehabilitation activity requirement. That means that you must meet with the officer supervising this requirement as and when required and you must attend and co-operate fully with any activities that are arranged. If you fail to comply with this requirement you will be in breach of this order, which means that you will be brought back to court and you will be liable to serve the sentence, either in full or in part.

[If reviews are ordered: … and you must return to court at {specify} on {date} when your progress will be reviewed. At that review the court will have a short report on your progress from

[137] [2019] EWCA Crim 848

[138] And see also new power introduced by s.153 and schedule 14 PCSCA referred to in S5.1(4).

your supervising officer. If you are doing well the order will continue, but if you are failing to comply with it, you will be in breach of this order and liable to serve the sentence.]

NOTE:

The original stipulation that a suspended sentence had to be expressed only in weeks no longer applies.

The possible consequences of reoffending/breach are simplified in the above example with a view to D being able to understand them. The court's full powers are set out in chapter S10.3.

S5.6 Minimum custodial sentences (aged 18+ at conviction)

Sections 311-320 SA 2020

ARCHBOLD 5A-751; BLACKSTONE'S E18; SENTENCING REFERENCER §§ 59-63

1. A custodial sentence imposed under the minimum sentence provisions for an offender aged 18-20 at conviction will be a term of detention in a young offender institution and for an offender aged 21+ at conviction will be a term of imprisonment.

2. Minimum sentences for single offences apply to:

   (1) Certain firearms offences listed in schedule 20 to the SA 2020 unless there are exceptional circumstances relating to the offence or to the offender which justify the court in not doing so (D aged 16 or over at the time of offence) [s.311 SA 2020].

   (2) Bladed articles/offensive weapons for offenders aged 16+ at the time of conviction:

      (a) s.139AA CJA 1988 (offence of threatening with article with blade or point or offensive weapon).

      (b) s.1A Prevention of Crime Act (PCA) 1953 (offence of threatening with offensive weapon in public).

   The requirement to impose a minimum sentence does not apply where there are exceptional circumstances relating to the offence or to the offender which justify not imposing the minimum term [s.312 SA 2020].[139]

3. Minimum sentences for repeat offences apply to:

   (1) A third class A drug trafficking offence (the latest of which must have been committed after 30 September 1997, and commission and conviction for each before the next) unless there are exceptional circumstances relating to any of the offences or to the offender which would justify not imposing the minimum term[140] (D aged 18 or over at the time of offence) [s.313 SA 2020].

   (2) A third domestic burglary (the latest of which was committed after 30 November 1999, and commission and conviction for each before the next) [s.314 SA 2020] unless there are exceptional circumstances relating to any of the offences or to the offender which would justify not imposing the minimum term[141] (D aged 18 or over at the time of offence).

   (3) Bladed articles/offensive weapons/corrosive substances offences committed on/after 17 July 2015 for offenders who at the time of the offence were aged 16+ and had a relevant previous conviction for at least one of the following offences:

      (a) s.139 CJA 1988 (offence of having article with blade or point in public place).

      (b) s.139A CJA 1988 (offence of having article with blade or point (or offensive weapon) on school premises).

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139 Applies to offences committed on or after 28 June 2022. For offences committed before that date see previous edition.

140 Applies to offences committed on or after 28 June 2022. For offences committed before that date see previous edition.

141 Applies to offences committed on or after 28 June 2022. For offences committed before that date see previous edition.

(c) s.1 PCA 1953 (prohibition of the carrying of offensive weapons without lawful authority or reasonable excuse)

(d) s.6 Offensive Weapons Act (OWA) 2019 (offence of having corrosive substance in a public place) (committed on or after 6 April 2022) [s.315 SA 2020].

The requirement to impose a minimum sentence does not apply where there are exceptional circumstances relating to the offence, the previous offence or to the offender which justify not imposing the minimum term.[142]

4. Where a minimum sentence must be passed this must be stated and, if D has pleaded guilty, it must be made clear what, if any, credit has been given.

5. It is important not to "water down" the statutory purpose of the minimum sentence regime, see *Chaplin*.[143] But the decision in *Whyte*[144] (that there is no power to suspend a sentence imposed under the minimum sentence provisions) has now been reversed by *Uddin*.[145]

Third class A drug trafficking offence

6. In the context of the minimum sentence for a third class A drug trafficking offence, a regrettable but unexceptional history of recruitment to gang-related drug dealing should not be elevated to the status of "particular circumstances" justifying a disapplication of the minimum sentence for a third class A drug trafficking offence, see *AG's Ref* (*Usherwood*).[146]

7. It is to be noted that Parliament has since changed the test from "particular circumstances" which would make it unjust to impose the minimum sentence to "exceptional circumstances".

Possession of a prohibited firearm

8. The general principles relating to minimum sentence in the context of possession of a prohibited firearm were reviewed in *Nancarrow*:[147]

(1) The purpose of the mandatory minimum term is to act as a deterrent.

(2) Circumstances are "exceptional" if to impose five years' imprisonment would be arbitrary and disproportionate.

(3) It is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional.

(4) It is necessary to look at all the circumstances of the case together, taking a holistic approach rather than looking at the features in isolation.

(5) The four questions set out in *Avis*[148] should always be considered, namely:

(a) What sort of weapon was involved?

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142 Applies to offences committed on or after 28 June 2022. For offences committed before that date see previous edition.

143 [2015] EWCA Crim 1491; [2016] 1 Cr.App.R. (S.) 10

144 In *Whyte* [2018] EWCA Crim 2437 the court found that, even though the minimum term specified for a second bladed article offence was short enough to be capable of being suspended, the reference to "imprisonment" under the minimum sentencing provisions is a reference to a term of "immediate imprisonment". That position has now been reversed by *Uddin*.

145 [2022] EWCA Crim 751

146 [2018] EWCA Crim 1156; [2018] 2 Cr.App.R. (S.) 39

147 [2019] EWCA Crim 470

148 [1998] 2 Cr App R (S) 178

(b) What use, if any, was made of it?

(c) With what intention did the offender possess it?

(d) What is the defendant's record?

(6) It is relevant that an offender is unfit to serve a five-year sentence or that such a sentence may have a significantly adverse effect on their health.

(7) Limited assistance is to be gained from referring the court to decisions in cases involving facts that are not materially identical.

(8) Unless the judge is clearly wrong in identifying exceptional circumstances where they do not exist or clearly wrong in not identifying exceptional circumstances where they do exist, this Court will not readily interfere (*Rehman* at para. 14).

Third domestic burglary

9. To reflect the policy of deterrence in the legislation, where an offender is liable to be sentenced for multiple offences, it is not generally appropriate to impose a concurrent sentence in respect of a burglary to which the minimum sentence applies, see *Haddock*.[149]

10. Where a sentence of more than the minimum is passed, credit is to be given for plea in accordance with the SC Guideline Reduction in Sentence for Guilty Plea. Save in the case of firearms offences, where a minimum sentence applies, a reduction in sentence for a guilty plea may not reduce the sentence below 80% of the prescribed minimum (see for example *Jones*).[150]

[149] [2018] EWCA Crim 2860
[150] [2015] EWCA Crim 1258

Minimum sentences and maximum credit for plea of guilty			
Offence	**Relevant age**	**Minimum**	**Minimum sentence where defendant pleads guilty**
Class A drug trafficking (third offence)	18 or over (date of offence)	Seven years	2045 days (that being 80% of the seven-year minimum)
Domestic burglary (third offence)	18 or over (date of offence)	Three years	876 days (that being 80% of the three-year minimum)
Firearms	18 or over (date of offence)	Five years	Five years (no reduction for guilty plea may be made)
	16 or 17 (date of offence)	Three years	Three years (no reduction for guilty plea may be made)
Minding firearms	18 or over	Five years	Three years (no reduction for guilty plea may be made)
Threatening with offensive weapon in public; Threatening with article with blade or point or offensive weapon in public or on school premises	18 or over (at date of conviction)	Six months	146 days (that being 80% of the six-month minimum)
	16-17 (at date of conviction)[151]	Four-month DTO	No restriction – the court may impose any available sentence where the defendant pleads guilty
Second offence of possession of an offensive weapon or bladed article in a public place or on school premises – offence committed on or after 17 July 2015 (offender aged 16+ at date of offence)	18 or over (at date of conviction)	Six months	146 days (that being 80% of the six-month minimum)
	16 or 17 (at date of conviction)[152]	Four-month DTO	No restriction – the court may impose any available sentence where the defendant pleads guilty

[151] The minimum term provisions apply even where D was under 16 as at the date of the offence as long as D is (at least) 16 as at the date of conviction. It might be thought, however, that, in conjunction with any other points that might be relied upon in support of an argument that the imposition of the minimum term would not be justified, the age of the offender at the date of the offence should carry some additional weight bearing in mind the other minimum term provisions as they apply to Ds aged under 18 but who have to have attained 16 years as at the date of the offence before they bite.

[152] However it is important to note that one of the criteria for imposing the minimum sentence for this offence is that at the time of the offence, the defendant was aged 16 or over and had a relevant previous conviction.

Example 1: (second knife/third domestic burglary/third class A trafficking: where proportionate sentence would be less than the minimum, but minimum term applied with permitted reduction for plea of guilty)

The right sentence in your case, taking into account the aggravating and mitigating factors, would be X months'/X years' imprisonment. That is less than the minimum sentence which I am required to pass for this offence which is a term of six months'/three years'/seven years' imprisonment. I am satisfied that there are no exceptional circumstances of the offence, or the previous offence or relating to you, the offender, that would justify not imposing the minimum term. As you pleaded guilty to this offence at the first reasonable opportunity, I shall give you the credit which I am permitted to give. I therefore reduce the term of your sentence by 20%, so that the sentence is one of 146 days/876 days/2,045 days' imprisonment. [Explain release on licence etc.]

Example 2: (firearm: minimum term where no reduction permissible for plea of guilty)

The right sentence in your case, taking into account the aggravating and mitigating factors, is beneath the minimum sentence which I am required to impose for this offence, that being a term of five years' imprisonment. I am satisfied that there are no exceptional circumstances of the offence or relating to you, the offender, that would justify not imposing the minimum term. Although you pleaded guilty to this offence at the first reasonable opportunity, I am not permitted to give you any credit for that plea and so the sentence which you will serve is one of five years' imprisonment. [Explain release on licence etc.]

Example 3: (firearm: sentence after trial would have been above the minimum term but reduced to minimum term for plea of guilty)

The minimum sentence which I am permitted to pass for this offence is one of five years' imprisonment, but given the seriousness of your offence, having taken account of all the aggravating and mitigating factors, I am satisfied that the least sentence that I could have passed after a trial would have been one of seven years. You pleaded guilty to this offence at the first reasonable opportunity and are entitled to receive credit for that plea. Normally I would have reduced your sentence by a full one-third, but given the minimum sentence which I must impose unless there are exceptional circumstances of the offence or relating to you the offender that would justify not imposing the minimum term, the sentence must be one of five years' imprisonment. I am satisfied that there are no exceptional circumstances of the offence or relating to you, the offender, that would justify not imposing the minimum sentence and so the sentence will be five years' imprisonment. [Explain release on licence etc.]

Example 4: (drug trafficking: exceptional circumstances justifying sentence below minimum term)

There are no aggravating factors in this case which would have required a longer sentence than the minimum sentence of seven years' imprisonment that I am ordinarily required to pass. Indeed, there are exceptional circumstances of the offence {specify}, of the previous offence {specify} or relating to you, the offender {specify} which justify not imposing a sentence of that length. The sentence which I would have imposed after a trial, taking account of the seriousness of your offence and all of the mitigating factors, is one of four years' imprisonment. I reduce that to take account of the fact that you have pleaded guilty, not at the first reasonable opportunity but at the plea and trial preparation hearing. I therefore allow a 25% reduction for your plea of guilty and sentence you to three years' imprisonment. {Explain release on licence etc.}

S5.7 Offenders of particular concern (aged 18-20 at conviction)

Section 265 and schedule 13 SA 2020

ARCHBOLD 5A-744; BLACKSTONE'S E16.38; SENTENCING REFERENCER § 58

General

1. By virtue of s.265 and schedule 13 additional restrictions are placed upon "offenders of particular concern", ie those convicted of certain serious sexual offences and terrorism offences. The full list of offences is set out in schedule 13 SA 2020.
2. These provisions apply if D is convicted of a schedule 13 offence, was aged 18 or over at the commission of the offence, and the court imposes an immediate custodial sentence which is not a life sentence or an extended sentence.

The term of the sentence

3. Once the court has decided to impose a sentence of imprisonment, the term of the "offender of particular concern order" must be equal to the aggregate of the "appropriate custodial term" and an additional period of one year during which the offender will be subject to licence. The "appropriate custodial term" is the term which the court considers will ensure that the sentence is appropriate.
4. The term of the overall sentence must not exceed the statutory maximum applicable at the date of the commission of the offence.
5. The appropriate custodial term will usually be the term commensurate with the seriousness of the offence. Certain sexual offences which have now been repealed have low maximum sentences which will require a reduction to the appropriate custodial term in order to accommodate the mandatory one-year licence period.

Release from immediate custodial sentence

6. When the offender has served two-thirds of the custodial term, the case will be referred to the Parole Board for consideration whether and on what terms it may be safe to order release on licence.
7. The offender must be released, at the latest, at the end of the custodial term, but will then be on licence for the remainder of the custodial term (if any) and the additional licence period of one year.
8. The provision is designed to ensure that:
   (1) offenders convicted of offences in the schedule serve at least two-thirds of the custodial sentence; and
   (2) there is always a minimum period of one year to be served on licence even if the offender has served the entire custodial term in custody.

Suspended sentence order

9. A special custodial sentence for offenders of particular concern may be suspended: *John*.[153]

[153] [2022] EWCA Crim 54

10. The following points are important to note from the decision in *John*:
    (1) A special custodial sentence for offenders of particular concern is a sentence of imprisonment for the purposes of s.277 SA 2020.
    (2) If the term of the custodial sentence was not more than two years, it could therefore be suspended.
    (3) The limit of two years applies to the aggregate of the appropriate custodial term and the further one-year licence period.
    (4) A suspended sentence pursuant to s.265 would only therefore be lawful if the custodial term did not exceed 12 months.
    (5) Therefore, it would only be in exceptional circumstances that a suspended sentence order would be appropriate in a case in which s.265 required a special custodial sentence.

Example 1

You will serve two-thirds of your custodial term in custody before your case is referred to the Parole Board for consideration of whether and on what terms it is safe for you to be released. You may be released at the direction of the Parole Board at some point not later than the end of the custodial term. You will then serve the remainder of the custodial term (if any) and an additional 12 months in the community on conditional licence and subject to supervision. You must abide by the conditions of your release, or you will be liable to serve the remainder of the sentence in custody.

Example 2

I have to sentence you for two offences. The sentence on the first count will be six years' detention in a young offender institution. The sentence on the second count will be two years' detention in a young offender institution, to run consecutively. That makes a total of eight years' detention.

Both of your offences fall within s.265 of the SA 2020. I am required by that section to impose on you a special custodial sentence for offenders of particular concern which will combine the custodial periods I have referred to and an extended licence period of one year in relation to each count.

This means that I impose custodial terms of eight years in total, together with further licence periods of two years in total, making 10 years in all.

The effect of this is that you will serve two-thirds of your total custodial term in custody before your case is referred to the Parole Board for consideration of whether and on what terms it is safe for you to be released. In your case, this means you will serve at least five years and four months' detention before that reference to the Parole Board can take place. Whatever view the Parole Board takes, you will be entitled to release as of right no later than the end of the custodial term, which in your case is eight years.

At whatever point you are released, you will then serve the remainder of the custodial term (if any) and the additional licence period of two years in the community on conditional licence and subject to supervision. You must abide by the conditions of your release, or you will be liable to serve the full sentence in custody.

NOTE: If there is any reason to suppose the offender aged 18-20 has comprehension difficulties, the approach to explaining sentences for children may provide assistance (See Appendix II).

S5.8 Offenders of particular concern (aged 21 or over at conviction)

Note: for Ds aged 18-20, see S5.7

Section 278 and schedule 13 SA 2020

ARCHBOLD 5A-744; BLACKSTONE'S E16.38; SENTENCING REFERENCER § 58

General

1. By virtue of s.278 and schedule 13 additional restrictions are placed upon "offenders of particular concern", ie those convicted of certain serious sexual offences and terrorism offences. The full list of offences is set out in schedule 13 SA 2020.
2. These provisions apply if D is convicted of a schedule 13 offence, was aged 18 or over at the commission of the offence, and the court imposes an immediate custodial sentence which is not a life sentence or an extended sentence.

Term of the order

3. Once the court has decided to impose a sentence of imprisonment, the term of the "offender of particular concern order" must be equal to the aggregate of the "appropriate custodial term" and an additional period of one year during which the offender will be subject to licence. The "appropriate custodial term" is the term which the court considers will ensure that the sentence is appropriate.
4. The term of the overall sentence must not exceed the statutory maximum applicable at the date of the commission of the offence.
5. The appropriate custodial term will usually be the term commensurate with the seriousness of the offence. Certain sexual offences which have now been repealed have low maximum sentences which will require a reduction to the appropriate custodial term in order to accommodate the mandatory one-year licence period.

Release from immediate custodial sentence

6. When the offender has served two-thirds of the custodial term the case will be referred to the Parole Board for consideration whether and on what terms it may be safe to order release on licence.
7. The offender must be released at the latest at the end of the custodial term but will then be on licence for the remainder of the custodial term (if any) and the additional licence period of one year.
8. The provision is designed to ensure that:
   (1) offenders convicted of offences in the schedule serve at least two-thirds of the custodial sentence; and
   (2) there is always a minimum period of one year to be served on licence even if the offender has served the entire custodial term in custody.

Suspended sentence order

9. A special custodial sentence for offenders of particular concern may be suspended: *John*.[154]

[154] [2022] EWCA Crim 54

10. The following points are important to note from the decision in *John*:

    (1) A special custodial sentence for offenders of particular concern is a sentence of imprisonment for the purposes of s.277 SA 2020.

    (2) If the term of the custodial sentence was not more than two years, it could therefore be suspended.

    (3) The limit of two years applies to the aggregate of the appropriate custodial term and the further one-year licence period.

    (4) A suspended sentence pursuant to s.278 would only therefore be lawful if the custodial term did not exceed 12 months.

    (5) Therefore, it would only be in exceptional circumstances that a suspended sentence order would be appropriate in a case in which s.278 required a special custodial sentence.

Example 1

You will serve two-thirds of your custodial term in custody before your case is referred to the Parole Board for consideration of whether and on what terms it is safe for you to be released. You may be released at the direction of the Parole Board at some point not later than the end of the custodial term. You will then serve the remainder of the custodial term (if any) and an additional 12 months in the community on conditional licence and subject to supervision. You must abide by the conditions of your release, or you will be liable to serve the remainder of the sentence in custody.

Example 2

I have to sentence you for two offences. The sentence on the first count will be six years' imprisonment. The sentence on the second count will be two years' imprisonment, to run consecutively. That makes a total of eight years' imprisonment.

Both of your offences fall within s.278 of the SA 2020. I am required by that section to impose on you a special custodial sentence for offenders of particular concern which will combine the custodial periods I have referred to and an extended licence period of one year in relation to each count.

This means that I impose custodial terms of eight years in total, together with further licence periods of two years in total, making 10 years in all.

The effect of this is that you will serve two-thirds of your total custodial term in custody before your case is referred to the Parole Board for consideration of whether and on what terms it is safe for you to be released. In your case, this means you will serve at least five years and four months' imprisonment before that reference to the Parole Board can take place. Whatever view the Parole Board takes, you will be entitled to release as of right no later than the end of the custodial term, which in your case is eight years.

At whatever point you are released you will then serve the remainder of the custodial term (if any) and the additional licence period of two years in the community on conditional licence and subject to supervision. You must abide by the conditions of your release, or you will be liable to serve the full sentence in custody.

S5.9 Dangerousness sentences (aged 18-20 and 21 or over at conviction)

1. These sections reflect the order in which a judge should approach sentencing:[155]

   (1) Consider the question of dangerousness. (See: **Dangerousness** below).

   (2) If the offender is dangerous under part 10 chapter 6 SA 2020:

      (a) Consider whether the seriousness[156] of the offence and offences associated with it justify a life sentence, in which case the judge must pass a life sentence in accordance with s.274. If s.273 also applies ("two strikes"), the judge should record that fact in open court. (See **Dangerousness – life**.)

      (b) If a life sentence for the individual offence is not justified, then the sentencing judge should consider whether s.273 applies. If it does, then (subject to the terms of s.273) a life sentence must be imposed. (See **Auto-life**.)

      (c) If no life sentence is imposed, the judge should consider whether a determinate sentence alone would suffice. (See **Determinate sentences**.)

      (d) But if a determinate sentence would not suffice, the judge should consider an extended sentence pursuant to s.266. (See **Extended determinate sentence (EDS)**)

   (3) It is necessary to note the following:

      (a) If the offence is listed in schedule 19 SA 2020 but occurred before 4 April 2005, it cannot attract a life sentence under s.274 SA 2020 (although note it may still attract an EDS since that sentence is not time-barred).

      (b) If the offence is not listed in schedules 18 or 19 SA 2020 and so falls outside the dangerousness regime altogether, the court has a residual discretion to impose a discretionary life sentence "at common law" where the maximum sentence for the offence so allows and it is necessary to do so. An example may include extremely serious drug supply. (See: **Common law life sentence**.)

      (c) The conditions in s.273 may yet be satisfied even if a "dangerousness" life sentence is not available, in which case (subject to a finding that it would be unjust to impose that sentence), a life sentence must still be imposed. (See: **Auto-life**.)

      (d) Where (a) the dangerousness test is not met and an automatic life sentence is not imposed under s.273 or (b) the court has determined that the offender is dangerous but exercises its discretion to not impose an extended sentence, a determinate sentence should generally be passed. (See: **Determinate sentence**.)

Criteria for a finding of dangerousness

2. The offence must be listed in either schedule 18 (extended sentences) or schedule 19 offence (life sentences).

3. The court must find that there is a significant risk that:

   (1) D will commit further specified offences; and

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[155] Adapted from the step by step guide provided in the case of *AG's Reference (No. 27 of 2013) (Burkinskas)* [2014] EWCA Crim 334; [2014] 1 W.L.R. 4209

[156] Ibid, para. 22

(2) by doing so, D will cause serious physical or psychological harm to one or more people.

4. Additional provisions concerning the finding of dangerousness are found in s.307 SA 2020.

S5.10 Extended determinate sentence (EDS) (aged 18-20 at conviction)

1. An extended sentence is available where:
   (1) the offender is aged 18-20 when convicted of an offence listed in schedule 18 SA 2020 (whenever the offence was committed);
   (2) the test for dangerousness is satisfied;
   (3) the court is not required to impose a life sentence under ss.273, 274 or 274A SA 2020, or to impose a serious terrorism sentence under s.268B SA 2020; and
   (4) either:
      (a) the offender has a previous conviction listed in schedule 14 SA 2020; or
      (b) if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least four years [s.267 SA 2020].
2. Where those four steps are met, there is a **discretion** to impose an extended sentence. The court should however consider whether a determinate sentence would be a sufficient sentence and if imposing an extended determinate sentence, should explain its reasons for concluding that a determinate sentence was not appropriate.[157]

Fixing the custodial term and the length of the licence

3. Where the court passes such a sentence, it must set the custodial term and the (licence) extension period. These must not, in total, exceed the maximum sentence permitted for the offence.
4. In setting the custodial term the usual principles of sentencing apply. The extension period is a further period of licence which is imposed if necessary to protect members of the public from the significant risk of serious harm caused by D's commission of further specified offences.
5. Maximum and minimum periods: the minimum extension period is one year; the maximum extension periods are five years for a violent offence, eight years for a sexual or terrorism offence unless the offence is a serious terrorism offence, in which case the maximum is 10 years [s.268 SA 2020].
6. Within these parameters, the length of the extension period is a matter for the discretion of the sentencer. The extended licence period is not tied to the seriousness of the offending; its purpose is protective. Like all sentences, it should not be longer than necessary and should be just and proportionate, see *Phillips*.[158]
7. Any extended sentence must be expressed to be imposed in relation to an individual offence or individual offences for which the criteria are satisfied. It cannot be imposed as a global sentence. It is not possible to make multiple extended sentences partly consecutive and partly concurrent, eg by imposing the custody consecutively but the licence periods concurrently, see *Francis*;[159] *DJ*.[160]

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157 *Bourke* [2017] EWCA Crim 2150
158 [2018] EWCA Crim 2008
159 [2014] EWCA Crim 631
160 [2015] EWCA Crim 563

8. Consecutive extended determinate sentences may exceed the limitation on the length of the licence period imposed under a single extended determinate sentence (five years in the case of a violent offence, eight years in the case of a sexual or terrorist offence) in exceptional cases. However, this should not be used to impose what is in effect a life licence, see *Thompson and Others*.[161]

9. Where imposing an extended sentence consecutively with a determinate sentence it is considered better sentencing practice for the determinate sentence to be imposed first with the extended sentence to run consecutively to it.[162]

Passing an extended sentence

10. The court must:

    (1) Set out findings in relation to those matters described in paragraphs 1-3 of chapter S1.7 above.

    (2) Set out the reasons for finding that D is dangerous within the meaning of part 10 chapter 6 SA 2020.

    (3) Set out the reasons for passing an extended sentence.

    (4) Explain that the sentence is an extended sentence of imprisonment/ detention in a young offender institution, which has two parts: a custodial term and an extended licence period.

    (5) Fix the custodial term. In doing so, credit should (almost invariably) be given for any plea of guilty and this should be spelt out clearly. The credit for pleading guilty is deducted from the custodial term only and not the extended licence period.

Example

If you had not pleaded guilty, the custodial term of your sentence would have been six years. Giving you the full one-third credit for your plea of guilty, I reduce this to four years.

11. Give credit for time spent on remand subject to a qualifying electronically monitored curfew: time spent on remand in custody counts automatically. For a full explanation of the provisions relating to time on remand, see chapter S5.14 below.

12. Where the court makes a direction in relation to time spent on remand subject to a qualifying electronically monitored curfew it should also state that if the calculation of days is not correct, a correction will be made administratively without the need for a further hearing.

13. Fix the extension period. This is to be such period as the court thinks appropriate having regard to the risk posed.

14. Explain the consequences:

    (1) Every D subject to an extended sentence will serve at least two-thirds of the custodial term in custody before their case is referred to the Parole Board for them to consider

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161 [2018] EWCA Crim 639

162 As *Ulhaqdad* [2017] EWCA Crim 1216 made clear, the Prison Service is able to make a proper sentence calculation whichever order is used. Notwithstanding this, the guidance from the Court of Appeal (Criminal Division) remains that in such cases, the determinate sentence should be imposed first, with the extended sentence to run consecutively.

their release. D will not serve more than the whole of the custodial term (unless they are recalled once on licence).

(2) On release, D will be on licence, which will last until the end of the custodial term (if any of this period remains), and D will then serve the extended period of licence: this begins when the custodial term expires and lasts until the end of the extended licence period.

(3) D's licence will be subject to conditions; and if any of the conditions are broken, D would be liable to have the licence revoked and be returned to custody to serve the rest of the total sentence in custody.

Example (offender does not have a previous schedule 14 conviction)

Because you have been convicted of a **schedule 18** offence I am required to consider the issue of dangerousness, that is, whether there is a significant risk of you committing further specified offences and, if so, whether there is a significant risk of your causing serious harm thereby. I am satisfied that you do present such a risk, as I have already told your advocate, because {specify}

(If this is also a **schedule 19** offence and a life sentence is not considered necessary or appropriate, explain why.)

I have considered whether a standard determinate sentence is appropriate. If imposing such a sentence the least period of detention I could have imposed in all the circumstances of your case (including credit for plea) would have been one of six years.

Such a sentence would not fully address the risk you currently represent and I do consider it necessary to impose an extended sentence in order to protect the public in the future.

The extended sentence is made up of two parts: a custodial period, which will be no longer than the six-year period I mentioned, and an extended licence period of four years, making an extended sentence of 10 years' duration in total.

You will serve two-thirds of the custodial period in prison before the Parole Board will consider whether it is safe to release you, and if so on what terms.

Once released, you will serve on licence any part of the custodial period which remains, and you will then be subject to an extended licence for a further period of four years, making 10 years in all.

If, when you are subject to licence, you commit another offence or fail to comply with the terms of your release, you are liable to be recalled to custody and may serve the entire sentence in custody.

[**Where time spent on remand in custody:** The days which you have spent on remand in custody will automatically count towards the custodial term of your sentence.]

[**Where time spent on qualifying electronically monitored curfew:** I certify that you have spent {47} days on a qualifying curfew and I direct that {24} days will count towards the custodial term of your sentence. If this calculation is later found to be wrong, it will be put right by correcting the record administratively without any further hearing.]

[Mention notification requirements if the offence is a sexual offence to which the notification regime under the Sexual Offences Act (SOA) 2003 or a terrorism offence to which the Counter-Terrorism Act (CTA) 2008 applies.]

NOTE: If there is any reason to suppose the offender aged 18-20 has comprehension difficulties, the approach to explaining sentences for children may provide assistance (See Appendix II).

Example (offender has previous schedule 14 conviction)

Because you have been convicted of a **schedule 18** offence, I am required to consider the issue of dangerousness, that is, whether there is a significant risk of you committing further specified offences and, if so, whether there is a significant risk of your causing serious harm thereby. I am satisfied that you do present such a risk, as I have already told your advocate, because {specify}

(If this is also a **schedule 19** offence and a life sentence is not considered necessary or appropriate, explain why.)

I have considered whether a simple determinate sentence is appropriate. If imposing such a sentence the least period of detention I could have imposed in all the circumstances of your case (including your guilty plea) would have been one of three years.

However, you have a previous conviction for [s.18 GBH with intent], an offence listed within schedule 18 to the SA 2020. Accordingly, I must consider whether to impose a standard determinate sentence or an extended sentence.

I do not consider that a sentence of three years detention would fully address the risk you currently represent and so it is necessary to impose an extended sentence to protect the public in the future.

The extended sentence is made up of two parts: a custodial period, which will be no more than the three years I mentioned, and an extended licence period of two years, making an extended sentence of five years' duration in total.

You will serve two-thirds of the custodial period in prison before the Parole Board will consider whether it is safe to release you, and if so on what terms.

Once released, you will serve on licence any part of the custodial period which remains, and you will then be subject to an extended licence for a further period of two years, making five years in all.

If, when you are subject to licence, you commit another offence or fail to comply with the terms of your release, you are liable to be recalled to custody and may serve the entire sentence in custody.

[**Where time spent on remand in custody:** The days which you have spent on remand in custody will automatically count towards the custodial term of your sentence.]

[**Where time spent on qualifying electronically monitored curfew:** I certify that you have spent {47} days on a qualifying curfew and I direct that {24} days will count towards the custodial term of your sentence. If this calculation is later found to be wrong it will be put right by correcting the record administratively without any further hearing.]

[Mention notification requirements if the offence is a sexual offence to which the notification regime under the SOA 2003 or a terrorism offence to which the CTA 2008 applies.]

NOTE: If there is any reason to suppose the offender aged 18-20 has comprehension difficulties the approach to explaining sentences for children may provide assistance (See Appendix II).

S5.11 Extended sentences (aged 21 or over at conviction)

Note: for Ds aged 18-20, see S5.9

1. These sections reflect the order in which a judge should approach sentencing:[163]
   (1) Consider the question of dangerousness. (See: **Dangerousness**).
   (2) If the offender is dangerous under SA 2020 Part 10 Chapter 6:
      (a) Consider whether the seriousness[164] of the offence and offences associated with it justify a life sentence, in which case the judge must pass a life sentence in accordance with s.285. If s.283 also applies ("two strikes"), the judge should record that fact in open court. (See: **Dangerousness – life**.)
      (b) If a life sentence for the individual offence is not justified, then the sentencing judge should consider whether s.283 applies. If it does then (subject to the terms of s.283) a life sentence must be imposed. (See: **Auto-life**.)
      (c) If no life sentence is imposed, the judge should consider whether a determinate sentence alone would suffice. (See: **Determinate sentences**.)
      (d) But if a determinate sentence would not suffice, the judge should consider an extended sentence pursuant to s.279. (See: **Extended determinate sentence**.)
   (3) It is necessary to note the following:
      (a) If the offence is listed in schedule 19 SA 2020 but occurred before 4 April 2005, it cannot attract a life sentence under s.285 SA 2020 (although note it may still attract an EDS since that sentence is not time-barred).
      (b) If the offence is not listed in schedules 18 or 19 SA 2020 and so falls outside the dangerousness regime altogether. The court has a residual discretion to impose a discretionary life sentence "at common law" where the maximum sentence for the offence so allows and it is necessary to do so. An example may include extremely serious drug supply. (See: **Common law life sentence**.)
      (c) The conditions in s.283 may yet be satisfied even if a "dangerousness" life sentence is not available, in which case (subject to a finding that it would be unjust to impose that sentence), a life sentence must still be imposed. (See: **Auto-life**.)
      (d) Where (a) the dangerousness test is not met and an automatic life sentence is not imposed under s.283 or (b) the court has determined that the offender is dangerous but exercises its discretion to not impose an extended sentence, a determinate sentence should generally be passed. (See: **Determinate sentence**.)

Criteria for a finding of dangerousness

2. The offence must be listed in either schedule 18 (extended sentences) or schedule 19 offence (life sentences).
3. The court must find that there is a significant risk that:
   (1) D will commit further specified offences; and

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[163] Adapted from the step by step guide provided in the case of *AG's Reference (No. 27 of 2013) (Burkinskas)* [2014] EWCA Crim 334; [2014] 1 W.L.R. 4209
[164] Ibid, para. 22

(2) by doing so D will cause serious physical or psychological harm to one or more people.

4. Additional provisions concerning the finding of dangerousness are found in s.307 SA 2020.

Extended determinate sentence (EDS) (aged 21+)

5. An extended sentence is available where:

(1) the offender is convicted of an offence listed in schedule 18 SA 2020 (whenever the offence was committed);

(2) the test for dangerousness is satisfied;

(3) the court is not required to impose a life sentence under ss.283, 285 or 285A SA 2020, or to impose a serious terrorism sentence under s.282B SA 2020;

(4) either:

(a) the offender has a previous conviction listed in schedule 14 SA 2020; or

(b) if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least four years [s.280 SA 2020].

6. Where those four steps are met, there is a **discretion** to impose an extended sentence. The court should however consider whether a determinate sentence would be a sufficient sentence and if imposing an extended determinate sentence, should explain its reasons for concluding that a determinate sentence was not appropriate.[165]

Fixing the custodial term and the length of the licence

7. Where the court passes such a sentence, it must set the custodial term and the (licence) extension period. These must not, in total, exceed the maximum sentence permitted for the offence.

8. In setting the custodial term the usual principles of sentencing apply. The extension period is a further period of licence which is imposed if necessary to protect members of the public from the significant risk of serious harm caused by D's commission of further specified offences.

9. Maximum and minimum periods: the minimum extension period is one year; the maximum extension periods are five years for a violent offence, eight years for a sexual or terrorism offence unless the offence is a serious terrorism offence, in which case the maximum is 10 years [s.281 SA 2020].

10. Within these parameters, the length of the extension period is a matter for the discretion of the sentencer. The extended licence period is not tied to the seriousness of the offending; its purpose is protective. Like all sentences, it should not be longer than necessary and should be just and proportionate, see *Phillips*.[166]

11. Any extended sentence must be expressed to be imposed in relation to an individual offence or individual offences for which the criteria are satisfied. It cannot be imposed as a global sentence. It is not possible to make multiple extended sentences partly consecutive and

[165] *Bourke* [2017] EWCA Crim 2150
[166] [2018] EWCA Crim 2008

partly concurrent, eg by imposing the custody consecutively but the licence periods concurrently, see *Francis*;[167] *DJ*.[168]

12. Consecutive extended determinate sentences may exceed the limitation on the length of the licence period imposed under a single extended determinate sentence (five years in the case of a violent offence, eight years in the case of a sexual or terrorist offence) in exceptional cases. However, this should not be used to impose what is in effect a life licence, see *Thompson and Others*.[169]

13. Where imposing an extended sentence consecutively with a determinate sentence, it is considered better sentencing practice for the determinate sentence to be imposed first with the extended sentence to run consecutively to it.[170]

Passing an extended sentence

14. The court must:

    (1) Set out findings in relation to those matters described in paragraphs 1-3 of chapter S1.7 above.

    (2) Set out the reasons for finding that D is dangerous within the meaning of part 10 chapter 6 SA 2020.

    (3) Set out the reasons for passing an extended sentence.

    (4) Explain that the sentence is an extended sentence of imprisonment/ detention in a young offender institution, which has two parts: a custodial term and an extended licence period.

    (5) Fix the custodial term. In doing so, credit should (almost invariably) be given for any plea of guilty and this should be spelt out clearly. The credit for pleading guilty is deducted from the custodial term only and not the extended licence period.

Example

But for your plea of guilty, the custodial term of your sentence would have been six years. Giving you the full one-third credit for your plea of guilty, I reduce this to four years.

15. Give credit for time spent on remand subject to a qualifying electronically monitored curfew: time spent on remand in custody counts automatically. For a full explanation of the provisions relating to time on remand, see chapter S5.14 below.

16. Where the court makes a direction in relation to time spent on remand subject to a qualifying electronically monitored curfew it should also state that if the calculation of days is not correct, a correction will be made administratively without the need for a further hearing.

17. Fix the extension period. This is to be such period as the court thinks appropriate having regard to the risk posed.

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167 [2014] EWCA Crim 631
168 [2015] EWCA Crim 563
169 [2018] EWCA Crim 639
170 As *Ulhaqdad* [2017] EWCA Crim 1216 made clear, the Prison Service is able to make a proper sentence calculation whichever order is used. Notwithstanding this, the guidance from the Court of Appeal (Criminal Division) remains that in such cases, the determinate sentence should be imposed first, with the extended sentence to run consecutively.

18. Explain the consequences:

    (1) Every D subject to an extended sentence will serve at least two-thirds of the custodial term in custody before their case is referred to the Parole Board for them to consider their release. D will not serve more than the whole of the custodial term (unless they are recalled once released on licence).

    (2) On release, D will be on licence, which will last until the end of the custodial term (if any of this period remains), and D will then serve the extended period of licence: this begins when the custodial term expires and lasts until the end of the extended licence period.

    (3) D's licence will be subject to conditions; and if any of the conditions are broken, D would be liable to have the licence revoked and be returned to custody to serve the rest of the total sentence in custody.

Example (offender does not have a previous schedule 14 conviction)

Because you have been convicted of a **schedule 18** offence, I am required to consider the issue of dangerousness, that is whether there is a significant risk of you committing further specified offences and, if so, whether there is a significant risk of your causing serious harm thereby. I am satisfied that you do present such a risk, as I have already told your advocate, because {specify}

(If this is also a **schedule 19** offence and a life sentence is not considered necessary or appropriate, explain why.)

I have considered whether a standard determinate sentence is appropriate. If imposing such a sentence the least period of detention I could have imposed in all the circumstances of your case (including credit for plea) would have been one of six years.

Such a sentence would not fully address the risk you currently represent and I do consider it necessary to impose an extended sentence in order to protect the public in the future.

The extended sentence is made up of two parts: a custodial period, which will be no longer than the six-year period I mentioned, and an extended licence period of four years, making an extended sentence of 10 years' duration in total.

You will serve two-thirds of the custodial period in prison before the Parole Board will consider whether it is safe to release you, and if so on what terms.

Once released, you will serve on licence any part of the custodial period which remains, and you will then be subject to an extended licence for a further period of four years, making 10 years in all.

If, when you are subject to licence, you commit another offence or fail to comply with the terms of your release, you are liable to be recalled to custody and may serve the entire sentence in custody.

[**Where time spent on remand in custody:** The days which you have spent on remand in custody will automatically count towards the custodial term of your sentence.]

[**Where time spent on qualifying electronically monitored curfew:** I certify that you have spent {47} days on a qualifying curfew and I direct that {24} days will count towards the custodial term of your sentence. If this calculation is later found to be wrong, it will be put right by correcting the record administratively without any further hearing.]

[Mention notification requirements if the offence is a sexual offence to which the notification regime under the SOA 2003 or a terrorism offence to which the CTA 2008 applies.]

Example (offender has previous schedule 14 conviction)

Because you have been convicted of a **schedule 18** offence, I am required to consider the issue of dangerousness, that is whether there is a significant risk of you committing further specified offences and, if so, whether there is a significant risk of your causing serious harm thereby. I am satisfied that you do present such a risk, as I have already told your advocate, because {specify}.

(If this is also a **schedule 19** offence and a life sentence is not considered necessary or appropriate, explain why.)

I have considered whether a simple determinate sentence is appropriate. If imposing such a sentence the least period of detention I could have imposed in all the circumstances of your case (including your guilty plea) would have been one of three years.

However, you have a previous conviction for [s.18 GBH with intent], an offence listed within schedule 18 to the SA 2020. Accordingly, I must consider whether to impose a standard determinate sentence or an extended sentence.

I do not consider that a sentence of three years' detention would fully address the risk you currently represent and so it is necessary to impose an extended sentence to protect the public in the future.

The extended sentence is made up of two parts: a custodial period, which will be no more than the three years I mentioned, and an extended licence period of two years, making an extended sentence of five years' duration in total.

You will serve two-thirds of the custodial period in prison before the Parole Board will consider whether it is safe to release you, and if so on what terms.

Once released, you will serve on licence any part of the custodial period which remains, and you will then be subject to an extended licence for a further period of two years, making five years in all.

If, when you are subject to licence, you commit another offence or fail to comply with the terms of your release, you are liable to be recalled to custody and may serve the entire sentence in custody.

[**Where time spent on remand in custody:** The days which you have spent on remand in custody will automatically count towards the custodial term of your sentence.]

[**Where time spent on qualifying electronically monitored curfew:** I certify that you have spent {47} days on a qualifying curfew and I direct that {24} days will count towards the custodial term of your sentence. If this calculation is later found to be wrong, it will be put right by correcting the record administratively without any further hearing.]

[Mention notification requirements if the offence is a sexual offence to which the notification regime under the SOA 2003 or a terrorism offence to which the CTA 2008 applies.]

S5.11A Serious terrorism sentence (aged 18-20 at conviction)

1. A serious terrorism sentence is a sentence of detention in a young offender institution the term of which is equal to the aggregate of:
   (1) the appropriate custodial term (see s.268C); and
   (2) a further period (the "extension period") for which the offender is to be subject to a licence: s.268A SA 2020.
2. A "serious terrorism offence" is an offence that:
   (1) is specified in part 1 of schedule 17A; or
   (2) is specified in part 2 of that schedule and has been determined to have a terrorist connection under s.69: s.306 SA 2020.
3. Where:
   (1) the offence was committed on or after the day on which s.4 Counter-Terrorism and Sentencing Act 2021 came into force;
   (2) the offender was aged 18 or over when the offence was committed;
   (3) the offender is aged under 21 when convicted of the offence;
   (4) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further serious terrorism offences or other specified offences;
   (5) the court does not impose a sentence of custody for life; and
   (6) the risk of multiple deaths condition is met,

   the court must impose a serious terrorism sentence unless the court is of the opinion that there are exceptional circumstances which relate to the offence or the offender and justify not doing so: s.268B SA 2020.
4. The risk of multiple deaths condition is that the court is of the opinion that:
   (1) either:
      (a) the serious terrorism offence; or
      (b) the combination of the offence and one or more offences associated with it;

      was very likely to result in or contribute to (whether directly or indirectly) the deaths of at least two people as a result of an act of terrorism (within the meaning of s.1 Terrorism Act 2000); and
   (2) the offender was, or ought to have been, aware of that likelihood: s.268B(3) SA 2020.
5. The appropriate custodial term is either:
   (1) 14 years; or
   (2) if longer, the term that would be imposed in compliance with s.231 Sentencing Code if it were not imposing a serious terrorism sentence: s.268C SA 2020.
6. The extension period must be at least seven years and not more than 25 years: s.268C SA 2020.

7. Where the court imposes a life sentence in a serious terrorism case, the minimum term must be at least 14 years, unless the court is of the opinion that there are exceptional circumstances which relate to the offence or the offender and justify a lesser period: s.323.
8. Where the defendant pleads guilty, the appropriate custodial term must not be less than 80% of the term that would otherwise be imposed: s.73(2A).

S5.11B Serious terrorism sentence (aged 21 or over at conviction)

1. A serious terrorism sentence is a sentence of detention in a young offender institution, the term of which is equal to the aggregate of:
   (1) the appropriate custodial term (see s.282C SA 2020); and
   (2) a further period (the "extension period") for which the offender is to be subject to a licence: s.282A SA 2020.
2. A "serious terrorism offence" is an offence that:
   (1) is specified in part 1 of schedule 17A; or
   (2) is specified in part 2 of that schedule and has been determined to have a terrorist connection under s.69: s.306 SA 2020.
3. Where:
   (1) the offence was committed on or after the day on which s.4 Counter-Terrorism and Sentencing Act 2021 came into force;
   (2) the offender was aged 18 or over when the offence was committed;
   (3) the offender is aged 21 or over when convicted of the offence;
   (4) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further serious terrorism offences or other specified offences;
   (5) the court does not impose a sentence of custody for life; and
   (6) the risk of multiple deaths condition is met,

   the court must impose a serious terrorism sentence unless the court is of the opinion that there are exceptional circumstances which relate to the offence or the offender and justify not doing so: s.282B SA 2020.
4. The risk of multiple deaths condition is that the court is of the opinion that:
   (1) either:
      (a) the serious terrorism offence; or
      (b) the combination of the offence and one or more offences associated with it,

      was very likely to result in or contribute to (whether directly or indirectly) the deaths of at least two people as a result of an act of terrorism (within the meaning of s.1 Terrorism Act 2000); and
   (2) the offender was, or ought to have been, aware of that likelihood: s.282B(3) SA 2020.
5. The appropriate custodial term is either:
   (1) 14 years; or
   (2) if longer, the term that would be imposed in compliance with s.231 Sentencing Code if it were not imposing a serious terrorism sentence: s.268C SA 2020.
6. The extension period must be at least seven years and not more than 25 years: s.282C SA 2020.

7. Where the court imposes a life sentence in a serious terrorism case, the minimum term must be at least 14 years, unless the court is of the opinion that there are exceptional circumstances which relate to the offence or the offender and justify a lesser period: s.323 SA 2020.

8. Where the defendant pleads guilty, the appropriate custodial term must not be less than 80% of the term that would otherwise be imposed: s.73(2A) SA 2020.

S5.12 Custody for life (two strikes life, dangerousness life and common law) (aged 18-20 at conviction)

NOTE: for mandatory life sentences, see S5.13 below

ARCHBOLD 5A-819; BLACKSTONE'S E17; SENTENCING REFERENCER §§ 67-70

1. This section covers life sentences (other than the **mandatory** life sentence for murder, as to which see chapter S5.13) and extended determinate sentences and is divided into five parts:
   (1) the criteria for making a finding of dangerousness;
   (2) "dangerousness" life sentences (s.274 SA 2020);
   (3) automatic "two strikes" life sentence (s.273 SA 2020);
   (4) "dangerousness" extended sentences (EDS) (s.266 SA 2020);
   (5) common law life sentence.
2. These sections reflect the order in which a judge should approach sentencing:[171]
   (1) Consider the question of dangerousness. (See: **Dangerousness**).
   (2) If the offender is dangerous under part 10 chapter 6 SA 2020:
      (a) Consider whether the seriousness[172] of the offence and offences associated with it justify a life sentence, in which case the judge must pass a life sentence in accordance with s.274. If s.273 also applies ("two strikes"), the judge should record that fact in open court. (See: **Dangerousness – life**.)
      (b) If a life sentence for the individual offence is not justified, then the sentencing judge should consider whether s.273 applies. If it does then (subject to the terms of s.273) a life sentence must be imposed. (See: **Auto-life**.)
      (c) If no life sentence is imposed the judge should consider whether a determinate sentence alone would suffice. (See: **Determinate sentences**.)
      (d) But if a determinate sentence would not suffice, the judge should consider an extended sentence pursuant to s.266. (See: **Extended determinate sentence**.)
   (3) It is necessary to note the following:
      (a) If the offence is listed in schedule 19 SA 2020 but occurred before 4 April 2005 it cannot attract a life sentence under s.274 SA 2020 (although note it may still attract an EDS since that sentence is not time-barred).
      (b) If the offence is not listed in schedules 18 or 19 SA 2020 and so falls outside the dangerousness regime altogether. The court has a residual discretion to impose a discretionary life sentence "at common law" where the maximum sentence for the offence so allows and it is necessary to do so. An example may include extremely serious drug supply. (See: **Common law life sentence**.)
      (c) The conditions in s.273 may yet be satisfied even if a "dangerousness" life sentence is not available, in which case (subject to a finding that it would be unjust to impose that sentence), a life sentence must still be imposed. (See: **Auto-life**.)

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[171] Adapted from the step by step guide provided in the case of *AG's Reference (No. 27 of 2013) (Burkinskas)* [2014] EWCA Crim 334; [2014] 1 W.L.R. 4209

[172] Ibid, para. 22

(d) Where (a) the dangerousness test is not met and an automatic life sentence is not imposed under s.273 or (b) the court has determined that the offender is dangerous but exercises its discretion to not impose an extended sentence, a determinate sentence should generally be passed. (See: **Determinate sentence**.)

Criteria for a finding of dangerousness

3. The offence must be listed in either schedule 18 (extended sentences) or schedule 19 offence (life sentences).
4. The court must find that there is a significant risk that:
   (1) D will commit further specified offences; and
   (2) by doing so D will cause serious physical or psychological harm to one or more people.
5. Additional provisions concerning the finding of dangerousness are found in s.307 SA 2020.
6. The court must[173] impose a life sentence where:
   (1) the defendant is convicted of an offence listed in schedule 19 committed on or after 4 April 2005;
   (2) the court considers that the criteria for a finding of dangerousness are met;
   (3) the offence is one in respect of which the offender would apart from s.274 be liable to imprisonment for life; and
   (4) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life [s.274 SA 2020].
7. A "dangerousness" life sentence will only be "justified" if the sentencer considers EDS is **not sufficient**, perhaps bearing in mind the likelihood that there would still be a significant ongoing risk to the public at the conclusion of any EDS that could be passed.[174]

Fixing the minimum term

8. If a sentence of imprisonment/custody/detention for life is passed it is necessary to fix a minimum term to be served in custody before the Parole Board may consider the offender's release on licence, unless a sentence of imprisonment is imposed with a "whole life" order. A whole life order is not available for detention/custody for life.
9. The court must consider the seriousness of the offence(s), following any applicable guidelines, to determine what would have been the notional determinate term.[175]
10. Credit should then (except in the most exceptional circumstances) be given for any guilty plea, in accordance with the Sentencing Council's guilty plea guideline.

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[173] The sentence is not discretionary, where the criteria are met: *Wilder* [2023] EWCA Crim 1295

[174] *A(A)* [2014] EWCA Crim 2483 – If […] an offender will cease to be a risk in the predictable future, that is a factor militating against the imposition of a life sentence and in favour of an extended sentence which imports a backstop release date. Conversely if the same court, having considered the evidence, considers that there may be a risk long into the future and is unable to say when the risk will cease, that might militate in favour of a life sentence which imports no backstop release date.

[175] See s.323(1A-C) SA 2020

11. The default position is that the minimum term will be two-thirds[176] of the notional determinate term to reflect the time that would be spent in custody subject to a determinate sentence.

12. Time spent on remand in custody or the proportion of time spent on qualifying electronically monitored curfew calculated by reference to the 5-step test [see chapter S5.14 below] should then (except in the most exceptional circumstances) be deducted. This must be done notwithstanding the fact that in the case of all other custodial sentences time spent on remand in custody is automatically deducted from the sentence.

Passing a life sentence

13. The court must:

    (1) Set out findings in relation to those matters described in paragraphs 1-3 of chapter S1.7 above.

    (2) State that the sentence is one of imprisonment/custody/detention for life because no lesser sentence is appropriate.

    (3) EITHER state that because of the [extreme] seriousness of the offence/combination of offences, the early release provisions will not apply and that the sentence is a whole life order.

    OR (in any other case) state the minimum term by explaining:

    (a) what the determinate sentence would have been after a trial (taking account of any aggravating and mitigating factors);

    (b) any reduction which would have been given for a guilty plea;

    (c) what the proportion of the notional determinate term comprises the minimum term, and why: and

    (d) the deduction made for days spent on remand in custody and/or on qualifying electronically monitored curfew. Any errors in the calculation of the days to be deducted cannot be amended administratively and must be dealt with by the sentencing judge in open court as a variation of sentence.[177]

    (4) Explain the consequences:

    (a) The minimum term will be served in full before D is eligible to be considered for release by the Parole Board.

    (b) The decision about whether or when D will be released will be taken by the Parole Board.

    (c) If D is released, then they will be on licence for the rest of their life.

    (d) The licence will be subject to conditions, which will be set at the time of D's release, and if D were to break any condition they would be liable to be returned to prison to continue to serve their sentence and might not be released again.

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176 Unless s.247A(2A) CJA 2003 applies – terrorism.
177 *Cookson* [2023] EWCA Crim 10

Example[178]

[As I have already told your advocate] I am satisfied that there is a significant risk of you committing further specified offences and, coupled with that a significant risk of your causing serious harm thereby, a risk that is likely to carry on long into the future. I am satisfied that your offence is so serious that a sentence of life imprisonment is required; and that is the sentence which I impose.

As to the **minimum term** which you must serve: if I had been sentencing you to a determinate sentence, taking account of all the aggravating and mitigating factors in this case, after a trial I would have sentenced you to 15 years' detention. Giving you full credit for your prompt plea of guilty I would have reduced that to 10 years. Because you would have served up to two-thirds of that sentence in custody, I fix the minimum term which you will serve at two-thirds of 10 years: that is six years and eight months. Finally, I reduce that minimum term of six years and eight months by the number of days which you have spent on remand in custody: 71 days. This means that the minimum term which you will serve before the Parole Board may consider your possible release is one of six years and 169 days.

It is most important that you and everyone concerned with this case should understand what this means. The minimum term is **not** a fixed term after which you will automatically be released but is the [initial] term that must be served before the Parole Board can undertake their first review of the case. They will review the risk that you then present and will consider whether you can properly be released from custody subject to licence at that stage and, if so, on what terms.

If and when you are released, you will be subject to licence; and this will remain the case for the rest of your life. If for any reason your licence is revoked, you will be recalled to prison to continue to serve your life sentence in custody. It follows that unless and until the Parole Board consider that your release is appropriate, then you will remain in custody.

NOTE: If there is any reason to suppose the offender aged 18-20 has comprehension difficulties, the approach to explaining sentences for children may provide assistance (see Appendix II).

Automatic "two strikes" life sentence (s.273) (aged 18-20 at conviction)[179]

Section 273 SA 2020

14. Where:
    (1) an offender aged 18+;
    (2) is convicted of an offence listed in schedule 15 SA 2020;
    (3) the sentence condition is met; and
    (4) the previous offence condition is met,

    the court must impose a life sentence [s.273(1) SA 2020].
15. However, where the court is of the opinion that it would be unjust to do so, the court need not impose a life sentence [s.273(3) SA 2020].

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178 See paragraph 12 above for the care that may be required if the notional determinate sentence is the product of combining qualifying and non-qualifying offences or where the sentences for some are under seven years and see also *Collins* [2021] EWCA Crim 1074.

179 Archbold 5A-850; Blackstone's E4.15; Sentencing Referencer § 68

16. The sentence condition is that the court would otherwise impose a sentence of DYOI for 10 years or more [s.273(4) SA 2020].
17. The previous offence condition is that:
    (1) at the time the offence was committed, the offender had been convicted of an offence listed in schedule 15; and
    (2) a relevant life sentence or a relevant sentence of imprisonment or detention for a determinate period was imposed on the offender for the previous offence [s.273(5) SA 2020].
18. For the purposes of the previous offence condition:
    (1) A life sentence is relevant if:
        (a) the offender was not eligible for release during the first five years of the sentence; or
        (b) the offender would not have been eligible for release during that period but for the reduction of the period of ineligibility to take account of a relevant pre-sentence period;
    (2) An extended sentence is relevant if the appropriate custodial term is 10 years or more;
    (3) Any other sentence of imprisonment or detention for a determinate period is relevant if the custodial term was 10 years or more;
    (4) Any extended sentence or determinate sentence is relevant if, but for the reduction of sentence to take account of a pre-sentence period, if the custodial period was 10 years or more [s.273(7)-(12) SA 2020].
19. A sentence imposed under s.273 is not a sentence fixed by law [s.273(13) SA 2020].

Fixing the minimum term

See S5.11 para. 9 above in relation to “dangerousness” life sentences.

Passing a life sentence

See S5.11 para. 14 above in relation to “dangerousness” life sentences.

Required life sentence for manslaughter (aged 18-20 at conviction)

Section 274A SA 2020

20. Where:
    (1) an offender aged 18-20;
    (2) is convicted of an offence listed in s.274A(4) SA 2020;
    (3) the offence was committed on or after 28 June 2022;
    (4) the offender was aged at least 16, and
    (5) the offence was committed against an emergency worker acting in the exercise of functions of such a worker;

    the court must impose a life sentence [s.274A(2) SA 2020] unless there are exceptional circumstances relating to the offence or the offender which justify not doing so.
21. A sentence imposed under s.274A is not a sentence fixed by law [s.274A(6) SA 2020].

Fixing the minimum term

See S5.12 para. 8 above in relation to “dangerousness” life sentences.

Passing a life sentence

See S5.12 para. 13 above in relation to “dangerousness” life sentences.

Common law life sentence (aged 18-20 at conviction)

22. Prior to sentencing provisions of the CJA 2003 (now repealed and re-enacted in the SA 2020), the criteria for imposing a discretionary life sentence centred around continuing serious danger for an indeterminate time.[180] These considerations are now likely to be reflected in a finding of dangerousness, thereby triggering the sentences set out above. However, there is a residual category of offender or offence where a discretionary life sentence cannot be imposed and where a common law life sentence may yet be justified. This will include any offence which pre-dates 4 April 2005, and an offence other than one in schedule 18 or 19 committed at any time. Note that the power to impose an extended sentence is available for offences committed at any time. There may be some rare cases, for example a campaign of historical rapes involving different victims over decades prior to 4 April 2005, where the sentencer cannot impose a “dangerousness” life sentence, but concludes that both an extended sentence or determinate sentence would be inadequate. In those circumstances, a common law life sentence could be considered.

23. A discretionary “common law” life sentence is available where:

    (1) the offender had been convicted of a “very serious offence” (whether or not classified as a “specified offence” for the purpose of consideration of dangerousness) and for which the maximum sentence is one of life imprisonment;[181]

    (2) there are good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence.[182]

    An example of a case which could fall into this category is *Saunders* [2013] EWCA Crim 1027, where the offence (described as “very serious drug supplying”) fell outside the CJA dangerousness provisions, since it was neither a violent nor sexual offence, yet gave rise to a very clear and substantial risk of serious harm to members of the public.

Fixing the minimum term

See S5.11 para. 9 above in relation to “dangerousness” life sentences.

Passing a life sentence

See S5.11 para. 14 above in relation to “dangerousness” life sentences.

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180 *Attorney General’s Reference (No.32 of 1996) (Whittaker)* [1997] 1 Cr.App.R. (S.) 261
181 ie otherwise than by virtue of s.224A CJA 2003
182 *Attorney General’s Reference (No.32 of 1996) (Whittaker)* [1997] 1 Cr.App.R. (S.) 261

S5.13 Life sentence (two strikes life, dangerousness life and common law) (aged 21 or over at conviction)

Sections 279-285 and schedules 18 and 19 SA 2020

ARCHBOLD 5A-819; BLACKSTONE'S E16; SENTENCING REFERENCER §§ 67-70

1. This section covers life sentences (other than the **mandatory** life sentence for murder (see chapter S5.14 below)) and extended determinate sentences and is divided into five parts:
   (1) the criteria for making a finding of dangerousness;
   (2) "dangerousness" life sentences (s.285 SA 2020);
   (3) automatic "two strikes" life sentence (s.283 SA 2020);
   (4) "dangerousness" extended sentences (EDS) (s.279 SA 2020);
   (5) common law life sentence.
2. These sections reflect the order in which a judge should approach sentencing:[183]
   (1) Consider the question of dangerousness. (See: **Dangerousness**.)
   (2) If the offender is dangerous under part 10 chapter 6 SA 2020:
      (a) Consider whether the seriousness[184] of the offence and offences associated with it justify a life sentence, in which case the judge must pass a life sentence in accordance with s.285. If s.283 also applies ("two strikes"), the judge should record that fact in open court. (See: **Dangerousness – life**.)
      (b) If a life sentence for the individual offence is not justified, then the sentencing judge should consider whether s.283 applies. If it does then (subject to the terms of s.283) a life sentence must be imposed. (See: **Auto-life**.)
      (c) If no life sentence is imposed the judge should consider whether a determinate sentence alone would suffice. (See: **Determinate sentences**.)
      (d) But if a determinate sentence would not suffice, the judge should consider an extended sentence pursuant to s.279. (See: **Extended determinate sentence** (EDS).)
   (3) It is necessary to note the following:
      (a) If the offence is listed in schedule 19 SA 2020 but occurred before 4 April 2005 it cannot attract a life sentence under s.284 SA 2020 (although note it may still attract an EDS since that sentence is not time-barred).
      (b) If the offence is not listed in schedules 18 or 19 SA 2020, the dangerousness regime is not applicable. The court has a residual discretion to impose a discretionary life sentence "at common law" where the maximum sentence for the offence so allows and it is necessary to do so. An example may include extremely serious drug supply. (See: **Common law life sentence**.)

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[183] Adapted from the step by step guide provided in the case of *AG's Reference (No. 27 of 2013) (Burkinskas)* [2014] EWCA Crim 334; [2014] 1 W.L.R. 4209

[184] Ibid, para. 22

(c) The conditions in s.283 may yet be satisfied even if a "dangerousness" life sentence is not available, in which case (subject to a finding that it would be unjust to impose that sentence), a life sentence must still be imposed. (See: **Auto-life**.)

(d) Where (a) the dangerousness test is not met and an automatic life sentence is not imposed under s.283 or (b) the court has determined that the offender is dangerous but exercises its discretion to not impose an extended sentence, a determinate sentence should generally be passed. (See: **Determinate sentence**.)

Criteria for a finding of dangerousness

3. The offence must be listed in either schedule 18 (extended sentences) or schedule 19 offence (life sentences).

4. The court must find that there is a significant risk that:

   (1) D will commit further specified offences; and

   (2) by doing so D will cause serious physical or psychological harm to one or more people.

5. Additional provisions concerning the finding of dangerousness are found in s.307 SA 2020.

"Dangerousness" life sentence

6. The court must[185] impose a life sentence where:

   (1) the defendant is convicted of a SA 2020 schedule 19 offence where, apart from under s.283 SA 2020, the offender is liable to a sentence of 10 years or more committed on or after 4 April 2005;

   (2) the court considers that the criteria for a finding of dangerousness are met;

   (3) the offence is one in respect of which the offender would apart from s.284 be liable to imprisonment for life; and

   (4) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life [s.285 SA 2020].

7. A life sentence will only be "justified" if the sentencer considers EDS is not sufficient, perhaps bearing in mind the likelihood that there would still be a significant ongoing risk to the public at the conclusion of any EDS that could be passed.[186]

Fixing the minimum term

8. If a sentence of imprisonment/custody/detention for life is passed it is necessary to fix a minimum term to be served in custody before the Parole Board may consider the offender's release on licence, unless a sentence of imprisonment is imposed with a "whole life" order. A whole life order is not available for detention/custody for life.

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185 The sentence is not discretionary, where the criteria are met: *Wilder* [2023] EWCA Crim 1295

186 *A(A)* [2014] EWCA Crim 2483 – If […] an offender will cease to be a risk in the predictable future, that is a factor militating against the imposition of a life sentence and in favour of an extended sentence which imports a backstop release date. Conversely if the same court, having considered the evidence, considers that there may be a risk long into the future and is unable to say when the risk will cease, that might militate in favour of a life sentence which imports no backstop release date.

9. The court must consider the seriousness of the offence/s, following any applicable guidelines, to determine what would have been the notional determinate term.

10. Credit should then (except in the most exceptional circumstances) be given for any guilty plea, in accordance with the Sentencing Council's guilty plea guideline.

11. The default position is that the minimum term will be two-thirds[187] of the notional determinate term to reflect the time that would be spent in custody subject to a determinate sentence. Time spent on remand in custody or the proportion of time spent on qualifying electronically monitored curfew calculated by reference to the 5-step test [see chapter S5.14 below] should then (except in the most exceptional circumstances) be deducted. This must be done notwithstanding the fact that in the case of all other custodial sentences time spent on remand in custody is automatically deducted from the sentence.

Passing a life sentence

12. The court must:

    (1) Set out findings in relation to those matters described in paragraphs 1-3 of chapter S1.7 above.

    (2) State that the sentence is one of imprisonment/custody/detention for life because no lesser sentence is appropriate.

    (3) EITHER state that because of the [extreme] seriousness of the offence/combination of offences, the early release provisions will not apply and that the sentence is a whole life order.

        OR (in any other case) state the minimum term by explaining:

        (a) what the determinate sentence would have been after a trial (taking account of any aggravating and mitigating factors);

        (b) any reduction which would have been given for a guilty plea;

        (c) what the proportion of the notional determinate term comprises the minimum term, and why; and

        (d) the deduction made for days spent on remand in custody and/or on qualifying electronically monitored curfew. Any errors in the calculation of the days to be deducted cannot be amended administratively and must be dealt with by the sentencing judge in open court as a variation of sentence.[188]

    (4) Explain the consequences:

        (a) The minimum term will be served in full before D is eligible to be considered for release by the Parole Board.

        (b) The decision about whether or when D will be released will be taken by the Parole Board.

        (c) If D is released, then they will be on licence for the rest of their life.

        (d) The licence will be subject to conditions, which will be set at the time of D's release, and if D were to break any condition they would be liable to be returned to prison to continue to serve their sentence and might not be released again.

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187 Unless s.247A(2A) CJA 2003 applies – terrorism.
188 *Cookson* [2023] EWCA Crim 10

Example[189]

[As I have already told your advocate] I am satisfied that there is a significant risk of you committing further specified offences and, coupled with that, a significant risk of your causing serious harm thereby. I am also sure that this is a risk that is likely to carry on long into the future. I am satisfied that your offence is so serious that a sentence of life imprisonment is required; and that is the sentence which I impose.

As to the minimum term which you must serve: if I had been sentencing you to a determinate sentence, taking account of all the aggravating and mitigating factors in this case, after a trial I would have sentenced you to 15 years' imprisonment. Giving you full credit for your prompt plea of guilty, I would have reduced that to 10 years. Because you would have served up to two-thirds of that sentence in custody, I fix the minimum term which you will serve at two-thirds of 10 years: that is six years and eight months. Finally, I reduce that minimum term of six years and eight months by the number of days which you have spent on remand in custody: 71 days. This means that the minimum term which you will serve before the Parole Board may consider your possible release is one of six years and 169 days.

It is most important that you and everyone concerned with this case should understand what this means. The minimum term is not a fixed term after which you will automatically be released but is the [initial] term that must be served before the Parole Board can undertake their first review of the case. They will review the risk that you then present and will consider whether you can properly be released from custody subject to licence at that stage and if so on what terms.

If and when you are released, you will be subject to licence; and this will remain the case for the rest of your life. If for any reason your licence is revoked, you will be recalled to prison to continue to serve your life sentence in custody.

It follows that unless and until the Parole Board consider that your release is appropriate then you will remain in custody.

Automatic "two strikes" life sentence (s.283) (aged 21 or over at conviction)[190]

Section 283 SA 2020

13. Where:
    (1) an offender aged 18+;
    (2) is convicted of an offence listed in schedule 15 SA 2020;
    (3) the sentence condition is met; and
    (4) the previous offence condition is met,

    the court must impose a life sentence [s.283(1) SA 2020].
14. However, where the court is of the opinion that it would be unjust to do so, the court need not impose a life sentence [s.283(3) SA 2020].
15. The sentence condition is that the court would otherwise impose a sentence of imprisonment for 10 years or more [s.283(4) SA 2020].

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189 See paragraph 11 above for the care that may be required if the notional determinate sentence is the product of combining qualifying and non-qualifying offences or where the sentences for some are under seven years and see also *Collins* [2021] EWCA Crim 1074.

190 Archbold 5A-850; Blackstone's E4.15; Sentencing Referencer § 68 and 69.

16. The previous offence condition is that:
    (1) at the time the offence was committed, the offender had been convicted of an offence listed in schedule 15; and
    (2) a relevant life sentence or a relevant sentence of imprisonment or detention for a determinate period was imposed on the offender for the previous offence [s.283(5) SA 2020].
17. For the purposes of the previous offence condition:
    (1) A life sentence is relevant if:
        (a) the offender was not eligible for release during the first five years of the sentence; or
        (b) the offender would not have been eligible for release during that period but for the reduction of the period of ineligibility to take account of a relevant pre-sentence period;
    (2) An extended sentence is relevant if the appropriate custodial term is 10 years or more;
    (3) Any other sentence of imprisonment or detention for a determinate period is relevant if the custodial term was 10 years or more;
    (4) Any extended sentence or determinate sentence is relevant if, but for the reduction of sentence to take account of a pre-sentence period, if the custodial period was 10 years or more [s.283(7)-(12) SA 2020].
18. A sentence imposed under s.283 is not a sentence fixed by law [s.283(13) SA 2020].

Fixing the minimum term

See S5.12 para. 8 above in relation to “dangerousness” life sentences.

Passing a life sentence

See S5.12 para. 13 above in relation to “dangerousness” life sentences.

Required life sentence for manslaughter (aged 21 or over at conviction)

Section 285A SA 2020

19. Where:
    (1) an offender aged 21+;
    (2) is convicted of an offence listed in s.285A(4) SA 2020;
    (3) the offence was committed on or after 28 June 2022;
    (4) the offender was aged at least 16; and
    (5) the offence was committed against an emergency worker acting in the exercise of functions of such a worker,

    the court must impose a life sentence [s.285A(2) SA 2020] unless there are exceptional circumstances relating to the offence or the offender which justify not doing so.
20. A sentence imposed under s.285A is not a sentence fixed by law [s.285(6) SA 2020].

Fixing the minimum term

See S5.12 para. 8 above in relation to “dangerousness” life sentences.

Passing a life sentence

See S5.12 para. 13 above in relation to “dangerousness” life sentences.

S5.14 Mandatory life sentences (all ages)

Sections 259, 275 and 322 and schedule 21 SA 2020

ARCHBOLD 5A-862; BLACKSTONE'S E17; SENTENCING REFERENCER § 71

1. Criteria for sentence

   The offence must be an offence for which the sentence is "fixed by law", ie murder.

2. Nature of sentence

   (1) Imprisonment for life [age 21 or over at date of conviction unless aged under 18 at date of offence].

   (2) Custody for life [age 18 to 20 inclusive at date of conviction unless aged under 18 at date of offence: see s.275 SA 2020].

   (3) Order for detention during His Majesty's pleasure [age under 18 at the time of the offence was committed:[191] see s.259 SA 2020.

   NOTE: this will lead to much older offenders being detained at His Majesty's pleasure if convicted as adults of offences committed when under age 18: s.259 takes precedence over the other age provisions.]

3. Fixing the minimum term (offences committed on/after 18 December 2003)

   (1) To fix the minimum term the court must consider the seriousness of the offence(s): s.322 SA 2020. In doing so the court must have regard to the general principles in schedule 21 SA 2020 and follow any relevant guidelines which are not incompatible with the provisions of that schedule. For children, this includes SC Guideline: Sentencing Children and Young People, especially section 4.[192]

   (2) Schedule 21 sets four starting points for all offenders aged 18 or over at the time of the commission of the offence: whole life, 30 years, 25 years and 15 years.

   (3) For children the starting points are set by schedule 21 para. 5A, as inserted by s.127 PCSCA 2022, as follows:[193]

1	2	3	4
Age of offender when offence committed	**Starting point supplied by paragraph 3(1) had offender been 18**	**Starting point supplied by paragraph 4(1) had offender been 18**	**Starting point supplied by paragraph 5 had offender been 18**
17	27 years	23 years	14 years
15 or 16	20 years	17 years	10 years
14 or under	15 years	13 years	Eight years

[191] It is worth noting that DDHMP sentences are determined by the child's age at the date of the offence and not the date of conviction.

[192] *DM and SC* [2019] EWCA Crim 1534; *Kyries Davies* [2020] EWCA Crim 921. The preclusion of the Guideline to mandatory sentences applies only to the imposition of the sentence of DDHMP and not the setting of the minimum term, and applies only to section 1 of the Guideline.

[193] This applies to convictions on or after 28 June 2022 where the offender was aged under 18 at the time of the offence.

(4) For children, the starting point is not to be applied mechanistically without regard to age and maturity.[194] This approach was authoritatively endorsed in *Kamara-Jarra*.[195] An individualistic approach should be adopted which considers 'in accordance with paragraph 4.10 of the guideline, whether the [child] has "the necessary maturity to appreciate fully the consequences of their conduct, the extent to which the child or young person has been acting on an impulsive basis and whether their conduct has been affected by inexperience, emotional volatility or negative influences".[196] Taking into account the child's age, the least possible minimum term should be "congruent with their welfare and necessary rehabilitation".[197]

(5) Having chosen a starting point, the court should take into account any aggravating and mitigating factors[198], noting that: (i) the lists of such factors set out in schedule 21 paragraphs 7-10 are not exclusive and (ii) other aggravating factors may include previous convictions and the offence(s) having been committed whilst on bail. This exercise may result in fixing a minimum term of any length.

(6) Credit should (almost invariably) be given for (a) a plea of guilty and (b) time spent on remand in custody or on qualifying electronically monitored curfew. For children, careful consideration should be given to time spent remanded to local authority accommodation. Credit which may be given for a plea of guilty in such cases is set by the SC Guideline Reduction in Sentence for a Guilty Plea which states "the maximum reduction [is] one-sixth or five years (whichever is less)". For children see SC Guideline: Sentencing Children and Young People, Section five: Guilty plea, paras. 5.22-5.25 and the exceptions at paras. 5.16-5.18. There is obviously no reduction for a guilty plea in the case of a whole life term, although the plea may be a factor in deciding whether a whole life term is appropriate.

(7) If the court is of the opinion because of the seriousness of the offence(s), that a whole life order must be made, the court must order that the early release provisions are not to apply.

(8) In any other case, the court must order that the early release provisions are to apply when the person being sentenced has served the minimum term.

4. Passing the sentence

(1) State that the sentence is one of imprisonment for life/custody for life/detention during His Majesty's pleasure.

(2) Either, if D is 21 or over and it is the case, state that because of the [extreme] seriousness of the offence/combination of offences, the early release provisions are not to apply and so the sentence is a whole life order.

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194 *Peters* [2005] EWCA Crim 605; *Kyries Davies* [2020] EWCA Crim 921.

195 [2024] EWCA Crim 198

196 *DM and SC* [2019] EWCA Crim 1534, para. 28.

197 *CN, FN, DW* [2020] EWCA Crim 1028, para. 32 (Macur LJ). See also *R (Smith) v SSHD* "an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity" [2005] UKHL 51, para. 25 (Baroness Hale). The welfare principles (as set out in S1.7 at para. 8) apply to all cases including those tried and sentenced in the Crown Court, SC Guideline: Sentencing Children and Young People at para. 2.1.

198 In respect of murders committed on or after 29 February 2024, schedule 21 has been amended by the addition of two aggravating factors and a mitigating one related to a history of controlling and coercive behaviour and/or violence.

Or, in any other case, state the minimum term, giving reasons for having fixed it at the level stated, in particular by reference to the applicable provision(s) of schedule 21 and the aggravating and mitigating factors, eg (having given reasons), "…so having regard to all the aggravating and mitigating features in your case, I fix the minimum term which you will serve in custody, before the Parole Board may consider your possible release, at 18 years."

(3) Credit should (almost invariably) be given, in this order, for:

(a) any plea of guilty.

Example (adult)

But for your plea of guilty I would have fixed the minimum term which you would have to serve in custody, before being able to apply to the Parole Board for your release, at 18 years. Giving you credit for your plea of guilty, I reduce that by one-sixth and fix the minimum term at 15 years.

Example (for a child)

You pleaded guilty. This means you told the court that you did the crime. If you had told the court you did not do the crime (or pleaded not guilty), the minimum term – the shortest time you would be in custody – would have been 12 years. But you pleaded guilty, so I make that shorter by one sixth. This means that the minimum term – the shortest time you have to be in custody – is 10 years.

(b) any time spent on remand in custody or half the time spent on remand on qualifying electronic curfew.

Example (adult)

From this will be deducted the 157 days which you have already spent on remand in custody so that the minimum term which you will serve is 14 years and 208 days.

Example (for a child)

You have already spent 157 days in custody before you came to court today (this is called being on remand). This means I take those days away from the minimum term – the shortest amount of time you have to be in custody. The minimum term is made less and is now 14 years and 208 days [**include as months as well,** eg this is the same as 14 years and nearly seven months].

Example (credit for time on qualifying curfew/remand to local authority accommodation)

You have already spent 313 days with an electronic tag and curfew (this is called being on bail)/staying with [insert name of foster carer or residential home] (this is called remand to local authority accommodation). You had to stay inside for nine hours or more each day. Because of that, the minimum term – the shortest amount of time you have to be in custody – is made less by 157 days. The minimum term is now 14 years and 208 days [**include as months as well**, eg this is the same as 14 years and nearly seven months].

(4) Explain the consequences:

(a) The minimum term will be served in full before D is eligible to be considered for release by the Parole Board.

(b) The decision about whether or when D will be released on licence will be taken by the Parole Board upon consideration of the risk(s) of D causing further harm.

(c) If D is released, D will be on licence for the rest of their life.

(d) The licence will be subject to conditions, which will be set at the time of D's release, and if D were to break any condition, they would be liable to be returned to prison to continue to serve their sentence and may not be released again.

Example (detention during His Majesty's pleasure – ie child defendant)

The sentence for murder is fixed by law. This means there is only one sentence I can give you. For a person your age it is called detention during His Majesty's pleasure. This is a custodial sentence. This means that instead of going home today you will go to a secure place. You will not be allowed to leave that secure place until you are told you can. I have decided that the shortest length of time you must stay in custody is 10 years. This is called a minimum term.

The Parole Board are a group of people who decide if it is safe for a person to leave custody. After you have spent 10 years in custody, they will decide if you can leave then or not. If they decide it is not safe, then you will stay in custody for a longer time. When you do leave custody, you will be on licence for the rest of your life. This means that there are rules, or conditions, that will be decided when you leave custody. You will have to follow those rules for the rest of your life. If you break those rules, you may have to go back into custody.

Example (life imprisonment – ie adult defendant)

The sentence for murder is fixed by law. This means there is only one sentence I can pass, namely a sentence of life imprisonment.

I must decide the minimum period that you must serve before you are first considered for release on licence. I consider the appropriate starting point is 25 years because [**reasons**…] but having considered all the features in this case, including the aggravating and mitigating features, in particular [**specify**…] I fix the minimum term which you will serve in custody, before the Parole Board may first consider your possible release, at 23 years.

The Parole Board will then decide whether you can leave custody at that stage, and if so on what terms. If you are refused parole at that time you will remain in custody, subject to regular reviews by the Parole Board. If and when you are released you will be on licence for the rest of your life. If you break the terms of your licence you will be liable to return to custody.

S5.15 Time spent on remand

Remand in custody

Section 240ZA CJA 2003

ARCHBOLD 5A-723; BLACKSTONE'S E13.12; SENTENCING REFERENCER § 72

1. When passing a determinate custodial sentence (whether or not extended) other than a detention and training order the time spent on remand in custody will, subject to certain qualifications, count automatically (s.240ZA CJA 2003): see Example 1.
2. A suspended sentence is to be treated as: (a) a sentence of imprisonment when it takes effect and (b) as being imposed by the order under which it takes effect [s.240ZA(7) CJA 2003]. Thus, time spent on remand in custody before the sentence was imposed will not lead to any reduction in the length of that sentence, but will count when the sentence takes effect: see Example 2.
3. It is still necessary for the court to make a reduction for the number of days spent on remand in custody when setting a minimum term to be served on a life sentence: see the Example under the heading Passing a life sentence in S5.12 above.
4. In the case of children, time spent on remand in youth detention accommodation will count against a custodial sentence (with the exception of detention and training orders), whereas time spent on remand in local authority accommodation will not (s.91; A Legal Aid, Sentencing and Punishment of Offenders Act 2012).[199] If a child is remanded to local authority accommodation subject to a restriction of their liberty, such as an electronically monitored curfew, "credit must be deducted in the process of calculating the sentence – with the sentence announced being net of any credit deducted".[200] This may warrant a similar approach to the 5-step test below in relation to a qualifying electronically monitored curfew).
5. The fact that an offender has previously served a sentence in respect of a conviction which was later quashed does not justify a reduction in the appropriate sentence for a subsequent offence now before the court for sentence: Asif.[201]

Example 1 (adults)

The days which you have spent on remand in custody will automatically count towards your sentence.

Example 1 (children)

You have already spent {specify} days in custody for this offence (this is called remand). Those days count as part of your sentence. Those {specify} days will be taken from the {specify} months sentence. This means that you have {specify} days of your sentence left. Any mistake as to time on remand can be corrected without you having to come back to court.

Example 2: when suspended sentence brought into operation

The days which you spent on remand in custody before you were originally sentenced will automatically count towards the [part of the] sentence which I have now brought into operation.

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199 [2019] EWCA Crim 106
200 *A* [2019] EWCA Crim 106 at paras. 46 and 50.
201 [2021] EWCA Crim 352

Remand on qualifying electronically monitored curfew

Section 325 SA 2020; s.240A CJA 2003

ARCHBOLD 5A-726; BLACKSTONE'S E13.16; SENTENCING REFERENCER § 73

6. When passing a determinate custodial sentence (whether or not extended), the court must certify the number of days spent on remand under a curfew with relevant conditions, ie (a) a curfew for nine hours or more and (b) which is electronically monitored and must direct that the appropriate proportion of those days will count towards the sentence. The sentencer has no discretion in this regard and this continues to be the case when activating an extended sentence in respect of which D spent time subject to a qualifying curfew prior to being made subject to such a sentence.[202]

7. The same considerations apply when setting the minimum term to be served in relation to a life sentence.

8. The proportion of those days is to be calculated by reference to the 5-step test prescribed by [s.325 SA 2020]. It is anticipated that this calculation will be done by the advocates and/or the clerk of the court but, since it is a judicial obligation to do so, the test is explained below.

9. The court should also direct that if the calculation of days is not correct, a correction will be made administratively without the need for a further hearing.

10. The 5-step test

    (1) Calculate the days on bail with the relevant conditions (namely (a) curfew for nine hours or more and (b) electronic monitoring) beginning on the day on which the conditions were imposed and ending on the day before the day of sentence.

    (2) Deduct any days where the offender has been subject, at the same time, to:

        (a) a community order, youth rehabilitation order or requirement of a suspended sentence with a similar qualifying curfew; or

        (b) release on home detention curfew or other temporary release with a similar qualifying curfew.

    (3) Deduct any days on which they have been in breach of any part of the relevant conditions[203].

    (4) Divide the resultant days by two.

    (5) Round up if there is a half-day.

Example (adults)

I certify that you have spent {47} days on remand subject to a qualifying curfew and I direct that {24} days will count towards your sentence. If this calculation is later found to be wrong it will be put right by correcting the record administratively without any further hearing.

Example (children)

You have already spent {47} days with an electronic tag and curfew (this is called being on bail)/staying with [insert name of foster carer or residential home] (this is called remand to local

202 *Lovelace* [2017] EWCA Crim 1589

203 See *Lewis* [2023] EWCA Crim 956 for an example of a judge taking an impermissible approach to this issue; it must not be an arbitrary exercise.

authority accommodation). You had to stay inside for nine hours or more each day. This time counts as part of your sentence. Because of that, I can make your sentence shorter. I can make it shorter by {24} days. Your sentence is now X days [X months]. Any mistake made as to the number of days when you were on a tag can be corrected (made right) without you having to come back to court.

S6 Further powers of sentencing

S6.1 Hospital, guardianship and s.45A Mental Health Act (MHA) orders

Sections 37-41 and 45A and 45B MHA 1983

ARCHBOLD 5A-1373 et seq.; BLACKSTONE'S E22.1 and E22.5; SENTENCING REFERENCER §§ 110-115

The various sentencing options

1. Where an offender suffers from a mental disorder, the court has a number of sentencing options:

   (1) If the court is satisfied that the offender is suffering from a mental condition which is such that it may be appropriate to make a hospital order, it can make an interim hospital order under s.38 whilst that appropriateness is being considered.

   (2) The court may make a hospital order under s.37 with or without a restriction order under s.41 if it considers that it is, "the most suitable method of disposing of the case". Where a restriction order is made under s.41, the First-tier Tribunal (Mental Health Chamber) (the FtT) decides when the offender should be released from the hospital order, either conditionally or unconditionally.

   (3) The court may impose a determinate or indeterminate sentence of imprisonment and leave it to the Secretary of State to exercise their administrative power under s.47 to transfer the prisoner to a hospital if they consider that (i) the prisoner is suffering from a mental disorder; (ii) the mental disorder is of a nature and/or degree that it is appropriate for them to be detained in hospital for medical treatment; and (iii) appropriate treatment is available. Whether such a direction is made is entirely in the hands of the Secretary of State.

   (4) The court may impose a "hybrid order" under s.45A if, when considering a hospital order under s.37 (i) the court is satisfied that the offender is suffering from a mental disorder; (ii) that mental disorder makes it appropriate for them to be detained in a hospital for medical treatment; and (iii) appropriate medical treatment is available. The effect of this is that instead of being removed to and detained in a prison (the hospital direction), the offender is removed to and detained in a hospital and is subject to the special restrictions set out in s.41 (the limitation direction).

   (5) Where an indeterminate sentence is imposed with a s.45A "hybrid order" and the responsible clinician or the FtT notifies the Secretary of State that the offender no longer requires treatment in hospital or that no effective treatment for their disorder can be given at the hospital to which they have been removed, the Secretary of State will normally simply remit the offender to the prison estate under s.51, unless their minimum term has expired. Where the tariff has expired, the Secretary of State may notify the FtT that they should be conditionally discharged, in which case they are subject to mental health supervision and recall in the usual way; but the Secretary of State can, and in practice usually does, refer the offender to the Parole Board as with any other post-tariff indeterminate sentence prisoner: *Fisher*.[204]

[204] [2019] EWCA Crim 1066

General approach

2. The various orders under the Mental Health Act (MHA) 1983 should be considered in the following order:

   (1) Consider whether a hospital order may be appropriate.

   (2) If so, consider all sentencing options including a s.45A order.

   (3) In deciding on the most suitable disposal, the judge should reflect upon the importance of the penal element in a sentence.

   (4) To decide whether a penal element to the sentence is necessary, the judge should assess the offender's culpability and the harm caused by the offence. The fact that an offender would not have committed the offence but for their mental illness does not necessarily relieve them of all responsibility for their actions.

   (5) A failure to take prescribed medication is not necessarily a culpable omission; it may be attributable in whole or in part to the offender's mental illness.

   (6) If the judge decides to impose a hospital order under s.37/41, they must explain why a penal element is not appropriate.

   (7) The regimes on release of an offender on licence from a s.45A order and for an offender subject to s.37/41 orders are different but the latter do not necessarily offer a greater protection to the public, as may have been assumed in *Ahmed* and/or or by the parties in the cases before us. Each case turns on its own facts: *Edwards.*[205]

Criteria for making a s.37 order

3. Section 37 MHA provides the court with power:

   (1) where a mentally disordered defendant (D) is convicted:

      (a) **either** to make an order for D to be admitted to and detained at a specified hospital;

      (b) **or**, in the case of a D who is aged 16 or over whose disorder can be managed without admission to hospital, to make an order placing D under guardianship of the local social services authority (or person approved by that authority);

   (2) where a mentally disordered D (a) having been found unfit to plead or stand trial, is found to have done an act/made an omission, or (b) is found not guilty by reason of insanity, to make an order for D to be admitted to and detained at a specified hospital.

4. The court must be satisfied as follows:

   (1) that, on the written or oral evidence of two registered medical practitioners, at least one of whom must be approved under s.12(2) MHA:

      (a) D is suffering from mental disorder; and

      (b) **either** that the mental disorder is of a nature or degree which makes it appropriate for D to be detained in hospital for medical treatment **and** treatment is available;

      (c) **or**, if a convicted D is aged 16 or over, that the mental disorder is of a nature or degree which warrants D being received into guardianship; and

[205] [2018] EWCA Crim 595

(2) that, having regard to all the circumstances (including the nature of the offence, D's character and antecedents and the other ways of dealing with D), an order under s.37 is the most suitable way of doing so.

5. When making a hospital order, the court must also be satisfied that arrangements have been made for D's admission to a specified hospital within 28 days of the date of the making of the order.

6. When making a guardianship order there is no requirement that the mental disorder is treatable, but the court must be satisfied that the authority or approved person is willing to receive D into guardianship.

7. When making such orders, it is important to demonstrate that all the statutory criteria have been met.

Example

[Having set out the facts of the case] Having heard the medical evidence which has been given in court today by Dr. …… and having read the reports prepared by Dr. …… and Dr. …… all of whom are approved by the Secretary of State under s.12(2) of the Mental Health Act 1983:

I am satisfied that:

- you are suffering from a mental disorder, namely {disorder};
- this disorder is of a nature which makes it appropriate for you to be detained in a hospital for medical treatment; and
- appropriate medical treatment is available for you at {place}.

I am of the opinion that:

- because of all the circumstances of your case, including:
  - the nature of the offence of {specify} to which you have pleaded guilty/of which you have been convicted/of which you have been found not guilty by reason of insanity/the act which you are found to have done}; and
  - your character and your past [antecedents], which includes a long-standing and complicated history of mental illness;
- and having considered all the other available ways in which I might deal with you, the most suitable method of dealing with your case is by making an order under s.37 of the Mental Health Act 1983.

I therefore make an order that you will be {re-} admitted to and detained at {place}. I am satisfied that arrangements have been made for you to be {re-} admitted within 28 days to this hospital {where you have already been for many months}.

[In some cases, it may be appropriate to add: I make it clear that the order which I have made is not a punishment but is for your own wellbeing and that of the public.]

Criteria for making a s.41 restriction order

8. Section 41 MHA provides the court with power, on making a hospital order, to order that D is subject to special restrictions (a restriction order) if it appears to the court, having regard to the nature of the offence, D's antecedents and the risk of D committing further offences if at large, that it is necessary to do so in order to protect the public from serious harm.

9. At least one of the registered medical practitioners whose evidence is taken into account must have given evidence orally.

10. The court must make a restriction order when it makes a hospital order under s.37 in cases where the sentence is fixed by law (murder) and D (a) having been found unfit to plead or stand trial, is found to have done an act/made an omission, or (b) is found not guilty by reason of insanity.

Example

I have also considered whether this order should be subject to special restrictions {which are specified in s.41 of the Act}. Having heard the evidence of Dr. …… I am satisfied that because of the nature of your offence/act and also having regard to your past (including your history of mental illness) and to the risk that you will commit further offences if you are not detained, it is necessary to protect the public from serious harm and it is not possible to say for how long that will be so.

Accordingly, I order that you will be subject to the special restrictions set out in s.41 of the Mental Health Act 1983.

Criteria for making a hybrid order under s.45A

11. Section 45A MHA provides the court with power to make a hospital direction and a limitation direction in relation to a D who is also sentenced to imprisonment (ie D must be aged 21 or over at conviction) so that on completion of treatment D will be transferred to prison for the remainder of his/her sentence instead of being released from hospital.

12. Orders under this provision are usually made in conjunction with very long or life sentences. The CACD has given guidance on the order in which the criteria for the imposition of such orders should be addressed in the case of *Vowles*[206] as follows [para. 54]:

> "i) As the terms of s.45A (1) of the MHA require, before a hospital order is made under s.37/41, whether or not with a restriction order, a judge should consider whether the mental disorder can appropriately be dealt with by a hospital and limitation direction under s.45A.
>
> ii) If it can, then the judge should make such a direction under s.45A(1). This consideration will not apply to a person under the age of 21 at the time of conviction as there is no power to make such an order in the case of such a person as we have set out at paragraph 19 above.
>
> iii) If such a direction is not appropriate the court must then consider, before going further, whether, if the medical evidence satisfies the condition in s.37(2)(a) (that the mental disorder is such that it would be appropriate for the offender to be detained in a hospital and treatment is available), the conditions set out in s.37(2)(b) would make that the most suitable method of disposal. It is essential that a judge gives detailed consideration to all

[206] [2015] EWCA Civ 56 and see also *Nelson* [2020] EWCA Crim 1615

the factors encompassed within s.37(2)(b). For example, in a case where the court is considering a life sentence under the Criminal Justice Act 2003 as amended in 2012 (following the guidance given in in *Attorney General's Reference (No.27 of 2013) (Burinskas)* [2014] 1 WLR 4209), if (1) the mental disorder is treatable, (2) once treated there is no evidence he would be in any way dangerous, and (3) the offending is entirely due to that mental disorder, a hospital order under s.37/41 is likely to be the correct disposal.

iv) We have set out the general circumstances to which a court should have regard but, as the language of s.37(2)(b) makes clear, the court must also have regard to the question of whether other methods of dealing with him are available. This includes consideration of whether the powers under s.47 for transfer to prison for treatment would, taking into account all the other circumstances, be appropriate."

13. Because directions under this section are made in conjunction with a sentence of imprisonment, if a hospital direction is made, a limitation direction must also be made.

Example

For the offence of {specify} I sentence you to {specify term} imprisonment and I direct, under the provisions of s.45A of the Mental Health Act 1983, that in the light of the psychiatric evidence, namely {specify}, the criteria for a hospital order are met; and so instead of being removed to and detained in a prison, you will be removed to and detained in {specify hospital}. You will be subject to the special restrictions set out in s.41 of the Mental Health Act 1983.

What this means is that you will be detained in hospital for as long as necessary. If and when it is no longer necessary and if your sentence has not expired, you will be transferred to prison. Once in prison you will serve the remainder of the sentence which I have imposed.

[Here explain the prison sentence and release provisions as appropriate, but add: On release from prison, in addition to the conditions on your licence you will also be subject to the conditions of your release from hospital.]

NOTE: If there is any reason to suppose the offender has comprehension difficulties the approach to explaining sentences for children may provide assistance (see Appendix II).

S6.2 Criminal behaviour orders

Sections 330-342 SA 2020

ARCHBOLD 5A-925; BLACKSTONE'S D25.16; SENTENCING REFERENCER § 75; CrimPR part 31

General

1. A criminal behaviour order (CBO) is an order designed to prevent behaviour which may lead to harassment, alarm and distress: s.330 Sentencing Act (SA) 2020. A CBO is not a sentence. But the existence of, or the prospect of, a CBO which addresses particular behaviour in the future is a matter that a sentencer can take into account in deciding how to deal with an offender.

Making an order

2. An order is available where an offender has been convicted of an offence and the court has imposed a sentence or a conditional discharge, but only where the prosecution apply: s.331 SA 2020. If a sentencer wishes the prosecutor to consider applying for such an order, a sentencing exercise could be adjourned for that purpose.[207]
3. The court may impose an order where:
   (1) it is satisfied[208] that the offender engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person[209]; and
   (2) making the order will help in preventing the offender from engaging in such behaviour: s.331(2) SA 2020.
4. If an order includes a requirement, the order must specify the person who will be responsible for supervising the compliance with the requirement. Before including such a requirement, the court must receive evidence about its suitability and enforceability: s.333(1) and (2) SA 2020.
5. In the case of an offender aged 18+ at the date of the order, the order may be for a fixed period of not less than two years, or for an indefinite period: s.334(5) SA 2020. In the case of a child (person aged under 18 when the order is made), the order may be for a fixed period of not less than one year and not more than three years: s.334(4) SA 2020.

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207 *Maguire* [2019] EWCA Crim 1193 left the question of whether it is permissible for a judge other than the one who passes sentence to deal with the adjourned CBO application but did express the view that "it might be thought at least undesirable for matters to be so organised and perhaps preferable for the judge who sentences the defendant to thereafter resolve any CBO application that has to be adjourned before it can be concluded."

208 Section 331 effectively consolidated s.22 Anti-social Behaviour, Crime and Policing Act 2014; in doing so, it omitted the reference to the "criminal standard" of proof. It should not be thought that this alters the position as regards the standard to which the court must be satisfied before it can impose a CBO. It does not. The reason for this form of words in the drafting and the deliberate omission of the reference to the standard of proof is because other behaviour orders consolidated by the Sentencing Code (which are subject to the same standard of proof) did not in their originating legislation contain reference to the criminal standard. Had the Code made reference to only the standard of proof in a CBO when it was bringing all provisions together in one Act, that inconsistent drafting could have been interpreted to indicate a substantive difference where none exists. The position remains that the court must be satisfied to the criminal standard of proof.

209 In *Kwake-Ampomah* [2023] EWCA Crim 1638 the court cautioned against reliance upon police intelligence reports when used to support an application for a CBO.

Explaining the order

6. The order must be explained to the offender. The exact terms of the order must be pronounced in open court and the written order must accurately reflect the order as pronounced, see *Khan*.[210]

Contents of the order

7. The order may prohibit the offender from doing anything, or require the offender to do anything, described in the order, for the purpose of preventing the offender from engaging in behaviour which causes harassment, alarm or distress: ss.330 and 333 SA 2020.

8. Prohibitions must be reasonable and proportionate, realistic and practical, and be in terms which make it easy to determine and prosecute a breach. Orders must be precise and capable of being understood by the offender (*Khan*). For example, a clause seeking to provide protection to persons the defendant might start associating by requiring the offender to notify the police when they entered into an intimate relationship with a new partner was held to be "hopelessly vague" in *Maguire.*[211]

9. The obligation to receive evidence from the supervising officer about the suitability and enforceability of the terms of the order is likely to mean that the officer will be present in court to discuss the practicalities of the order.

Example

You were convicted by a jury of arson of a structure in the play area in {specify}. You claimed during the trial that you were living rough in or around that structure. You have resisted attempts to move you on the basis that you had some kind of right to live there, and you defended your trial on the basis that you were entitled to light fires in order to cook for yourself. I will have to sentence you for the offence of arson. I shall come back to that exercise in a moment.

During your trial I heard evidence from users of the play area who have witnessed you lighting fires in the park, and who said that you were often offensive to anyone who challenged your behaviour. They were in fear that you would further damage the play equipment, would injure yourself or injure others. Following the trial, I heard an application for a criminal behaviour order which included evidence from a number of neighbours about your behaviour, and from the community police officer assigned to the park. You declined to give evidence. I was left in no doubt whatsoever that you have acted in a way that caused harassment, alarm and distress to users of the park, and that an order would be helpful to prevent you doing so in the future.

Accordingly, I will make a criminal behaviour order. I have concluded that the right length of that order will be for three years from today's date with the following prohibition. I have heard from the supervising officer as to the suitability of the prohibitions and have taken their views into account. You will be prohibited from entering the {specify}. For others this will not be a criminal offence but for you it will be because, as a result of your repeated behaviour, you have simply lost the right, for the time being, to visit that location without consequences. If you breach the terms of the order, you will commit a criminal offence punishable with imprisonment. If at some stage during the order it is no longer appropriate, it may be varied or removed on application either by you or the supervising officer. The order takes effect from today. You have been given a copy of that order. I am told that you have read it and that you understand it. Is that the case?

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210 [2018] EWCA Crim 1472
211 [2019] EWCA Crim 1193

The criminal behaviour order forms no part of the sentence for the offence of arson. However, I can take into account the fact that you will be subject to that order for a considerable time into the future and that if you set foot anywhere in the park you will be liable to arrest. It will therefore put a stop to some of the behaviour and the interactions that keep on occurring in the park.

Bearing that in mind, I can consider whether I can pass a sentence in relation to the arson count that is less severe than I otherwise would impose…

S6.3 Sexual harm prevention orders

Sections 343-358 SA 2020

ARCHBOLD 20-272; BLACKSTONE'S E21; SENTENCING REFERENCER § 83

1. This order may be made on D's conviction of a relevant sexual offence, ie one listed in schedule 3 or schedule 5 Sexual Offences Act (2003)[212], where the court is satisfied that it is necessary to make an order for the purpose of protecting the public or a member of the public from sexual harm.
2. A draft of the order should be supplied to the court and to D by the prosecution not less than two days before the hearing.[213] It should not be drafted by the police.
3. Any order must be tailored to meet the harm D represents and made in terms that are enforceable.
4. The order may impose prohibitions or positive requirements.[214]
5. The court ought to address three questions when considering making an order:
   (1) Is the making of an order necessary to protect from sexual harm through the commission of further scheduled offences?
   (2) If some order is necessary, are the terms proposed nevertheless oppressive?
   (3) Overall, are the terms proportionate? *Allen*.[215]
6. Orders must be in clear terms and capable of being understood by D without recourse to legal advice.
7. Orders may be for a fixed period of not less than five years or without limit of time,[216] although any sentencer considering a Sexual Harm Prevention Order (SHPO) that will extend beyond the statutory notification period will wish to consider the principles set out at para. 25 of *McLellan*[217] to the effect that:
   (1) an SHPO might extend beyond the statutory notification requirements, but
   (2) no order should be longer than necessary; and
   (3) no indefinite SHPO should be made without careful thought and explanation, especially bearing in mind such an order will extend the significant consequences of the notification requirements [see chapter S8.1 below] until the expiry of the order: s.352 SA 2020.
8. Orders may be renewed or varied on application to the court by D or an interested chief officer of police.

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212 There is no power to impose a SHPO when dealing with an offender for breaching such a behaviour order. Further, there is no power to vary a SHPO other than on an application by the offender or Chief Officer of Police for the area in which the offender at that time resides or to which the offender is intending to move.

213 CrimPR 31(3)(5)

214 Section 347A requires the court to specify the person/organisation responsible for supervising the offender's compliance with positive requirements.

215 [2018] EWCA Crim 108

216 See *Hanson* [2021] EWCA Crim 1008 which addresses in detail the way a court should approach assessing the correct duration of a SHPO. So far as a prohibition against foreign travel is concerned made under s.348 that cannot be for more than five years.

217 [2017] EWCA Crim 1464

9. When considering appropriate prohibitions/requirements, the court should note that the definition of a child for the purposes of the SHPO regime is a person aged under 18: [s.358 SA 2020].

10. In *David*[218] the court allowed an appeal against a requirement that the appellant undergo a polygraph test if required to do so by an "offender manager/police". The court did not consider that such a requirement was justified and also identified the importance of the court having regard to s.347A which requires the court to identify the person responsible for supervising requirements.

11. In relation to notification requirements under the SOA 2003, the court should be mindful of the following:

    (1) an SHPO operates in tandem with the notification requirements; it must not, therefore, conflict: *Sokolowski*;[219]

    (2) an SHPO extending longer than the notification requirements applicable by virtue of the conviction/sentence has the effect of extending the length of the notification period [s.352 SA 2020]; and

    (3) there is no general principle that an SHPO should be imposed of a length equal to or less than the notification requirements: *McLellan*.[220]

12. A total prohibition on internet access would not be appropriate in anything other than an exceptional case. In all other cases, a blanket ban would be unrealistic, oppressive and disproportionate as it would cut the offender off from too much of everyday, legitimate living: *Parsons*.[221] *Hewitt*[222] provide an example of a blanket ban being found to be disproportionate. *Connor*[223] provides an example of SHPO terms being amended to remove a de facto blanket ban so as to permit internet usage for the ordinary tasks of everyday life while ensuring that usage was properly monitored.

13. The Examples on the next page are based on those approved by the CACD in *Smith and others*[224] and subsequent cases, most particularly *Parsons and Morgan*[225] which is now the leading case on SHPO terms. However, it must be remembered that the order should be tailored to the individual, and that prohibitions on computer use should reflect current technology. That was particularly so in relation to risk management monitoring software, cloud storage and encryption software. See *Parsons*[226] as to guidance on prohibitions containing such technology.

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218 [2023] EWCA Crim 1561
219 [2017] EWCA Crim 1903
220 [2017] EWCA Crim 1464 and see also *Hanson* [2021] EWCA Crim 1008
221 [2017] EWCA Crim 2163
222 [2018] EWCA Crim 2309
223 [2019] EWCA Crim 234
224 [2011] EWCA Crim 1772
225 [2017] EWCA Crim 2163
226 [2017] EWCA Crim 2163

Example 1: internet access

The defendant is prohibited from:

1. Using any computer or device capable of accessing the internet[227] unless:
   (1) they have notified the police Violent and Sex Offender Register (ViSOR) team within three days of the acquisition of any such device;
   (2) it has the capacity to retain and display the history of internet use, is at all times set so as to retain the history of internet use and they do not delete such history;
   (3) they make the device immediately available on request for inspection by a police officer, or police staff employee, and allows such person to install risk management monitoring software if they so choose.

This prohibition shall not apply to a computer at their place of work, Job Centre Plus, public library, educational establishment or other such place, provided that in relation to their place of work, within three days of them commencing use of such a computer, they notify the police ViSOR team of this use.

2. Interfering with or bypassing the normal running of any such computer monitoring software.
3. Using or activating any function of any software which prevents a computer or device from retaining and/or displaying the history of internet use, for example using "incognito" mode or private browsing.
4. Using any "cloud" or similar remote storage media capable of storing digital images (other than that which is intrinsic to the operation of the device) unless, within three days of the creation of an account for such storage, they notify the police of that activity, and provides access to such storage on request for inspection by a police officer or police staff employee.
5. Possessing any device capable of storing digital images (moving or still) unless they provide access to such storage on request for inspection by a police officer or police staff employee.
6. Installing any encryption or wiping software on any device other than that which is intrinsic to the operation of the device.

This order will last until {specify}/indefinitely.

Example 2: contact with children

The defendant is prohibited from having any unsupervised contact or communication of any kind with any female/male/child under the age of 16/18, other than:

1. such as is inadvertent and not reasonably avoidable in the course of lawful daily life, or
2. with the consent of the child's parent or guardian (who has knowledge of their convictions) **and** with the express approval of social services for the area.

This order will last until {specify}/indefinitely.

[227] Some SHPOs are being drafted so as to state "…capable of accessing the internet and downloading images…" given the growing prevalence of internet enabled central heating systems etc. There is also a growing concern about issues of practicability in the context of "smart" TVs, cars that are internet enabled and other manifestations of the ubiquity of the internet in modern life.

Example 3: living with children

The defendant is prohibited from:

1. living in the same household as any male/female/child under the age of 16/18, unless with the express approval of social services for the area;
2. having any unsupervised contact or communication of any kind with any male/female/child under the age of 16/18, other than:
   (1) such as is inadvertent and not reasonably avoidable in the course of lawful daily life, or
   (2) with the consent of the child's parent or guardian (who has knowledge of his/her convictions) and with the express approval of social services for the area.

This order will last until {specify}/indefinitely.

S6.4 Restraining orders

Section 359 SA 2020 and s.5A PROTECTION FROM HARASSMENT ACT 1997

ARCHBOLD 19-357b; BLACKSTONE'S E21.31; SENTENCING REFERENCER § 81

1. A restraining order (RO) may be made following D's conviction or, if the court considers it necessary, on acquittal of a person for any offence, for the purpose of protecting a person from harassment or fear of violence.
2. If made on acquittal, the court must be satisfied on the civil standard of proof of the facts that give rise to the necessity for an order.[228]
3. In *McCarren*[229] the court emphasised the procedural and evidential requirements that arise where an RO is sought. The consent of the subject of the application will not suffice if there has been a lack of compliance with the correct procedure or a failure to identify the evidence upon which the application is based. The judge is also required to identify the basis upon which there is a finding of "necessity" for the making of an order.
4. A finding that a person has done the acts charged against them in proceedings under the Criminal Procedure (Insanity) Act 1964 is neither a conviction nor an "acquittal" and therefore there is no power to make a restraining order.
5. Any order should be in precise terms.
6. An order is usually made for a fixed period but may be "until further order".
7. Although not prevented by the statute, an order should not in general be made if it is opposed by the person whom the court might otherwise seek to protect.
8. A person affected by the order, including D and/or the person to be protected, may apply for the order to be varied or removed.

Example

In order to protect {name of victim} from further assaults/harassment you will be subject to a restraining order prohibiting contact with {name of victim} directly or indirectly. This means that you must have absolutely no contact with {name of victim} whatsoever: for example, you must not speak to {name of victim} if you see them in town and there must be no phone calls, no Facebook messages (either from you or anyone passing on messages from you) and you must not go to their home.

This order will last for five years from today.

(If appropriate – for example, in some domestic contexts: If for any reason the order is no longer necessary and appropriate then either you or {name of victim} may apply to the court for it to be amended or removed. But until that time it will remain in force and must be complied with to the letter.)

You will be given full details of the order before you leave court and I must warn you that if you were to disobey the order you would be committing a further offence, punishable with up to five years' imprisonment.

228 See *Baldwin* [2021] EWCA Crim 703
229 [2023] EWCA Crim 1233

S6.5 Serious crime prevention order

SERIOUS CRIME ACT 2007

ARCHBOLD 5A-987; BLACKSTONE'S D25.48; SENTENCING REFERENCER § 82

1. Serious crime prevention orders may only be made in the Crown Court,[230] on conviction of an offender for a "serious offence", or in the High Court[231] on application. In every case such orders may only be made on the application of the Director of Public Prosecutions or the Director of the Serious Fraud Office.
2. In the Crown Court an order may only be made against a person who has been convicted of a "serious offence", listed in part 1 of schedule 1 of the Act, as amended by s.47 Serious Crime Act 2015.
3. In the High Court an order may be made against a person who has been involved in "serious crime", as defined by ss.2 and 4 and schedule 1 of the Act.
4. An order may only be made against a person who is over 18.
5. An order may last for up to five years; but with effect from 3 May 2015 may be extended in the effect of (a) breach or (b) charge with a further serious offence during the term of the order.
6. Any judge who is considering making such an order must refer to the legislation.
7. *Sidat*[232] helpfully reviews the relevant principles that apply when the court is considering making such an order.

NOTE: No example is provided because these orders may only be made on the application of those named above and a draft order, which will reflect the particular circumstances of the case, will always be attached to the application. While the draft will be subject to amendment after representations are made on behalf of the offender, it will always provide the basis for the making of the order if one is made.

230 Section 19 Serious Crime Act 2007
231 Section 1 Serious Crime Act 2007
232 [2023] EWCA Crim 1411

S6.6 Exclusion from licensed premises

LICENSED PREMISES (EXCLUSION OF CERTAIN PERSONS) ACT 1980

BLACKSTONE'S E21.1; SENTENCING REFERENCER § 77

1. Orders may only be made where D committed an offence in which violence was used or threatened on licensed premises.
2. An order may not be made as the only sentence or order for the offence.
3. Orders exclude D from entering specified licensed premises (by reference to named premises or premises otherwise specified, eg by area).
4. An order may be for no less than three months or more than two years.
5. The breach of an order is a summary offence punishable by a fine up to level 3, or one month's imprisonment.

Example

In addition to the sentence of {specify} for the offence of {specify} I make an exclusion from licensed premises order, which means that you must not go into {specify public houses}. This order will last for {period} from today.

If you disobey this order, you will be committing a further offence, which is punishable with a fine or imprisonment.

S6.7 Football banning orders

FOOTBALL SPECTATORS ACT 1989

ARCHBOLD 5A-964; BLACKSTONE'S E21.3; SENTENCING REFERENCER § 79

1. A football banning order operates:
   (1) to prohibit a D who has been convicted of a relevant offence from attending regulated football matches in England and Wales; **and**
   (2) when a representative team from England or Wales or a Premier or Football League team from England, Wales or Scotland is playing a match outside the UK, to require D to surrender their passport from five days before the game until after it has been concluded.
2. When D is convicted of a relevant offence the court must make a banning order unless there are particular circumstances relating to the offence or the offender which would make it unjust in all the circumstances to do so.
3. An order may only be imposed in addition to another sentence or a conditional discharge.
4. If the court does not make an order, it must state the fact in open court and give reasons.
5. If the offender is sentenced to custody on conviction of a relevant offence the banning order must be for not less than six nor more than 10 years.
6. If the offender is not sentenced to custody the banning order must be for not less than three nor more than five years.
7. A relevant offence is one listed in schedule 1 of the Act.
8. The breach of an order is a summary offence punishable with a fine up to level 5 or six months' imprisonment.

Example

In addition to the sentence of {specify} for the offence of {specify}, because that offence was committed at the ground of {specify} you will be banned from attending any match at {specify ground} or any other football league ground as explained in the order for a period of {number} years. If you do not obey the order you will be committing another offence and may be fined or sent to prison.

S6.8 Travel restriction orders

Section 33 CRIMINAL JUSTICE AND POLICE ACT 2001

ARCHBOLD 5A-1032 BLACKSTONE'S E21.17; SENTENCING REFERENCER § 85

1. A travel restriction order may be made on conviction of a drug trafficking offence as defined in s.34 Criminal Justice and Police Act (CJPA).

NOTE: this definition is not the same as that in Proceeds of Crime Act (PoCA) 2002.

2. The effect of an order is to prohibit D from leaving the UK for the period of the order, commencing on the date of D's release from custody. D may be required to deliver up their passport, which is a natural pre-requisite to enforcing such an order.

3. The court has a power to make orders in all such cases. In particular:

   (1) Where D is sentenced to a custodial sentence of four years or more the court must consider making an order and make one if appropriate; and if it does not make an order the court must give reasons.

   (2) It is appropriate to make an order where there is reason to believe that it will reduce the risk of re-offending on release from prison.

4. The minimum length of an order is two years from the date of D's release from custody.

Example

You will be subject to a travel restriction order. This means that (if it is not already in the possession of the Police) you must arrange for the surrender of your passport to {specify} Police Station within 14 days; and for the period of {number} years following your release from custody you will not be allowed to leave the United Kingdom.

6.8A Serious violence reduction orders (pilot)

Section 342A SA 2020

1. A serious violence reduction order (SVRO) is an order that imposes requirements and prohibitions on the offender: s.342B(1) SA 2020.

Making the order

2. A SVRO is available where:
   (1) A person aged 18 or over is conviction of an offence committed on or after [19 April 2023]; and
   (2) The prosecution make an application for such an order: s.342A(1) SA 2020.
3. The order is available for the piloting period only (two years from 19 April 2023) and only in the pilot areas (police areas of Merseyside, Thames Valley, Sussex and West Midlands) [SI 2023/387].
4. An order is not available where the court imposes a conditional discharge: s.342A(6) SA 2020.
5. The Court may make an SVRO if (1) or (2) and (3) are satisfied:
   (1) The court is satisfied on the balance of probabilities that:
      (a) a bladed article or offensive weapon was used by the offender in the commission of the offence; or
      (b) the offender had with them while the offence was committed a bladed article or offensive weapon.
   (2) The court is satisfied on the balance of probabilities that:
      (a) a bladed article or offensive weapon was used by another person in the commission of the offence and the offender knew or ought to have known that this would be the case; or
      (b) another person who committed the offence had a bladed article or offensive weapon with them when the offence was committed, and the offender knew or ought to have known that this would be the case.
   (3) The Court considers that it is necessary to make a SVRO to:
      (a) protect the public in England and Wales from the risk of harm involving a bladed article or offensive weapon;
      (b) protect any particular members of the public in England and Wales (including the offender) from such harm; or
      (c) prevent the offender from committing an offence involving a bladed article or offensive weapon. [s.342A(2)-(5) SA 2020]

Requirements and prohibitions

6. The requirements imposed by an order are that:
   (1) The offender notifies the police within three days of the beginning of the order:
      (a) their name (and whether they use more than one name, and if so, each of those names);

(b) their home address;

(c) any other address where they regularly reside; and

(2) The offender notifies the police of the following, within three days:

(a) use of a name not previously notified to the police;

(b) a change of their home address;

(c) a decision to live for a period of one month or more at any premises not previously notified to police. [s.342B(1)-(4) SA 2020]

7. An order may impose requirements of prohibitions specified in regulations for the purposes of s.342C where the court considers it appropriate to impose such a requirement or prohibition for the purposes of assisting constables to exercise the powers conferred by s.342E (search, detention, seizure etc.) [s.342C SA 2020].

Length of the order

8. An SVRO must be imposed for a fixed period of not less than 6 months and not more than 24 months [s.342D(2) SA 2020].

9. An SVRO takes effect upon the day on which it was made, subject to the offender being:

(1) remanded in custody;

(2) sentenced to a period of immediate custody.

In those instances, the court may provide that the order does not take effect until the offender is released from custody [s.342D(3)-(4) SA 2020].

10. Where an offender is already subject to an SVRO, that order will cease to have effect upon the imposition of a subsequent SVRO [s.342D(5) SA 2020].

Breach

11. It is an offence to breach (see s.342G(1)) an SVRO, punishable upon summary conviction with imprisonment for 12 months (subject to the general limit of the magistrates' courts) and punishable upon conviction on indictment with imprisonment for two years [s.342G SA 2020].

Variation/discharge

12. Applications may be made to vary or discharge the order by the offender or the police (see s.342H(2)).

Appeal

13. The offender may appeal against the imposition of an SVRO as if it were a sentence [s.342I(1) SA 2020].

14. There are limited rights of appeal in relation to variation/renewal/discharge of SVROs (see s.342I(2)).

S6.9 Parenting orders

Sections 365-375 SA 2020 and ss.8-10 CDA 1998

ARCHBOLD 5A-1258; BLACKSTONE'S E14; SENTENCING REFERENCER § 103

1. An order requiring the parent of a child convicted of an offence to comply with requirements set out in the order, which may include an order to attend for counselling.
2. A parenting order, while required by statute when the relevant condition is met, will normally be made only when specifically recommended by the youth offending service in a pre-sentence report.
3. There are multiple orders available:
   (1) On conviction: s.366 SA 2020.
   (2) Where a parent/guardian fails to attend a meeting of youth offender panel: s.368 SA 2020.
   (3) On conviction for certain offences under the Education Act 1996: s.369 SA 2020.
   (4) Where a CBO or SHPO has been imposed on a child: ss.8-10 CDA 1998.

NOTE: No example is given for this order. If such an order is appropriate, its terms will be set out in the report from the youth offending service.

S6.10 Recommendations for deportation

Section 6 IMMIGRATION ACT 1971

ARCHBOLD 5A-1048; BLACKSTONE'S E20; SENTENCING REFERENCER § 108

1. No recommendation for deportation may be made unless D has been given at least seven days' notice in writing.
2. A recommendation may be made if D is aged 17 or over and has been convicted of an offence punishable with imprisonment.
3. The criteria for making the recommendation is whether the defendant's continued presence in this country is to the detriment of the community.
4. Full reasons must be given if a recommendation is made.
5. The court should consider only the criminal conduct of the defendant while in this country; matters relating to conditions in the defendant's country of origin and/or the defendant's ECHR rights are for the Home Secretary.
6. No recommendation should be made where the offender is sentenced to 12 months' imprisonment or more in respect of a single offence and is subject to the "automatic liability to deportation" provisions of ss.32-39 UK Borders Act 2007.

Example

You have committed an offence of {specify}. I am satisfied that your continued presence in this country is to the detriment of the community for these reasons {specify}.

I therefore recommend to the Secretary of State that you should be deported.

S6.11 Costs

PROSECUTION OF OFFENCES ACT 1985 Part II as amended by schedule 7 LASPO 2012; CPR PART 45; PRACTICE DIRECTION (COSTS IN CRIMINAL PROCEEDINGS) 2015

ARCHBOLD 6-1; BLACKSTONE'S D33; SENTENCING REFERENCER § 86

1. Issues of costs will have to be considered in many cases.
2. Where a defendant is found guilty, the prosecution will commonly ask for costs and an order may be made for the payment of all or part of the sum sought either by an order for payment forthwith or within a fixed period or by instalments subject to the ability of the defendant to pay: s.18 Prosecution of Offences Act (POA) 1985.
3. The court must order the parent or guardian to pay the costs for children aged 10-15 years old, and if the child is 16 or 17 years old the court may order the parent or guardian to pay, unless they cannot be found or it would be unreasonable. s.380 SA 2020.
4. While there is no strict limit to the period over which costs orders should be payable, the sum, rate and period over which payment will be made must be proportionate: *Reilly*.[233]
5. Where a defendant is acquitted or successfully appeals conviction or sentence from the magistrates' court, the defence will commonly apply for an order for payment of the defendant's costs from central funds (a DCO): s.16 POA 1985.
6. In proceedings commenced on or after 1 October 2012, schedule 7 Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) made changes to what costs may be included in a DCO by inserting a new s.16A into POA:
   (1) Where D is an individual and has paid for their own legal representation and appeals successfully against conviction or sentence in the magistrates' court D will be entitled to recover D's reasonable legal costs incurred in the magistrates' court and the Crown Court.
   (2) Where D is not an individual, it may not recover legal costs on a successful appeal from the magistrates' court as part of a DCO.
7. Section 16A POA 1985 has been amended by paragraph 2 of The Costs in Criminal Cases (Legal Costs) (Exceptions) Regulations 2014. This provides that if a defendant, who is an individual who has applied for representation on or after 27 January 2014 and has been determined to be financially ineligible (ie has been refused legal aid on grounds of means), the court may extend the DCO to cover the defendant's legal costs of the proceedings. Proceedings are defined in the Regulations as being any of the following:
   (1) proceedings in the Crown Court in respect of an offence for which the accused has been sent by a magistrates' court to the Crown Court for trial;
   (2) proceedings in the Crown Court relating to an offence in respect of which a bill of indictment has been preferred by virtue of s.2(2)(b) Administration of Justice (Miscellaneous Provisions) Act 1933;
   (3) proceedings in the Crown Court following an order by the Court of Appeal or the Supreme Court for a retrial.

   See also para. 2.2.4 Practice Direction (Costs in Criminal Proceedings) 2015.

[233] [2017] EWCA Crim 2240

8. Unless the criteria of s.16A POA 1985 as amended (as detailed in paragraph 5 above) are fulfilled, no legal costs are recoverable as part of a DCO in respect of proceedings on indictment whether D is an individual or not.
9. Where D is acquitted on some charges but convicted on others the court has discretion to order that part of D's expenses be met from central funds.
10. When making an order for costs, whether for the prosecution or defence, the court may either make a summary order for a fixed amount or order that the costs are to be determined by the appropriate authority in accordance with the Costs Regulations.
11. If the court decides to do the former, the amount of any defence costs in proceedings commencing after 1 October 2012 must be in accordance with the rates and scales issued by the Lord Chancellor.
12. Where the court considers a legal representative has acted in an improper, unreasonable or negligent manner, it may be necessary to order:
    (1) the party to show cause why they should not pay the costs of other parties ascertained to have been wasted by their conduct; and
    (2) if satisfied after giving all parties an opportunity to make representations that there was improper, unreasonable or negligent conduct order the costs to be paid: s.19A POA 1985 (wasted costs order).
13. Wasted costs orders require very careful consideration and are very rarely made in practice.
14. Where the court considers a third party (eg police, witness, probation service) has acted in an improper, unreasonable or negligent manner, it may be necessary to order:
    (1) the party to show cause why they should not pay the costs of other parties ascertained to have been wasted by the conduct; and
    (2) if satisfied after giving all parties an opportunity to make representations that there was improper, unreasonable or negligent conduct, order the costs to be paid: s.19B POA 1985.

NOTE: Further information on costs regulation can be obtained from members of the National Taxing Team or at Guidance: Claims paid out of central funds.

S6.12 Confiscation order

Various statutes – see below.

ARCHBOLD 5B; BLACKSTONE'S E19; SENTENCING REFERENCER § 87

1. Confiscation orders may be made under the provisions of a number of statutes, depending on the date and type of offence, as shown in the table below. The procedures and timetables to be followed under each Act are mandatory and it is essential to know and to follow the statutory framework in each case.

Offence	**Statute**
Any offence committed before 1 November 1995	Criminal Justice Act 1988
Any offence committed on/after 1 November 1995 but before 24 March 2003 – except DT in circumstances below	Criminal Justice Act 1988 as amended by the Proceeds of Crime Act 1995
Drug Trafficking: where **every** offence was committed on/after 3 February 1995 but before 24 March 2003	Drug Trafficking Act 1994
Any offence committed on/after 24 March 2003	Proceeds of Crime Act 2002
Any offence committed on/after 24 March 2003, where the order is made after 1 June 2015	Proceeds of Crime Act 2002 as amended by the Policing and Crime Act 2009, the Crime and Courts Act 2013 and the Serious Crime Act 2015 – **see** Home Office Circular issued 22 May 2015

2. Although often the parties agree some or all of the figures in such cases, ultimately it is for the judge to make a proportionate order following their assessment of the facts.
3. Where an order is made following an agreement by the parties, this should be recorded in the order and it is prudent to ensure that D signs the schedule of available or realisable assets (form 5050A). Where an order is made after a contested hearing, it will follow the court's findings of fact.
4. The full amount ordered to be paid under a confiscation order must be paid on the day on which the order is made unless the court is satisfied that D is unable to pay the full amount on that day in which case the court may make an order requiring whatever cannot be paid on that day to be paid in a specified period, or specified periods each of which relates to a specified amount. Any specified period must not exceed three months from the date of the order. If within any specified period D applies to the court for that period to be extended the court may, on being satisfied that D has made all reasonable efforts to comply, make an order extending the period for up to six months from the date of the order.

5. Sentences in default:

(1) In respect of orders made before 1 June 2015, the maximum period to be served in default is the same as for non-payment of fines: see the table in Chapter S3.3.

(2) In respect of orders made on or after 1 June 2015 the following maxima apply (s.10 Serious Crime Act 2015):

Amount	**Period**
£10,000 or less	Six months
More than £10,000 but no more than £500,000	Five years
More than £500,000 but no more than £1,000,000	Seven years
More than £1,000,000	14 years

Example

I find that:

- the benefit from your offending/criminal conduct is £ {amount};
- the available amount (that is the value of your realisable assets) is £ {amount};
- the recoverable amount (that is the smaller of the benefit figure and the realisable amount) is £ {amount}.

I therefore make a confiscation order in the sum of £ {amount}.

Either: I direct that the full amount must be paid today.

Or: I am satisfied that you are not able to pay the full amount of this sum today and so I direct that the sum of £x must be paid today and the balance, namely £y, must be paid on or before {specify date, not to be more than three months from the date of the order}.

In default of payment of the total sum of £ {full available amount} you will serve a sentence of {duration}.
[If appropriate: this will be served consecutively to the sentence for the offence(s) {which you are already serving} and you must understand that time in prison will still not reduce or clear the amount that you owe].

S7 Consequences of conviction and/or sentence

S7.1 Sexual offences notification requirement

Sections 80-91 SEXUAL OFFENCES ACT 2003

ARCHBOLD 20-246; BLACKSTONE'S E23; SENTENCING REFERENCER § 105

1. A defendant is subject to the notification requirements of the Act if they are convicted of an offence within Schedule 3 to the Act. Some of the offences listed in schedule 3 contain conditions as regards the commission of the offence (eg as to the victim or offender's age) or the severity of the disposal (eg whether the sentence was custodial). The notification requirements begin at the point of conviction unless there is a condition as regards the disposal imposed for the Schedule 3 offence in which case they will begin only at the point at which sentence is imposed (see *Rawlinson*).[234]
2. The court is not required, and should not purport, to "order" a defendant to be "registered". The notification provisions are automatic.
3. The court has two functions:
   (1) to certify that the defendant has been convicted of a relevant offence and tell the defendant of their obligation to notify the police within three days of their conviction, if at liberty, or within three days of their release from custody of various personal particulars, including where they are living. See also CrimPR 28.3.
   (2) for children (those aged under 18), the court may also make a direction under s.89 Sexual Offences Act (SOA) 2003 that the obligations imposed on the child are in fact to be imposed on the parent/guardian.

Example

I certify that you have been convicted of a sexual offence so that you must, for a period of {number} years from the date of your conviction/for the rest of your life, keep the police informed at all times of your personal particulars, the address at which you are living and any alteration in the name you are using. You will be given full details of these requirements on a form at the end of this hearing.

4. Notification periods:

Disposal	**Period**
30 months' or more custody or hospital order with restriction	Indefinite
More than six but less than 30 months' custody	10 years
Up to six months' custody or hospital order (without restriction)	Seven years
Caution	Two years

[234] [2018] EWCA Crim 2825

Disposal	Period
Conditional discharge	The period of the discharge
Any other disposal (including community orders, fines, a verdict of not guilty by reason of insanity or a finding of being unfit to plead or tried but to have done the act charged)	Five years

NOTE:

(1) Custody includes imprisonment, detention in a youth offender institution (YOI), detention and training order (DTO) and custody under s.250 Sentencing Act (SA) 2020.

(2) When a sentence of custody is suspended, the notification period is determined by the length of the term of custody. The fact that the sentence is suspended, or whether or not the sentence is ultimately served, does not affect this.

(3) When an extended sentence is imposed, the length of the sentence for notification purposes is the full length of the sentence and not only the custodial term.

(4) Periods must be halved for offenders under the age of 18 at the date of the conviction/caution/finding.

(5) When a DTO is imposed, the notification period is determined by the custodial element of the sentence. For example, the custodial element of a DTO of 12 months being six months, the notification period would normally be seven years but, as the offender will be under 18 at the date of conviction, the notification period is three and a half years.

(6) An absolute discharge does not attract liability to notification.

S7.2 Barring requirements

Schedule 3 paragraph 25 SAFEGUARDING VULNERABLE GROUPS ACT 2006 as amended by Part 5 Chapter 1 PROTECTION OF FREEDOMS ACT 2012

ARCHBOLD 5A-1309; BLACKSTONE'S E21.17; SENTENCING REFERENCER § 106

1. Paragraph 25 of schedule 3 Safeguarding Vulnerable Groups Act 2006, as amended by Part 6 of Schedule 9 Protection of Freedoms Act 2012, provides as follows:

   "A court by or before which a person is convicted of an offence of a description specified for the purposes of paragraph 24(1)(a), or which makes an order of a description specified for the purposes of paragraph 24(1)(b), must inform the person at the time he is convicted, or the order is made, that the Disclosure and Barring Service will, or (as the case may be) may, include him in the Barred list concerned".

2. The court has an obligation to inform (not "order") a defendant that they will or may be barred by the Disclosure and Barring Service from regulated activity with children and/or adults.

3. Whether a defendant must be barred or may, subject to making representations, be barred and whether the barring is from working in regulated activity with children or adults will depend on the type of offence and order(s) made, subject in the case of some offences, to qualifications. This is a matter for the Disclosure and Barring Service and not for the Court.

Example

The offence of which you have been convicted is one which will (or may) make you subject to barring from working with children or others. You will be told of the restrictions under the Safeguarding Vulnerable Groups Act 2006 by the Disclosure and Barring Service.

S7.3 Automatic liability to deportation

Sections 32-39 UK BORDERS ACT 2007

ARCHBOLD 5A-1319; BLACKSTONE'S E20,1; SENTENCING REFERENCER § 108

1. **Liability:** "Foreign criminals" are automatically liable to be deported: s.32(1), (2) and (5) UK Borders Act (UKBA) 2007. There is a duty upon the Home Secretary to make a deportation order in relation to a "foreign criminal": s.32(5) UKBA 2007.
2. A "foreign criminal" means a person:
   (1) who is not a British citizen;
   (2) who is convicted in the United Kingdom of an offence; and
   (3) to whom Condition 1 or 2 applies: s.32(1) UKBA 2007.
3. Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months. The reference to a person who is sentenced to a period of imprisonment of at least 12 months:
   (1) does not include a reference to a person who receives a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
   (2) does not include a reference to a person who is sentenced to a period of imprisonment of at least 12 months only by virtue of being sentenced to consecutive sentences amounting in aggregate to more than 12 months;
   (3) includes a reference to a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for at least 12 months; and
   (4) includes a reference to a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period (provided that it may last for 12 months): s.38(1) UKBA 2007.
4. Condition 2 (which is not currently in force) is that:
   (1) the offence is specified by order of the Secretary of State under s.72(4)(a) Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal); and
   (2) the person is sentenced to a period of imprisonment.
5. **Exceptions:** There are numerous exceptions to the automatic liability to deportation provisions created by s.33. In outline, they are:
   (1) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach:
      (a) a person's Convention rights; or
      (b) the United Kingdom's obligations under the Refugee Convention.
   (2) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.
   (3) Exception 3 is where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the EU treaties.

(4) Exception 4 is where the foreign criminal:

(a) is the subject of a certificate under s.2 or 70 Extradition Act 2003;

(b) is in custody pursuant to arrest under s.5 of that Act;

(c) is the subject of a provisional warrant under s.73 of that Act;

(d) is the subject of an authority to proceed under s.7 Extradition Act 1989 or an order under paragraph 4(2) of schedule 1 to that Act; or

(e) is the subject of a provisional warrant under s.8 of that Act or of a warrant under paragraph 5(1)(b) of schedule 1 to that Act.

(5) Exception 5 is where any of the following has effect in respect of the foreign criminal:

(a) a hospital order or guardianship order under s.37 Mental Health Act 1983 (c. 20);

(b) a hospital direction under s.45A of that Act;

(c) a transfer direction under s.47 of that Act;

(d) a compulsion order under s.57A Criminal Procedure (Scotland) Act 1995 (c. 46);

(e) a guardianship order under s.58 of that Act;

(f) a hospital direction under s.59A of that Act;

(g) a transfer for treatment direction under s.136 Mental Health (Care and Treatment) (Scotland) Act 2003; or

(h) an order or direction under a provision which corresponds to a provision specified in paragraphs (a) to (g) and which has effect in relation to Northern Ireland.

(6) Exception 6 is where the Secretary of State thinks that the application of s.32(4) and (5) would contravene the United Kingdom's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (done at Warsaw on 16 May 2005).

(7) Exception 7 is where:

(a) the foreign criminal is a relevant person; and

(b) the offence for which the foreign criminal was convicted as mentioned in s.32(1)(b) consisted of or included conduct that took place before implementation period (IP) completion day.

6. **Avoiding the deportation provisions:** It is impermissible for a sentencing court to rearrange or otherwise reduce sentences to avoid the application of the automatic liability to deportation provisions.[235]

Example – qualifying sentence for automatic liability to deportation

Of the sentence of three years' imprisonment that I have imposed you will serve no more than half in custody. Ordinarily you would then be released into the community on licence until the end of the sentence, but in your case, since you are a foreign national, and since I have imposed a qualifying sentence, you are liable in principle to automatic deportation to your country. The earliest point at which you may be deported will be on completion of the custodial part of this sentence and before you are released on licence.

[235] *Mintchev* [2011] EWCA Crim 499

However, there may be a delay in your case in the operation of the automatic deportation provisions or there may be a particular reason in your case why the provisions do not apply to you at all, in which case you will be released into the community on licence. In that event you must comply with all conditions on your licence until the end of this sentence, or your deportation, whichever comes first, failing which you may be recalled to custody.

S7.4 Statutory surcharge

Section 42 SA 2020 and SI 2012/1696

ARCHBOLD 5A-377; BLACKSTONE'S E2.31; SENTENCING REFERENCER § 29

General

1. The court **must** impose a surcharge where the conditions are met: s.42 SA 2020.
2. The court must impose the order; it is not an automatic consequence of conviction. Failure to do so results in the order not being imposed.
3. There are multiple regimes and applicability depends on the date of the commission of the offence(s). The latest regime (currently reflected in Schedule 1 to SI 2012/1696 as amended) applies where the offence(s) were committed on or after 14 April 2020.
4. Where a court "deals with an offender" for an offence committed before the relevant date no surcharge should be imposed: (SI 2020/310 art.3); (SI 2019/985 art.3); (SI 2016/389 art.3).
5. Where a court "deals with an offender" for multiple offences where two or more offences fall into different regimes, the regime that applies is the earliest regime: (SI 2020/310 art.3); (SI 2019/985 art.3); (SI 2016/389 art.3 and *Abbott*[236]).
6. The amounts to be imposed are set out in Schedule 1 to SI 2012/1696 (as amended).
7. If an offender was convicted in a magistrates' court of a number of offences and was sentenced by the magistrates for some of those offences but committed to the Crown Court for sentence for another, s.42 Sentencing Code requires both the magistrates' court and the Crown Court to order the defendant to pay a surcharge: *Cuthbertson*.[237]
8. For children, and adults who offended as children and who have turned 18, the relevant date for determining the amount of the surcharge is their age on the date of the offence.
9. The court must order the parent or guardian to pay the surcharge for children aged 10-15 years old, and if the child is 16 or 17 years old the court may order the parent or guardian to pay, unless they cannot be found or it would be unreasonable. s.380 SA 2020.

Imposing the surcharge

10. Where a court deals with an individual for **one or more offences by way of a single disposal** described in column 1 of table 1 in the SI 2012/1696 Schedule 1, and every one of those offences was committed when that individual was aged under 18, the surcharge payable under s.161A of the 2003 Act is the amount specified in the corresponding entry in column 2 of that table.
11. Where a court deals with an individual for one or more offences by way of more than one disposal described in column 1 of table 1 in SI 2012/1696 Schedule 1, and every one of those offences was committed when that individual was aged under 18, the surcharge payable under s.161A of the 2003 Act is:
    (1) where the amount in column 2 of that table corresponding to each of those disposals is the same, that amount;
    (2) where the amount in column 2 of that table corresponding to each of those disposals is not the same, the highest such amount.

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236 [2020] EWCA Crim 516 at [84]
237 [2020] EWCA Crim 1883

S8 Passing sentence

S8.1 Duty to explain release provisions

Sections 243A-264 CJA 2003; s.52 SA 2020

ARCHBOLD 5A-1460; BLACKSTONE'S E2.20; SENTENCING REFERENCER § 33 and 118

Duty

1. There is a statutory duty to explain the reasons for, and effect of, the sentence of the court: s.52 SA 2020.
2. Best practice in the case of an immediate custodial sentence is to explain the period for which the offender will detained in custody, in addition to the mechanism of release (whether automatic or via the Parole Board). Additionally, an explanation of any post-sentence supervision should be given where applicable.

Unconditional release

3. Unconditional release applies to:
   (1) A prisoner serving a sentence of one day.
   (2) A prisoner serving a sentence of less than 12 months who is aged under 18 on the last day of the requisite custodial period.
   (3) A prisoner serving a custodial sentence of less than 12 months imposed before 1 February 2015: s.243A Criminal Justice Act (CJA) 2003.

Example 1: unconditional release

I have sentenced you to one day's imprisonment. You will be released unconditionally once the term of imprisonment is served. That will complete the sentence.

Release on licence from determinate sentences

4. When an offender is released on licence, they are subject to certain conditions, breach of which exposes the offender to recall to custody.
5. The general rule is that an offender who receives a standard determinate sentence[238] who is **not** subject to unconditional release will be entitled to be released from custody on licence no later than the half-way point of the custodial sentence: s.244 CJA 2003. The offender will serve the remainder of the sentence on licence (subject to any "recall"): s.249 CJA 2003.
6. There are exceptions to this general rule:
   (1) Sentences of seven years or more: Where an offender is serving a custodial sentence containing one or more sentences of seven years or more for an offence listed in parts 1 or 2 of Schedule 15 CJA 2003, and which has a maximum of life imprisonment in the case of an adult, the general rule is modified such that entitlement to release is obtained at the two-thirds point of the sentence: s.244ZA CJA 2003. Note that this does not apply

[238] A standard determinate sentence is an ordinary sentence of immediate detention or imprisonment, ie not an extended determinate sentence, life sentence, special custodial sentence for offenders of particular concern or a serious terrorism sentence.

to consecutive sentences each below seven years, even if the total custodial sentence exceeds seven years: *AB*.[239]

(2) Sentences of four years or more: Where the offender is aged 18+ at conviction and is serving a custodial sentence containing one or more sentences of four years or more, but less than seven years for an offence listed in s.244ZA(7) CJA 2003 (certain violent and sexual offences with a maximum sentence of life imprisonment), the general rule is modified such that entitlement to release is obtained at the two-thirds point of the sentence [s.244ZA CJA 2003]. Note that this does not apply to consecutive sentences each below four years, even if the total custodial sentence falls between four and seven years: *AB*.[240]

(3) Terrorist offenders: Where an offender is serving a custodial sentence for offences listed in Schedule 19ZA to the CJA 2003,[241] the general rule is modified such that the offender will be released only on the expiry of the full custodial term: s.247A CJA 2003.

(4) Offenders of particular concern: Where an offender is serving a sentence for offenders of particular concern, the general rule is modified such that the offender is eligible, rather than entitled, to be released at the direction of the Parole Board at the two-thirds point of the custodial portion of the sentence. This is subject to s.247A CJA 2003 in relation to terrorist offenders: s.244A CJA 2003.

(5) Extended determinate sentences: Offenders serving extended determinate sentences are eligible to be released, subject to a direction of the Parole Board upon the expiry of two-thirds of the custodial portion of the sentence: s.246A CJA 2003.

Example 1: determinate sentence under two years

I have imposed a sentence of 12 months' imprisonment. You will be released no later than half-way through the sentence, namely after six months, and the remainder of the sentence will be served in the community. On your release from custody, you will be subject to post-sentence supervision for a period of one year. You must comply with all the instructions given to you, failing which you will commit a further offence punishable by imprisonment.

Example 2: determinate sentence between two years and under seven years to which s.244ZA CJA 2003 does not apply

I have imposed a sentence of four years' imprisonment. You will be released no later than half-way through the sentence, namely after two years, and the remainder of the sentence will be served on licence in the community. You must comply with all the conditions of your licence, failing which you will be at risk of recall to prison to serve the remainder of the term in custody.

Example 3: determinate sentence seven years and over to which s.244ZA CJA 2003 does apply

I have imposed a sentence of nine years' imprisonment. You will be released from custody no later than two-thirds of the way through the sentence, namely six years, and the remainder of the sentence will be served on licence in the community. You must comply with all the conditions of your licence, failing which you will be at risk of recall to prison to serve the remainder of the term in custody.

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239 [2021] EWCA Crim 692 [decided under SI 2020/158 should apply equally to s.244ZA].
240 [2021] EWCA Crim 692 [decided under SI 2020/158 should apply equally to s.244ZA].
241 See s.247A(2) CJA 2003.

Example 4: extended determinate sentence

I have imposed an extended determinate sentence of 14 years' duration in total, comprising a custodial element of nine years and an extended licence period of five years. You will be entitled to release as of right at the conclusion of the custodial element of nine years, but the Parole Board may release you earlier if they decide it is appropriate to do so. The earliest date the Parole Board will consider your case will be two-thirds of the way through the custodial term, namely after six years, and their decision is likely to take into account your progress on this sentence. It will be for the Parole Board to consider whether, when, and on what terms, you may be released, but whenever you are released you will be subject to a licence that continues until the end of the sentence as a whole, namely 14 years. It follows that once you are released you must comply with all the conditions on your licence, failing which you will be at risk of recall to prison to serve the remainder of the entire 14-year sentence in custody.

Example 5: offender of particular concern

I have imposed a sentence of eight years' imprisonment with an extended licence of one year, making nine years in total. You will be entitled to release as of right at the conclusion of the custodial term, but the Parole Board may decide to release you earlier if they consider it is appropriate to do so. The earliest date the Parole Board will consider your case will be after you have served two-thirds of your custodial term, namely five years and four months, and their decision is likely to take into account your progress on this sentence. It will be for the Parole Board to consider whether, when, and on what terms you may be released, but whenever you are released, you will be subject to a licence that continues until the end of the sentence as a whole, including the extended licence period of one year. It follows that once you are released you must comply with all the conditions on your licence, failing which you will be at risk of recall to prison to serve the remainder of the entire sentence, including the extended licence period in custody.

Release from life sentences

7. Offenders who are subject to life sentences, whether a mandatory life sentence for murder or another form of life sentence, are eligible to be released at the direction of the Parole Board upon the expiry of the minimum term imposed by the sentencing judge: s.28 Crime (Sentences) Act 1997.

8. Where an offender is released, they remain on licence for the rest of their life, subject to recall to custody.

9. In cases where the court has imposed a whole life order (rather than setting a minimum term), the offender is not eligible for release.

Post-sentence supervision

10. Adults serving sentences of more than one day but less than two years who:

    (1) are aged 18 or over on the last day of the requisite custodial period;

    (2) are not serving extended sentences or sentences for offenders of particular concern;

    (3) are not serving sentences for an offence committed before 1 February 2015;

    (4) are subject to supervision beginning on the expiry of the sentence and ending 12 months later: s.256AA CJA 2003.

11. Children who:
    (1) are aged under 18 on the last day of the requisite custodial period (the halfway stage of the total sentence) serving a sentence of s.250 detention of a period of less than 12 months; or
    (2) are serving a sentence of detention under ss.250 or 262 of less than 12 months for an offence committed prior to 1 February 2015;
    (3) are subject to a supervision period beginning on their release and ending three months later: s.256B CJA 2003.

Recall to custody

12. The Secretary of State may revoke the licence of a person who has been released on licence and recall them to custody.There is no requirement to specify any conditions before this power is exercised: s.254(1) CJA 2003. This is usually because the offender has:
    (1) allegedly committed another offence;
    (2) breached one or more of their licence conditions; or
    (3) has exhibited behaviour which indicates a risk of serious harm to others.

S9 After sentencing

S9.1 Slip rule

ARCHBOLD 5A-1433; BLACKSTONE'S D20.95; SENTENCING REFERENCER § 117

Section 385 SA 2020

Availability

1. A sentence may be varied or rescinded within a period of 56 days beginning on the day on which the sentence was imposed: s.385(2) Sentencing Act (SA) 2020. Variation must be completed within the time limit. Once a sentence is rescinded, however, there must be a fresh sentencing exercise and so long as the power to rescind sentence was exercised within the time limit, the court may adjourn any new sentencing exercise for an appropriate period and the time limit ceases to apply.[242]
2. The 56-day time limit for varying or rescinding a sentence may not be extended.[243]
3. The power may be exercised even if an appeal is pending, but may not be exercised if an appeal, or application for leave to appeal, has been determined: s.385(3) SA 2020. In considering whether or not a material error was made, it may be relevant that the error might be corrected by the Court of Appeal on the Attorney General's application.[244]

Exercising the power

4. The sooner the slip rule is invoked, the better. Errors should therefore be identified and brought to the court's attention as soon as possible, to enable correction on the same day, if possible, rather than on a subsequent day. The passage of time from the first decision to the possibility of its revision may impact on how the power is exercised.[245]
5. The power to revise has until now vested only in the court as originally constituted, see *Filer*.[246] Amendments to CrimPR 28.4 that came into force on the 7 October 2019 removed that requirement but any variation must be approved by the original sentencing judge and the result of the variation must be dealt with on notice and dealt with in open court.[247] The revision hearing should be in open court in the presence of the offender[248] and listed publicly so that all interested parties may attend.[249] The importance of adopting the correct approach was underlined in *Robinson*.[250]
6. In the case of *O'Connor*,[251] it was held that administrative convenience should not be allowed to degrade those principles, although on the particular facts the court had rightly exercised its discretion to proceed in the defendant's absence where he could not be brought to court within the 56-day period, and counsel on his behalf was fully briefed as to facts and law.

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242 *Gordon* [2007] EWCA Crim 165
243 *AG's Ref (Nguyen)* [2016] EWCA Crim 448
244 *O'Connor* [2018] EWCA Crim 1417
245 *O'Connor* [2018] EWCA Crim 1417
246 [2018] EWCA Crim 2346
247 As confirmed in CPD 9.7.
248 *May* 3 Cr.App.R.(S.) 165
249 *Perkins* [2013] EWCA Crim 323
250 [2022] EWCA Crim 715
251 [2018] EWCA Crim 1417

The scope of the power

7. The power **may** be exercised where the court is satisfied it has made a material error in the sentencing process, whether of law or fact.

   (1) The power is frequently used to enable a formal (even if significant) correction to what would otherwise be an unlawful or incomplete sentence, such as to replace a term of imprisonment for a 20-year-old defendant with detention in a youth offender institution (YOI), or to add a compulsory element that was overlooked – such as a mandatory driving disqualification or the additional licence period that falls to be imposed in respect of an offence falling within Schedule 13 to the SA 2020 (offences for the purposes of the special custodial sentence for offenders of particular concern).

   (2) It may be used to correct factual or legal assumptions made at the time of sentence, such as a factual error over the number of curfew days to be credited; or a legal error as to whether time on remand would automatically be credited towards a detention and training order. A factual error might be a failure to appreciate a matter that was known at the time of the original sentence, or a matter that only came to light afterwards – such as the defendant admitting that they had "conned" the sentencing judge.

   (3) Subject to paragraph 8 below, sentence may in principle be varied by way of a discretionary reduction **or** an increase in sentence, although there will need to be exceptional reasons for a significant increase from the original sentence.

   (4) Where an error has not been induced by anything that D has said or done, the impact of the original sentence or the revision on D are relevant considerations and, in an appropriate case, could be reflected in a modest discount to the proposed revised sentence.[252]

8. The power may not be exercised where the court has simply changed its mind about the nature or length of sentence, nor due to the prospect of an Attorney General's reference. If the judge concludes that the sentence is not wrong in principle and is not unduly lenient, they should not be motivated to revise the sentence simply because there was the possibility of a reference.[253]

Example 1: variation: correcting a formal error in the expression of the sentence

This case has been listed under s.385 SA 2020.

Earlier today I sentenced you to two years' imprisonment. It was my mistake to express the custodial term as "imprisonment". It should have been "detention in a young offender institution" since you were of course only 20 years old when convicted.

I make clear that in arriving at the appropriate custodial term I had fully taken into account your age and I had considered and applied the sentencing guidelines I was referred to, including in particular the Overarching Principles for Sentencing Children and Young People.

The appropriate custodial term remains two years but it must be detention in a young offender institution. To that extent the original sentence is varied.

252 *O'Connor* [2018] EWCA Crim 1417
253 *O'Connor* [2018] EWCA Crim 1417

Example 2: variation: material error of fact resulting in significant increase in sentence

This case has been listed under s.385 SA 2020.

Last Monday I sentenced you to three years' imprisonment on the basis that you had, in your words, "turned over a new leaf" and were committed to working hard in custody to address the issues that you have got. Whilst on your journey back to prison you attempted to escape from custody. You had made an elaborate plan that involved outside help and which must have been set up well in advance of the sentencing hearing. Your conduct on leaving court demonstrates that your promises prior to and at the hearing were entirely empty.

The case has been re-listed to enable me to take into account additional information available to the court which corrects an error of fact that was highly material to your original sentence.

I have heard submissions from both prosecution and defence about the circumstances as they are now known to be. I have concluded that the appropriate sentence for your original offence should be no less than four years and so to that extent the original sentence will be varied.

Example 3: rescission of sentence: material error of fact resulting in adjournment for a fresh sentence exercise

This case has been listed under s.385 SA 2020.

You were charged with one offence of possessing criminal property. I was invited to sentence you on the basis that this was one-off offending by someone of good character who was only peripherally involved in criminal activity and that the offending that fell to be sentenced related to a discrete period. I imposed a suspended sentence order.

Almost immediately after your sentence, however, the officers involved in putting the results into the Police National Computer discovered that someone with a slight variation in the spelling of your name had three ongoing cases in different courts relating to identical conspiracies over the same time period. Their enquiries have now established that you are the defendant in each case, at least one of which is awaiting sentence elsewhere. It follows that the assumptions that both counsel put before me on an agreed basis, and which lay behind the basis for your sentence in this court, were therefore entirely false. Almost everything said on your behalf has to be considered again in the light of this new material.

Accordingly, I have no hesitation in rescinding the sentence that was passed last week. The entire basis of that sentencing exercise was in error. The effect is that the sentence becomes a nullity and the sentencing exercise must start all over again. Your ultimate sentence will be determined on the basis of the material before the court at that future hearing and will not be limited by the outcome you heard last week.

You will therefore return to prison as an unsentenced prisoner. You will not be re-sentenced until the case is ready for that to occur. I will now make directions to ensure that the sentencing exercise can be undertaken as soon as possible.

S10 Breach, revocation or amendment of orders

S10.1 Breach, revocation or amendment of youth rehabilitation orders and effect of further conviction

Section 195 and schedule 7 SA 2020

ARCHBOLD 5A-1287; BLACKSTONE'S E11; SENTENCING REFERENCER § 93

Breach of requirement: schedule 7 paragraphs 4-11 SA 2020

1. The offender will be before the court on summons or warrant.
2. The court must take into account the extent to which the offender has complied with the order.
3. The court should have as its primary objective ensuring that the requirements of the order are completed if there is a realistic prospect of this being achieved.
4. On proof or admission that the offender has failed without reasonable excuse to comply with any requirement of the order the court may deal with the offender in one of the following ways:
   (1) By allowing the order to continue as imposed.
   (2) By imposing a fine of up to £2,500.
   (3) By amending the terms of the order to add or substitute any requirement which it could include in a youth rehabilitation order (YRO) if, applying the relevant assumptions, it were now making such an order in respect of the relevant offence (save that a fostering requirement or extended activity requirement may not be imposed if there was no such requirement in the original order).
   (4) By revoking the order and re-sentencing the offender in any way in which the court could sentence the offender had they just been convicted of the offence (see s.402 Sentencing Act (SA) 2020).
   (5) By imposing a YRO with intensive supervision and surveillance (Schedule 7 para.11 SA 2020).
   (6) By imposing a custodial sentence, where the YRO had a requirement of intensive supervision and surveillance and the offence in respect of which the order was made is punishable with imprisonment.
   (7) By imposing four months' detention and training order (DTO), where the YRO had a requirement of intensive supervision and surveillance and the offence in respect of which the order was made is not punishable with imprisonment.

Revocation: schedule 7 paragraphs 12 and 13 SA 2020

5. The offender or the responsible officer may apply to the court for one or more requirements to be revoked. The circumstances in which such applications are made may include good progress or a satisfactory response to the requirements of the order.
6. If the court is to exercise its powers on the application of the responsible officer, the offender is summoned to appear and, if the offender fails to do so, the court may issue a warrant.

7. The court may either revoke the order or revoke the order and deal with the offender in some other way for the offence which gave rise to the order if it is in the interests of justice to do so having regard to circumstances which have arisen since the order was made.
8. If the court re-sentences, it must take into account the extent to which the offender has complied with the requirements of the order.

Amendment: Schedule 7 paragraphs 14 to 19 SA 2020

9. The offender or the responsible officer may apply to the court.
10. Amendment may be ordered:
    (1) because of any change, or proposed change, of the offender's residence;
    (2) to cancel or replace any requirements. A mental health treatment, drug treatment or drug testing requirement may not be imposed unless the offender has expressed willingness to comply with the requirement, though if the offender does not express willingness the court may revoke the order and re-sentence the offender in any way in which it could had the offender just been convicted of the offence;
    (3) to extend, for up to six months after the original expiry date of the order, the period for completion of any requirement.

Subsequent conviction of an offence: schedule 7 paragraphs 20-23 SA 2020

11. A subsequent conviction of an offence is not of itself a breach of an order.
12. Where an offender is convicted by the Crown Court or committed for sentence and it is in the interests of justice having regard to the circumstances which have arisen since the order was made, the Crown Court may (in respect of any youth rehabilitation still in force) either revoke the order or revoke the order and re-sentence the offender for the offence in respect of which the order was made in any way in which the offender could be dealt with if they had just been convicted before the court.
13. If the court re-sentences the offender, it must take into account the extent to which the offender has complied with the requirements of the order.

NOTE: The Sentencing Council's definitive guideline on sentencing for breach offences (effective 1 October 2018) does not apply to the breach of youth rehabilitation orders.

S10.2 Breach, revocation or amendment of community order and effect of further conviction

Section 218 and Schedule 10 SA 2020

ARCHBOLD 5A-1507 BLACKSTONE'S E12; SENTENCING REFERENCER § 120

Breach of requirement: s.218 and schedule 10 part 2 paragraph 11 SA 2020

1. The offender will be before the court on summons or warrant.
2. The court must take into account the extent to which the offender has complied with the order.
3. The court should have as its primary objective ensuring that the requirements of the order are completed if there is a realistic prospect of this being achieved.
4. On proof or admission that the offender has failed without reasonable excuse to comply with any requirement of the order the court must deal with the offender in one of the following ways:
   (1) By making the requirements of the order more onerous. If the original order did not contain an unpaid work requirement one may be imposed and the minimum number of hours may be 20 rather than 40.
   (2) By revoking the order and sentencing the offender for the offence; the court's powers are those of the Crown Court, had the defendant just been convicted of the offence unless the original order was made by the magistrates' court or the order was made by the Crown Court but in circumstances where the sentencing powers were limited to those of the magistrates' courts. This applies to the breach of any original order, regardless of whether the offence giving rise to the original order carried a custodial sentence or not.
   (3) Where the offender has wilfully and persistently failed to comply with an order which was made in respect of an offence which was **not** an offence punishable with imprisonment, by imposing a custodial sentence not exceeding six months.
   (4) By ordering the offender to pay a fine of up to £2,500.

Revocation: schedule 10 paragraph 15 SA 2020

5. The offender or the responsible officer may apply to the court for one or more requirements to be revoked. The circumstances in which such applications are made may include good progress or a satisfactory response to the requirements of the order.
6. If the court is to exercise its powers on the application of the responsible officer, the offender is summoned to appear and, if the offender fails to do so, the court may issue a warrant.
7. The court may either revoke the order or revoke the order and sentence the offender for the offence; the court's powers are those of the Crown Court, had the defendant just been convicted of the offence unless the original order was made by the magistrates' court or the order was made by the Crown Court but in circumstances where the sentencing powers were limited to those of the magistrates' courts. This power is only exercisable if it is in the interests of justice to do so having regard to circumstances which have arisen since the order was made.
8. If the court re-sentences, it must take into account the extent to which the offender has complied with the requirements of the order.

Amendment: schedule 10 paragraph 16 SA 2020

9. The offender or the responsible officer may apply to the court.

10. Amendment may be ordered:

    (1) because of any change, or proposed change, of the offender's residence;

    (2) to cancel or replace any requirements. A mental health treatment, drug rehabilitation or alcohol treatment requirement may not be amended without the offender's consent but, if the offender does not express willingness, the court may revoke the order and deal with the offender for the offence in any way in which it could have done originally;

    (3) to vary or cancel a treatment requirement (mental health, drug rehabilitation, alcohol) on the report of a medical practitioner;

    (4) for drug rehabilitation reviews to take place without/with a hearing;

    (5) to extend, beyond 12 months, the period for completion of unpaid work: *NPS v Blackfriars Crown Court*.[254]

Subsequent conviction of an offence: schedule 10 part 5 paragraphs 22-25 SA 2020

11. A subsequent conviction of an offence is not of itself a breach of an order.

12. Where an offender is convicted by the Crown Court or committed for sentence and it is in the interests of justice having regard to the circumstances which have arisen since the order was made, the Crown Court may (in respect of any community order still in force) either revoke the order or revoke the order and re-sentence the offender for the offence in respect of which the order was made. The court's powers are those of the Crown Court, had the defendant just been convicted of the offence unless the original order was made by the magistrates' court or the order was made by the Crown Court but in circumstances where the sentencing powers were limited to those of the magistrates' courts.

13. If the court re-sentences, it must take into account the extent to which the offender has complied with the requirements of the order.

NOTE: No examples are provided in this chapter because the consequences of breach etc will be the imposition of orders of which examples have already been given.

NOTE: The Sentencing Council has issued a definitive guideline on sentencing for breach offences (effective 1 October 2018).

[254] [2019] EWHC 529 (Admin)

S10.3 Breach, revocation or amendment of suspended sentences and effect of further conviction

Section 303 and schedule 16 SA 2020

ARCHBOLD 5A-1522; BLACKSTONE'S E14; SENTENCING REFERENCER § 121

Breach of requirement, or conviction of an offence committed during the operational period

1. The offender will be brought before the court on summons or warrant.
2. If the offender has failed, without reasonable excuse, to comply with any community requirement or is convicted of an offence committed within the operational period:
   (1) Unless it would be unjust to do so, the court must order the sentence to be brought into operation either in full or in part.
   (2) If the sentence is brought into operation, it may be ordered to run consecutively to or concurrently with any sentence imposed for any offence of which the offender has been convicted during the operational period. The default position is that it will be imposed consecutively.
   (3) If the suspended sentence order had community requirements and it would be unjust to order the sentence to take effect or order the offender to pay a fine, the court may amend the order by imposing more onerous community requirements or by extending the supervision or operational period.
   (4) If it would be unjust to order the sentence to take effect either in full or in part, the court may allow the original sentence to continue but impose further community requirements or order the offender to pay a fine not exceeding £2,500.
3. The question of whether it would be unjust to order the sentence to take effect is to be addressed by looking at all the circumstances, including the extent to which the offender has complied with the community requirements and the facts of any further offence. If the court finds it would be unjust, reasons must be given.
4. The authorities show that there will generally be some reduction of the term of the suspended sentence if there has been substantial compliance with an unpaid work requirement. There may, however, sometimes be a case in which it is nevertheless appropriate in all the circumstances to activate the suspended sentence in full.[255]
5. Where the activation of a suspended sentence order comprises two or more suspended sentence orders, the resultant sentence imposed will take effect as a single indivisible term of imprisonment: *Bostan*.[256]
6. A suspended sentence order may only be activated once: *Rashid*.[257]
7. A mental health treatment, drug rehabilitation or alcohol treatment requirement may not be amended without the offender's consent.

NOTE: The court has no power (a) to add requirements to a suspended sentence imposed without requirements or (b) to make "no order" on the breach of a suspended sentence.

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255 *McDonagh* [2017] EWCA Crim 2193
256 [2018] EWCA Crim 494
257 [2022] EWCA Crim 328

NOTE: The Sentencing Council has issued a definitive guideline on the sentencing for breach offences (effective 1 October 2018).

Example 1: where suspended sentence brought into operation following breach of requirement, with the term not reduced

It is clear that you have not cooperated with the {specify requirement} at all since the sentence of {specify terms of the suspended sentence} was passed and that you are unable or unwilling to do so. Because of this the suspended sentence will be brought into operation in full: you will serve the sentence of {length of sentence}.

Example 2: where suspended sentence brought into operation following breach of requirement, with the term reduced because of some progress

Although you are in breach of the {specify} requirement of the suspended sentence imposed on {date} and it is not unjust to bring the sentence into operation, I give you credit for the fact that {eg initially you cooperated with the curfew requirement/you have performed some unpaid work} by reducing the length of the sentence. The sentence you will now serve is one of {specify}.

Example 3: where suspended sentence brought into operation following commission of a further offence, with the term reduced

The suspended sentence to which you were subject when you committed the offence of {specify} will be brought into operation but I take account of {eg your cooperation with the curfew requirement/the hours of unpaid work which you performed} by reducing the length of that sentence to {specify reduced term}. This will be served consecutively to the sentence of {specify} which you are to serve for {specify new offence(s)}.

Example 4: where suspended sentence not brought into operation because it would be unjust to do so

Although you are in breach of the {specify requirement} of the suspended sentence passed on {date} I am satisfied that it would be unjust to bring the sentence into operation because {state reasons eg you only failed to do unpaid work on two occasions, and you have since nearly completed all of the hours which were ordered}. In these circumstances, the order will continue but you will {specify, eg do 20 extra hours of unpaid work/be fined £{amount}}.

[The effect of the order should then be explained as per examples given earlier in this work.]

Amendment: schedule 16 part 3, paragraphs 21-27 SA 2020

8. The offender or the responsible officer may apply to the court.

9. Amendment may be ordered:

   (1) to cancel the community requirements if it is in the interests of justice;

   (2) because of any change or proposed change of the offender's residence;

   (3) to amend any community requirement, by cancelling or replacing it with another requirement listed in s.190(1) (though, as above, a mental health treatment, drug rehabilitation or alcohol treatment requirement may not be amended without the offender's consent);

   (4) to change a treatment requirement (mental health, drug rehabilitation, alcohol) on the report of a medical practitioner;

(5) for drug rehabilitation reviews to take place without/with a hearing;

(6) to extend, beyond 12 months, the period for completion of unpaid work.

S11 Appendix I Template for sentence[258]

R. v.
Offences to be sentenced: (note max sentences) **Age at offence/conviction/sentence:**
Prosecution outline: **Impact statement(s):** (victim, family, community or business) **Checklist of guidelines to consider:** (offence-specific guideline, or otherwise general guideline; and all relevant overarching guidelines, eg youth, domestic abuse, mental health, totality, guilty plea etc)

[258] For guidance on the content of sentencing remarks see *Chin-Charles and Cullen* [2019] EWCA Crim 1140

Culpability factors:	**Harm factors:** (actual, intended or foreseen): (see s.63 SA and guidelines)
Guideline category and category starting point:	
Factors increasing seriousness: (including relevant antecedents)	
Factors reducing seriousness:	
Personal mitigation: (and/or assistance to prosecution) **Welfare factors:** (for children only: see S1.7, para 8)	
Appropriate figure for sentence following a contested trial: (after upward/downward adjustment from category starting point for aggravation/mitigation)	

Dangerousness: (if specified offence)
Credit for guilty plea: (applying guideline) **Consecutive/concurrent:** (applying guideline) **Totality (if applicable):** (applying guideline) **Sentence(s) imposed:** (including reasons – s.52 SA 2020)
Suspension possible?: (reasons for doing so, reasons for not doing so – refer to guideline)
Practical effect of sentence:
Time on remand in custody (automatically credited)[259]/qualifying electronically monitored curfew: (identify appropriate number of days, with administrative variation if incorrect)

[259] If imposing a life sentence, time on remand/qualifying curfew time to be deducted from the minimum term must be accounted for at the time of sentence and stated in open court. The exact length of the minimum term (after the deduction of any qualifying remand/qualifying curfew time) must be specified and announced as part of the sentencing process. If later correction is required this must also be dealt with in open court.

Statutory surcharge: (if applicable and/or by reference to date of offence)
Ancillary orders:
PoCA timetable:

S12 Appendix II[260] Communicating sentences to children

1. Introduction

1.1 Appendix II provides guidance for writing and delivering sentencing remarks to children (all those aged under 18 years).

1.2 The term "child(ren)" is used throughout this Appendix to reflect international and domestic law.[261] This Appendix is applicable when sentencing a person who was under 18 years when they committed the offence for which they are being sentenced.[262] It is also likely to be of relevance when sentencing a young adult (aged 18-25).[263]

1.3 Appendix II draws on relevant law and research to set out best practice. It should be read alongside S1.8 of The Crown Court Compendium: Part II Sentencing and SC Guideline: Sentencing Children and Young People and the structured approach to sentencing children set out in *ZA*.[264]

2. Context

2.1 Although sentencing is a key aspect of the criminal justice process for all defendants, it is particularly significant for children, given:

- their **chronological age** (the potential impact on, for example, their education, the ability of legal guardians to provide care, and care/leaving care status);
- their **developmental stage** (including their developing capacities to understand, reason and process information and emotions);
- their **more limited life experience** (the sentencing process takes on greater significance in the context of a shorter life);
- their **unique vulnerabilities** (they are legally, economically, and politically dependent on adults);

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260 This appendix was written by Professor Kathryn Hollingsworth (Newcastle University) and Kate Aubrey Johnson (Barrister, Garden Court Chambers), with assistance from Clare Parkinson (Consultant Speech and Language Therapist). It draws on research conducted by Kathryn Hollingsworth and Helen Stalford ("This is a case about you and your future": Towards Judgments for Children, (2020) 83(5), Modern Law Review 1030-1058) and additional research carried out by Professor Hollingsworth based on interviews with justice-experienced children and young people (Sentencing Remarks for Children, Newcastle Law School Research Briefing No.14) The grey-boxed quotes are from the justice-experienced children interviewed as part of this project (ages given are the age at sentence). Thanks are owed to the children who were interviewed for this research.

261 See for example Article 1 of the UN Convention on the Rights of the Child (hereafter UNCRC); the Children Acts 1989 and 2004; Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 91(6); and the Criminal Justice Act 2003, schedule 21. Other legislation and SC Guideline: Sentencing Children and Young People use the term "children and young persons". It should however be noted that there is no longer any legal significance attached to the differentiation between "children" (historically under 14s) and "young persons" (14-17 years inclusive).

262 Aligning with the applicability of SC Guidance: Sentencing Children and Young People. See *Hobbs and DM* [2018] EWCA Crim 1003; *R v Ahmed & Others* [2023] EWCA Crim 281.

263 Aligning with the applicability of SC Guidance: Sentencing Children and Young People. *Clarke* [2018] 1 Cr App R(S) 52; *Balogun* [2018] EWCA Crim 2933

264 [2023] EWCA Crim 596

- the **unique obligations owed to them** (derived from domestic and international law– see section 3 below);
- the **significant proportion** of children in the criminal justice system who have experienced **adverse childhood experiences** (including neglect or abuse, bereavement, poverty, brain injury, or mental health problems);[265]
- the **over-representation** of care-experienced children and black and minority ethnic children; and
- the **significant proportion** of children in the criminal justice system who have neurodevelopmental conditions and/or speech, language and communication needs.[266]

Children's speech, language and communication needs

1. Children with speech, language and communication needs (SLCN) have particular difficulty understanding their sentence and its requirements, especially the use of technical language and commonly used words such as "breach" or "condition" (see further Table 1). In turn, this can impact on their ability to comply with the sentence, their perception of fairness, and their ability to contribute to other subsequent legal decision-making, including whether or not to pursue an appeal.[267]
2. A significant proportion of children in the criminal justice system have SLCN (between 70-90% compared to about 10% of the general population).[268] There is also a high prevalence of children with neuro-disabilities.[269]
3. The term SLCN encompasses the ability to attend and listen, to understand, to process information, to express ourselves, to produce speech sounds correctly and to understand and use social interaction. Having English as an additional language (EAL) is not included in the term SLCN. Those children with EAL who are diagnosed as having SLCN will have difficulties in their first language as well as in English.
4. Many neurodevelopmental disorders such as a learning disability, developmental language disorder, autism spectrum condition and attention deficit hyperactivity disorder can impact on communication skills. Risk factors for SLCN include low socio-economic status, genetic factors, experience of neglect, abuse and trauma and mental health difficulties, many of which are experienced by children in the youth justice system. Traumatic brain injury is an acquired disability that is common in children in the criminal justice system[270] and is often associated with having SLCN, particularly with decision making, problem solving, impulse control and social communication.

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265 See the research reported in M. Liddle et al (2016) Trauma and Young Offenders: A Review of the Research and Practice Literature: Research Summary (Beyond Youth Custody).

266 For more detail on each of these factors, see SG Guidance: Sentencing Children and Young People.

267 H. Stalford and K. Hollingsworth. "This is a case about you and your future": Towards Judgments for Children, (2020) 83(5): Modern Law Review 1030-1058 and K. Hollingsworth, Sentencing Remarks for Children, Newcastle Law School Research Briefing No.14.

268 YJB and Ministry of Justice (2020) Assessing the Needs of Sentenced Children in the Youth Justice System 2018-19 (London, May 2020); K. Bryan, J. Freer and C. Furlong (2007), Language and communication difficulties in juvenile offenders, International Journal of Language & Communication Disorders, 42(5), pp 505-520; K, Bryan, G. Garvani, J. Gregory,and K. Kilner (2015), Language Difficulties and Criminal Justice: the Need for Earlier Identification, 50(6), pp 763-75.

269 See further N. Hughes et al (2012), Nobody Made the Connection: The Prevalence of Neurodisability in Young People who Offend (Office of the Children's Commissioner).

270 N. Hughes et al (2015), The Prevalence of Traumatic Brain Injury Among Young Offenders in Custody: A Systematic Review, 30(2) Journal of Head Trauma Rehabilitation 94-105.

5. SLCN is a hidden disability. Ninety two per cent of children with SLCN were undiagnosed before entering the justice system.[271] There are many reasons for this, for example, children often learn how to "mask" their difficulties from a young age, or their difficulties might be misinterpreted as "challenging behaviour", "non-compliance" or in some cases "laziness".

6. Children's ability to understand, communicate and participate in proceedings is made more difficult in situations experienced by them as highly stressful. By supporting spoken information with written or visual prompts, the child's anxiety levels can be significantly reduced during the hearing. Moreover, by understanding a child's difficulties and implementing suggested strategies the hearing becomes more accessible (see Table 3 – functional impact of difficulties and strategies to support).

7. It is not uncommon for adults to have concerns that simplifying their vocabulary or supporting verbal information with visuals may be perceived as patronising by older teenagers. Where adults feel comfortable simplifying language or providing visual support for younger children, they might be reluctant to do so for an older child with the same developmental level. However, from a Speech and Language Therapist's perspective, older children are appreciative of the simplified and accessible use of language. Failure to do so can lead to missed opportunities to make information accessible to older children.

Effective participation and communication: legal obligations

8. The obligation to communicate to children in a way they can understand is founded in domestic and international law.

9. Section 52 Sentencing Act 2020 requires courts to give reasons "in ordinary language" and Rule 25.16(7)(b)(iii) of the Criminal Procedure Rules requires that judges explain their sentence in a way that the offender can understand.

10. Part 6 of the Practice Directions provides for a range of adjustments to be made to reduce a child's distress and intimidation and to aid communication and understanding at all stages of the proceedings, including sentencing. This includes: the need to sit in a court in which communication is more readily facilitated; the opportunity for the child to sit with family or other supporting adult in a place which permits easy, informal communication with their legal representatives; court familiarisation visit; and ensuring that the proceedings are explained to the child.

11. Article 6 European Convention on Human Rights (the right to a fair hearing) protects the right to participation. For children, following the decision in *V v United Kingdom,* this must be done in a "manner which takes full account of [their] age, level of maturity and intellectual and emotional capacities and that steps are taken to promote [the child's] ability to understand and participate in the proceedings" and the participation must be "effective" ((1999) 30 EHRR 121 at [84]).

12. The right to effective participation extends to sentencing and to the communication of the sentencing outcome. In *SC v UK,* the European Court of Human Rights held that '"effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, "**including the significance of any penalty which may be imposed**" (emphasis added) (*SC v United Kingdom*[272]).

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[271] Bryan et al 2007, above n. 8.
[272] (2005) 40 EHRR 10 at [29]

13. The Court of Appeal in *Chin Charles and Cullen*[273] confirmed the need for judges to write their sentencing remarks primarily for the offender, in ways the defendant can understand (with a particular focus on being concise and avoiding references to case law).
14. The Court of Appeal in *ZA*[274] reminded courts that sentencing children requires a "root and branch" difference of approach and that when sentencing a child this means "taking care to explain the sentence, and the reasons for it to them (emphasis in original), in a way and using words that they can easily grasp".
15. SC Guideline: Sentencing Children and Young People requires sentencing courts to have regard to the child's welfare. A specific consideration is: "any speech and language difficulties and the effect this may have on the ability of the child or young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction".
16. Equal Treatment Bench Book (July 2024), Introduction, para. 8 states that "Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed".

Communicating with children before, during and after the sentencing hearing

17. Judges are experienced in conducting ground rules hearings in cases where a witness has additional communication needs. A similar approach can help child defendants to understand the sentencing process and the sentence outcome. Where appropriate, invite the defence to "provide information about the defendant's welfare" (CrimPD 6.4.2(j)). As noted in paragraph 14, this may include information about "any speech and language difficulties" that impact the child's ability to understand the sanction.

18. Before the hearing

- Court listing should ensure that there is sufficient time for the judge to read and consider all reports and prepare sentencing remarks in age-appropriate language. Consideration should also be given to listing separately, and as a priority, the sentence of any child(ren) jointly convicted with adult co-defendants.[275]
- Determine whether the child has any diagnoses which may impact on their ability to effectively participate in sentencing.
- Where there is no diagnosis, determine whether there has been any assessment of the child's ability to effectively participate.
- If an assessment has not been carried out, consider inviting the defence to instruct an expert, for example a speech and language therapist or psychologist.
- Where there is no formal report on communication needs, request information from the child's lawyer about the communication strengths and needs of the child, and what helps the child to understand and express themselves.
- Gather as much information about the child as possible. If, having read the pre-sentence report (PSR) further information is needed, this might be done by addressing questions through the youth offending team (YOT) or requesting a local authority report under s.9 Children and Young Persons Act 1969.

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273 [2019] EWCA Crim 1140
274 [2023] EWCA Crim 596
275 *ZA* [2023] EWCA Crim 596 at [82]

- Ascertain the child's wishes regarding their participation. For some children, the legitimacy of the process is enhanced when the court speaks directly to them, and they are given the opportunity to speak, rather than other people speaking **about** them. Other children will not want to speak in open court but may want to write a letter to the judge.
- If the child does wish to participate directly during the process, ensure their lawyer/counsel prepares them for this (it may be helpful to provide some simple, open-ended questions to the lawyer/counsel before the sentence hearing).

19. During the hearing

- Explain to the child what is happening at every stage of the sentencing hearing. It can be helpful to explain your role as a judge and that you are neutral.
- Check who is in court to support the child. Where the child is "looked after", it is regarded as good practice for this to be the child's allocated social worker.
- Check that the child has read the PSR – they should have been given the opportunity to read the report before it is finalised. If this has not happened, give the child or their family the opportunity to correct any mistakes.
- Make necessary adaptations to facilitate participation. The requirements for children's effective participation in CrimPD 6.4.2 apply.[276] These include sitting in a court in which communication is more readily facilitated; familiarisation visit; if live link is used, a practice session; opportunity for the child to sit out of the dock with a parent/guardian (or another family member or supporting adult) and near advocate; allow breaks to accommodate the child's concentration and to check the child's understanding; and the removal of wigs and robes. In addition, the Court of Appeal recommends that, so far as possible, the judge should be seated on a level with the child.[277]
- Be aware that the majority of children will have SLCN. Use simple vocabulary, short "chunks" of information and leave pauses for them to process information. Refer to Table 3 for suggestions on how to support understanding.

20. After sentencing remarks have been delivered

- Check the child has understood and allow them to ask questions. Avoid asking the child "have you understood?". Instead, ask questions intended to ascertain their understanding. For example: "So when will you first have to see the YOT?", "When is your first appointment?", "When are you allowed out of the house?", "What is happening to you when you leave this court?", "How long will you have to spend in custody?".
- It may be helpful to liaise with an intermediary to communicate the sentence in a visual or pictorial manner. This can help the child to understand the sentence and comply with any requirements (especially for a youth referral order).
- CrimPD 9.6.1 encourages sentencers to provide child defendants with a written version of the remarks. This allows the child to read the remarks later with their parents, guardian, and/or YOT worker. This aids the child's ability to understand and increases other benefits that may come from child-sensitive sentencing remarks (such as increasing the child's perception of fairness and their emotional reconciliation with the decision).

[276] [2023] EWCA Crim 596 at [86]
[277] [2023] EWCA Crim 596 at [82]

Sentencing remarks

21. Structure and length of sentencing remarks

- It may be helpful to set out the sentence outcome (the type and length of sentence) at the beginning of the sentencing delivery. This is obviously good for comprehension and can help to reduce the child's stress and anxiety, allowing them to better focus on and understand the rest of the sentencing process. It can be helpful to then have a pause or a break to allow the child to digest the information (if possible, with the support of an adult). This can help the child to digest the sentence and to engage with the remainder of the process, even if an unexpected or unwelcome sentence is to be imposed.
- Clearly structure and signpost your sentencing remarks, using sub-headings.[278]
- Be concise. In very complex cases, consider providing separate, simplified remarks for the child. Explain to the child that you will speak to them first, and then speak for a longer time to the lawyers and the child does not need to pay attention at that point. It is recommended, however, that in most cases the entirety of the remarks should be written in a way the child can understand.
- **Provide a written copy of the sentencing remarks to the child being sentenced, or alternatively a note of the outcome.**

22. Language and explanation

- The Court of Appeal in *ZA* noted that: "Remarks which properly speak to the child or young person before the court require time to get right but experience shows it can make a real difference".[279]
- Consult the list of alternative words or explanations for words/phrases commonly used in sentencing, many of which children do not understand (eg sentence, culpability, custody, aggravating, mitigating, licence, parole) – [see Table 1].
- Avoid language that may be interpreted as stigmatising or labelling, including describing the child as a youth, young offender, criminal or juvenile. Take care to describe the behaviour and not the child.
- Signpost clearly the sentence and sentence length. It can be particularly difficult for children to understand complex calculations of sentence length, so try to do this as simply and clearly as possible.
- Explain simply the mechanics of the sentence: the factors taken into account and relevant reductions. This should include the relevant welfare factors.
- **Include where possible the child's strengths, any positive behaviour, and a focus on the child's future beyond their offending.**

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[278] See for example the sentencing remarks of Mr Justice Coulson, *William Cornick* Leeds Crown Court, 3 November 2014.

[279] [2023] EWCA Crim 596 at [83], [88]

23. For an example of sentencing remarks that reflect the principles set out here, endorsed for being audience sensitive by the Court of Appeal[280] please see below:

I am going to deal with sentence in three stages. After I have passed sentence, these sentencing remarks will be provided to BAZ, the lawyers and anyone else who wishes to have a copy. It must be remembered that BAZ is a child and, pursuant to an order made under s.45 of the Youth Justice and Criminal Evidence Act 1999, the publication of anything likely to lead members of the public to identify BAZ as a person concerned in these proceedings is prohibited.

The stages by which I am going to deal with sentence are:

- **Stage 1**

  The sentence.

- **Stage 2**

  Reasons set out in terms that BAZ and other interested parties will understand.

- **Stage 3**

  Reasons designed for the lawyers to understand.

Stage 1

BAZ – the crime you committed was so serious that I have decided that I must pass a sentence which will affect you for nine years. That is until you are 24 years old. The sentence is called an extended sentence. There are two parts to this sentence. The first part is a custodial sentence. That is for five years. This means that you are going to remain in Vinney Green at least for now. The longest time you will be in custody is five years. The shortest time you will be in custody is 40 months, but that includes the time you have already been at Vinney Green. This means the shortest time you will be in custody is about two years, which will take you up to around the time of your 18th birthday. Whether you are allowed out after 40 months, or whether you have to stay in custody for the whole five years, will depend upon how you behave and whether it is safe for you to be released. When you are told you can leave custody you will be on extended licence for at least four years. Being on extended licence means that there are rules, or conditions, that you will have to follow. If you break those rules whilst you are on licence you may have to go back into custody.

This means the total length of your sentence – the custody part and the licence part – is nine years.

Stage 2

BAZ, when you killed X he was just 24 years old. This is the same age you will be when your sentence comes to an end. He was young, he was caring, he tried to care for you, he had hopes and dreams for the future, he was talented and loved by his family and friends. By taking his life you robbed X of his future and you have broken the hearts of those who loved him. You have put on them a heavy burden of grief that they will carry for all their remaining days. You have also put a heavy burden on yourself because you will have to live with the responsibility of what you did for all your life too. You have done a terrible thing and you have caused unbearable harm to very many people. He didn't deserve this and his family and friends did not deserve the pain you have caused. The sentence I pass cannot make that right and there is nothing you can do that can make it right.

[280] *BAZ* 2022 EWCA Crim 940

I have read and reread the letter you wrote to me. Your letter shows me that you understand the harm you have done and that you are sorry for what you did. It is right that you feel like that. It shows you do have a heart and that you could still have a future worth living.

I decided I had to give you a custodial sentence because you went after X with a knife and you stabbed him, and because of the harm you caused. I had to think about a lot of things when I decided how long you should be in custody. I thought about your actions on the day, all that I know about your life up to the point when you killed X and everything that the doctors and the probation officer have said about you. I know that you have had a terrible life up until now. You have experienced things that no one should have to do. You have been hurt and you have been damaged. I also thought very carefully about your age, that you are only 15 now and were only 14 when you committed this crime.

I also had to think about a lot of things when I decided that you should be on licence for an extra four years. That is, for how long you should have to follow rules when you come out of custody. I thought again about everything I know about you. I thought especially about how you struggle to control yourself at times and the risk that you might again hurt someone very badly.

I could have decided to sentence you to a what is called detention for life. This would have meant you would not know how long you would be in custody. Some people will think you deserve a life sentence because those who loved X will have a life sentence of grieving. But I thought about your age and your circumstances and I do not think you should have a life sentence. But you should understand that the crime was so serious that I could have given you a life sentence and very nearly did.

I want to know how you get on during this sentence. I am ordering that the youth offending team send me a report every three months telling me how you have been doing. I would be really pleased to hear that you are working hard at your studies, growing up and behaving sensibly. I would also be really pleased to hear that you are keeping out of trouble with the others at Vinney Green and showing that you can be a better person. You need to make yourself responsible for your future. You now have choices. You need to make the right ones.

I was grateful for the letter that you wrote to me. It meant I could have some idea of who you are and who you might become. It meant I wasn't just seeing you through the words of doctors, probation officers, lawyers and police. If you wanted to write to me now and then to tell me how you are doing that would be good. I am not saying you have to, it is up to you. It is one of those choices you can make, but if you do write I will read what you say and I will be grateful to you.

BAZ – the rest of what I have to say is going to be in lawyer speak. Even if you do not follow it today you will have it in writing and you will understand it in time. I will also ask that your lawyers make sure that you understand the sentence and the reasons as I am now going to explain them.

[BAZ told that should she wish to leave the dock and go into the custody holding area then she can do so.]

Stage 3

This is on any view a complex sentencing exercise. It engages a number of guidelines and in particular difficult issues as to the level of retained responsibility, the relevance of the defendant's age, both in respect of the assessment of retained responsibility but also generally, and the assessment of future risk. Great significance attaches to the fact that this case involves sentencing a child, and one who, through no fault of her own, is highly damaged by the many terrible events that she has experienced during her young life. It is important to bear in mind that this is a sentence being imposed upon a child but in respect of a very serious crime.

It should not be thought by those who loved X that in the course of addressing some of the legal issues that arise I am at any stage forgetting the tragedy that his death represents. The pain of those who loved X must be unbearable. He was young, he was talented and he had everything to live for.

I am not going to recite the facts in detail as they were fully opened by the prosecution; repetition of these tragic events would serve no purpose as they have been referred to in open court and with an appropriate level of detail. It does seem to me important to refer to some of the points made by both the prosecution and the defence that have particular significance to the issues I have to address. The fact that I do not mention every point that has been made does not mean I have not got them in mind – all the circumstances of this crime, and of the offender, are at the forefront of my thinking in this case.

So far as the defendant is concerned I have read a very substantial volume of material detailing her childhood experiences, the impact those have had on her, the mental health challenges that she faces and her prospects for the future, particularly in the context of how she has coped with her time at Vinney Green.

So by way of highlighting some key points the following merit specific mention:

1. The circumstances of the defendant on the day she killed X have to be assessed in the context of her lived experience of life. In a supplementary note, expanding the content of paragraph 15e of the original written submissions, the defence highlight some of the worst things that BAZ has experienced. I will not review what is there set out but suffice to say BAZ's childhood has been beset with trauma, has involved sexual and physical abuse, has lacked any true love or nurturing and she has been let down at every turn by those who should have looked out for her.
2. Unsurprisingly, the behaviour of the defendant reflects the life that she has lived. The prosecution have introduced evidence of things she has done and behaviour that she has exhibited prior to the night of the killing. In so far as they are reflected in her record, or are documented by way of body worn video and the like, the defence accept the behaviour can be considered and may have some potential relevance. The defence document sought to explain how BAZ has come to be who she is. She has been a child angry at the world and easily triggered – which is as depressing as it is unsurprising.
3. BAZ has **severe** PTSD, she has been diagnosed as having a learning disability, she suffers from a conduct disorder and probably ADHD. Developmentally and emotionally BAZ is assessed as having the cognitive age of a seven or eight year old, markedly lower than her chronological age.
4. BAZ has not had the benefit of any effective social boundaries. She has been what might be termed a "lost child", free to hang out with anyone she chose and inevitably she would choose the wrong people – to who else could she turn?
5. On the day of the killing, BAZ was alone in her mother's accommodation. She would not have felt safe living there for reasons the defence identified. She did not know that X was going to come to the flat. She was emotionally unstable, having caused damage to her mother's bedroom.
6. X was understandably cross when he saw the state of his partner's room. He kicked the defendant's bedroom door and swore about what she had done. What followed arose from the defendant's reaction to that stimulus.
7. X left the flat and the defendant did not follow for just less than a minute. She had time to think during that period. The defendant had choices. The defence at one point suggested

that the defendant was “incapable” of stopping herself from doing what she did. I think that overstates the position and of course in terms of future risk the defence inevitably seek to argue that the defendant can change and learn self-control.

8. The defendant chased after X but before exiting her bedroom and setting off in pursuit she chose to arm herself with a knife that she kept under her pillow.

9. It took the defendant up to a minute longer until she was able to catch up – X was walking at a normal pace but the defendant was running quickly in a determined pursuit.

10. The defendant was heard to be repeatedly shouting about the fact that X “keep kicking down my fucking door fam”.

11. As she closed in on X she was shouting threats that she would stab him: “I will fucking stab you fam, I will stab you bruv, don’t think I am not afraid to stab you” and “Fucking doing that to me, doing that in the house, fucking calling my mum, telling mum, I’ll stab you up you know, I’ll stab you”.

12. X sought to calm the defendant. He raised his arms in a placatory manner. He said to her “What’s wrong with you BAZ, what’s wrong with you?” He spoke in measured tones and did not react aggressively at all.

13. BAZ would appear to have been face-to-face with X for a few seconds before she punched out stabbing him, inflicting a single fatal wound.

14. BAZ returned to the flat and packed a few things to take with her, clearly intent on fleeing the area. She took the knife she had used to kill X with her when she left.

15. She did not summon assistance for X although it is clear she knew she had stabbed him and knew that the injuries were serious and possibly fatal. As she was leaving a neighbour asked her what was going on and she said “I just stabbed him in the chest and he’s in the alleyway”. She was described as speaking without emotion. The neighbour was able to lead the police to where X lay.

16. In telephone calls made 30-60 minutes after the killing BAZ evidenced clear emotional distress, stated that she was going to be sick, said she had done “something really bad”, that she had not meant to and that she did not know what she was doing.

17. BAZ sought to evade the police for as long as she could. She went to stay with someone the defence described as a stranger to her. However it was she came to be with him, he was an unsuitable person to have responsibility for this child.

18. BAZ’s mobile phone has never been examined because she has refused to provide the police with the PIN. She faced proceedings in respect of that and was conditionally discharged for an offence arising from that refusal. Given that she was in custody at the point of sentence the disposal was effectively a token one. She has suggested her motivation in adopting the stance she chose was because the phone would reveal the activities of some of her criminal contacts and she did not want to get them into trouble.

19. Some of the defendant’s psychiatric issues had been diagnosed even before the killing. The doctors instructed by the prosecution and the defence agreed that the defence of diminished responsibility applied: “At the time of the incident, BAZ’s PTSD, learning disability, conduct disorder and probable ADHD, substantially impaired her ability to form a rational judgment and exercise self-control, which provides an explanation for her actions on the night in stabbing X”. In opening, the prosecution mentioned more than once that the decision on the part of the Crown to accept a plea to manslaughter was a “finely balanced” one. I tend to disagree. Acceptance of a plea to manslaughter in the circumstances of a

child defendant where the psychiatrists were in agreement as to that being the appropriate verdict seems to me the obviously correct decision for the prosecution to have made.

20. The defendant pleaded guilty to manslaughter on the first occasion of being arraigned. It was always obvious that such a plea would be forthcoming. The defence were right to get medical reports ahead of arraignment. The defendant is entitled to and will get the maximum credit for her plea of guilty. No one suggests otherwise.

I turn now to the manslaughter guideline. The first step is to identify the level of retained responsibility. One of the issues in respect of that is the question of the extent to which the defendant's age at the time of offending should play into that assessment. It is notable that "age and/or lack of maturity" is listed under the heading "Factors reducing seriousness or reflecting personal mitigation". It is difficult to divorce from the analysis of the correct level of retained responsibility the fact that at the time of the offence the defendant was only 14, but with an even lower developmental and emotional age assessment. Equally, it seems to me not irrelevant that the defendant's age comes into play later both as a mitigating factor but also by way of the application of the youth guideline, and the imposition of a sentence set at between a half and two thirds of what an adult offender would receive.

The prosecution contend for a "high" level of retained responsibility and it is in this context that emphasis was placed on what was said to be the "finely balanced" decision to accept a plea to manslaughter. The defence on the other hand suggest I should conclude this case falls within the "lower" category. I have decided that in the context of the psychiatric evidence as to the degree to which the defendant's mental state impacted on her actions on this day the case falls somewhere between the "lower" and "medium" levels of retained responsibility. Consequently, a starting point of around 13 years would appear to be appropriate.

In terms of aggravating factors, and whilst being conscious of the need to avoid double counting of matters that have already contributed to the identification of the starting point, there would appear to be some – use of a weapon, previous convictions, the fact that the defendant was subject to a court order at the time of the offence, her actions after the event departing the scene and the area leaving X alone to die, avoiding arrest and then refusing to cooperate fully with the police investigation. There are mitigating factors such as remorse, her age and lack of maturity and her general lived experiences that are inextricably linked to the events of this day.

Balancing all those factors I have concluded that for an adult offender the sentence after a trial would be one of 15 years. That is the shortest term commensurate with the seriousness of the offence.

I turn next to the question of dangerousness. It is realistically and sensibly conceded by the defence that the defendant is currently properly to be assessed as "dangerous". There is currently a high likelihood of her committing further serious offences and a high risk of her causing serious harm thereby. The author of the pre-sentence report states at paras 5.3-5.5:

> 5.3 The definition of high risk as outlined in the West Sussex YJS Risk and Safety Policy 2021 states that "the potential event could happen at any time and the impact would be serious". Whilst there has been a marked reduction in frequency of aggressive and violent behaviour, BAZ does still take opportunities to that arise to avenge perceived wrong doings. She admits that she "sometimes gets thoughts", "thinking of ways to hurt people". This can include people she cares about and those "being nice to me".
>
> 5.4 In my assessment it is the continued presence of external controls and monitoring currently provided by Vinney Green SCH which is managing this risk. A significant period of intervention to address the underlying issues could build BAZ's internal controls and positively impact the ability to manage and reduce this risk in the future.

5.5 It is my view that if BAZ was in the community at the current time, without the current external controls in place, the risk would be very high – the potential event of risk of harm to others would be more likely than not to happen imminently. I am concerned that a similar serious further offence could happen again at any time if BAZ was emotionally triggered.

The defence submissions make reference to a number of cases which highlight the self-evident point that children have a greater capacity to mature and change than may be the situation with an adult, and that a court should be slow to conclude that a child defendant is beyond the capacity to be rehabilitated over time given appropriate input. Equally, as the defence contended in the context of analysing the level of retained responsibility, and the capacity of the defendant to control herself when triggered, the depth and severity of BAZ's issues mean that she will face a very real challenge in seeking to recover from her current state of emotional turmoil. She will need to develop a greater capacity to react more appropriately to the sort of triggers that she will inevitably face in the future. This may be particularly so in the context of the lifestyle she may choose to adopt, or even be unable to resist, given the circles in which she has found herself being forced to seek comfort in the past. There are going to be some significant challenges as and when she resumes living in the wider community.

Because the defendant is assessed as being dangerous s.258 of the Sentencing Code falls to be considered. That provision states:

"258.— Required sentence of detention for life for offence carrying life sentence

(1) This section applies where—

(a) a person aged under 18 is convicted of a Schedule 19 offence (see section 307),

(b) the court considers that the seriousness of—

(i) the offence, or

(ii) the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of detention for life, and

(c) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences (see sections 306(1) and 308).

(2) The court must impose a sentence of detention for life under section 250

(3) The pre-sentence report requirements (see section 30) apply to the court in relation to forming the opinion mentioned in subsection (1)(c).

(4) An offence the sentence for which is imposed under this section is not to be regarded as an offence the sentence for which is fixed by law."

In assessing the seriousness of the offence s.63 of the Code states:

"s.63. – Where a court is considering the seriousness of any offence, it must consider—

(a) the offender's culpability in committing the offence, and

(b) any harm which the offence—

(i) caused,

(ii) was intended to cause, or

(iii) might foreseeably have caused."

In my judgment this offence, looked at in the context of the age and culpability of this defendant, does not justify or require me to impose a sentence of detention for life on this child.

I turn then to consider whether a determinate term meets the sentencing needs here. I bear fully in mind all that the guideline on Sentencing Children and Young People has to say. The relevant passages are set out extensively and helpfully in the written submissions provided on behalf of the defendant and so are a number of relevant authorities. They are very familiar but equally, taking time to review this helpful guidance always pays dividends and that I have done.

Even taking all that into account in the defendant's favour I am quite sure that given the extensive work that needs to be undertaken with the defendant a determinate sentence alone would fail to sufficiently address the issue of future risk. In my judgment this case cries out for the imposition of an extended sentence of the nature that I identified in Stage 1 of these sentencing remarks. I indicated that the extended licence period will be one of four years. In my judgment that is an appropriate and proportionate duration of extended licence in the context of the necessary custodial term and the work that will be required to address future risk.

I am fully conscious that this could mean the defendant has to transition into an adult prison. Whether that happens will depend on the assessment of the parole board as at the two thirds stage of the custodial term. For reasons that I will spell out shortly that will be at or around the time of that potential transition. The parole board will be in the best position to assess at that stage what is the right thing to do. As I have already mentioned from the defendant's perspective this will be a decision upon which her conduct during this sentence will have a significant impact.

The next matter I need to address is the discount for youth as it is termed.[281] As I have already indicated the notional sentence prior to the youth discount upon which I have settled is 15 years. For a child of 14 as at the date of the offence, with a developmental age around half that, in my judgment the right adjustment is to a period of custody half that which would be appropriate for an adult ie seven years six months. To that credit for plea has to be applied and that reduces the sentence to one of five years. The extended licence part of the sentence is four years. Thus it is that I reach the sentence that I announced at the start of these remarks.

The defendant has to serve at least two thirds ie 40 months of that term. The period she has been in custody will, however, count automatically[282] towards that ie 16 months. That is because:

1. she has been on remand (under s.91(4) of LASPO 2012) at Vinney Green which is a secure children's home [see remand order];
2. a secure children's home is "youth detention accommodation" [see s. 102 LASPOA 2012];
3. references to a person being remanded in custody for the purposes of s.240ZA includes reference to their being in "youth detention accommodation under section 91(4) of LASPO".

Accordingly, she will first fall to be considered for release in about two years, which will be around the time of her 18th birthday. Whether or not she is released at that point is going to depend on how much progress the defendant is able to make in the context of the assistance those responsible for her during this sentence will provide.

I do not make any order for costs or compensation.

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281 As to order in which this should be done see *RB* [2020] EWCA Crim 643

282 In contrast to the position that arose in *A* [2019] EWCA Crim 106

I do make a forfeiture order in respect of the knife the police recovered from the defendant and her mobile telephone. In normal circumstances the surcharge payable in this case in accordance with s.42 of the Code would have to be paid by the defendant's parent or guardian – see s.380 of the Code. However, in accordance with s.380(2)(b) I consider it would be unreasonable to make such an order in this case and accordingly no surcharge order will be recorded.

Table 1: checklist for sentencing children

Child-sensitive process	
Prioritise for listing the sentence of children and ensure court listing gives sufficient time to read all reports and prepare remarks using child-sensitive language.	✓
Determine whether the child has any diagnosis or communication needs and provide the child with the necessary support (see Tables 3 and 4).	✓
Ensure all relevant information has been obtained, including from the local authority; ensure that the child has had the opportunity to read the PSR before finalised.	✓
Ascertain the child's wishes re participation; facilitate participation by ensuring the child is prepared, explaining what is happening and making necessary adaptations (eg allow the child to sit with family/supporting adult, breaks to check understanding etc).	✓
Use simple vocabulary (Table 2), short "chunks" of information and leave pauses for them to process information. Refer to Table 3 and 4 for suggestions on how to support understanding.	✓
After sentencing remarks have been delivered, check the child has understood and allow them to ask questions.	✓
Consider liaising with an intermediary to communicate the sentence visually/pictorially.	✓
Provide the child with written copy of sentencing remarks.	✓
Consider reserving any breach hearing.	✓
Style and content of sentencing remarks	
Tell the child the sentence outcome at the outset, allow a break to give time to digest (if possible, with the support of an adult). Clearly structure and signpost remarks (sub-headings are helpful).	✓
Be concise – in more complex cases, consider separate, simplified remarks for the child.	✓
Use simplified language and provide explanations for complex or legal terminology where this must be used (see Table 2).	✓

Explain simply the mechanics of the sentence: the factors taken into account and relevant reductions.	✓
Explain in ways that the child can understand the mitigating and aggravating factors and any discount for pleading guilty, and explain further discount for child's age on date of offence.	✓
Explain custody is a last resort and for the shortest possible time.	✓
Use the child's first name; talk directly to them and make eye contact.	✓
Provide information about the child's individual background and any specific vulnerabilities or factors that may be relevant to their behaviour.	✓
Use non-stigmatising and non-labelling language; condemn the behaviour but not the child.	✓
Preserve the child's anonymity.	✓
Encourage the child to take responsibility for their behaviour.	✓
Include a focus on the child's strengths and any positive behaviour.	✓
Include a focus on the child's future prospects (give hope) and reintegration.	✓

Table 2: Dictionary for children (words commonly used in sentencing)

Actions	Something you have done or are going to do.
Accused	The person that someone says has done wrong.
Adjourn	To finish the meeting or court hearing for now and start again at another time.
Aggravating factors	Reasons why your sentence could be longer or more severe.
Allegation	What someone says happened.
Alleged crime/offence	The crime/offence that someone says has happened. This has not yet been proven in court.
Appointment	A meeting that happens at a particular time.
Attack	A violent action against someone or something.
Attend	To go to a meeting or place.
Bail	You can leave the police station or court but you have to follow certain rules. You have to go back to court on a certain date.
Barrister	A professional who talks to the court for you, or for the police. Your barrister is trying to help your case.
Breach	Not following the rules, for example not turning up at agreed meeting times.
Category starting point	The “normal” sentence a person would get if they were found guilty of a particular crime.
Circumstances	The who, what, where of an event/situation.
Co-defendant	Another person who is in court for the same crime as you.
Compensation	Giving money back to make up for a loss, injury or damage.
Comply	You must follow the rules.
Concurrent	At the same time.
Conditional	Something that will happen if certain rules are followed first.
Conditions	The rules that you must follow. If you break these rules, you may go back to court.
Contract	An agreement between two people. It says what you will do. It says what the other person will do. You have to follow the rules of the contract.
Conviction	Where a court decides a person did a crime.

Convince	To make someone believe something.
Court	A place where there is a judge and decisions are made to do with the law. Here it is decided if someone is guilty or not guilty of a crime and told what will happen next.
Court order	Rules given by a court or a judge telling a person what they have to do.
Counsel	Another name for the barristers or solicitors who are working on your case.
Criminality	Behaviour which is against the law.
Culpable/admitting culpability	When someone takes responsibility for doing something wrong.
Culpability	Things that make someone more responsible for doing something wrong.
Custody	A secure place that you can't leave until you are told.
Defence	The people helping you with your case.
Detention during His Majesty's Pleasure	This is a custodial sentence. This means that instead of going home you will go to a secure place. You will not be allowed to leave until you are told you can by the Parole Board. The Parole Board are a group of people who decide if it is safe or not for a person to leave custody [see also the definition of being on licence below].
Detention and training order	A detention and training order has two parts. The Detention part means you will spend (eg) six months, half a year, in custody (a secure place). After you have spent six months in custody, you will be allowed to leave. Then you will have six months on supervision in the community. This is the training part. Supervision in the community means you will have to meet with your YOT worker when they tell you.
Exclusion zone	An area that the police say you cannot go.
Failed to attend	You did not go to an appointment or a court hearing.
Guilty	The court decides that you have done something against the law and that you are responsible.
Impose	To make someone do a thing.
"In your defence"	Something that makes your actions seem better.
Joint enterprise	Being part of a (criminal) team, working together to do a crime.
Lawyer	Barristers and solicitors are types of lawyer [see definitions for barrister and solicitor].
Legal adviser	A person that can give you information about the law.

Liable	When the law says you are responsible for something.
On licence	You are still serving your sentence but you can live in the community instead of being in custody. When you are on licence, there are rules you must follow. If you break any of these rules, you can be asked to go back into custody.
Known to police	It has been recorded (written down) that you have previously had contact with the police, for example by being stopped and searched.
Legal rights	What the law says must happen to protect you when you are dealt with by the police or the courts, like knowing what the case is about and when you have to go to court next.
Magistrate	A judge.
Mitigating factors	Reasons why your sentence could be shorter or less severe.
Not guilty	You have NOT done something against the law, or the police cannot show the court that you have done.
Offence	Something wrong and against the law.
Order	Rules you have to follow and things you have to do.
Parole	When you can leave custody and then finish the sentence while living at home [with your gran etc].
Parole Board	A group of people who decide if you are ready to leave custody (or finish the custodial part of your sentence).
Plead guilty/not guilty	Plead guilty – You say that you **did** the crime. Plead not guilty – You say that you **did not do** the crime.
PTPH	Plea and trial preparation hearing. This is often when you will be asked to say if you are guilty or not guilty.
PSR	Pre-sentence report. This includes information about you and your situation.
Punishment	What you have to do because you have done something wrong.
Referral order	A set of rules that you have to follow and things you have to do. It can last for three months or up to 12 months.
Release	To let out. For example, to be “released from custody” means to be “let out of custody”.
Relevant	Something that is important to a situation/to what has happened.
Remand	When you are kept in custody until you go to court.
Remorse	To feel and show that you are sorry for something you have done wrong.

Reparation	Work that you have to do because you have done something against the law. You don't get paid.
Report	Spoken or written information about what that has been seen, heard or done. Sometimes the court will ask for a report, and this might tell the court something, or suggest what action should be taken.
Responsibility/ taking responsibility	You having control or care of someone or doing something. Accepting that you have done something wrong.
Restorative justice	To make amends for what you did, and show that you accept that you did something wrong and are sorry.
Revocation	When something is cancelled or taken back.
Self-defence	Protecting yourself from an attack.
Sentence	What the judge or magistrate tells you that you have to do when you have done something that is a crime.
Solicitor	A professional lawyer like a barrister who gathers information, gives advice, and sometimes talks to the court on behalf of you or the police.
Statement	The version of events told to the police which is written down or video recorded.
Statutory	Something written down in the law.
Supervision	Where someone watches what is going on and checks it is going right.
Sustained	Going on for a long time without stopping.
Threatening	To make someone believe something is going to happen, including that you are going to cause harm or put anyone in danger.
Unconditional	Something that will definitely happen.
Upward/downward adjustment	Sentence that is added to or taken away from the Category Starting Point.
Usher	Someone who helps organise people around the court room.
Victim	A person that has been harmed by a crime.
Vulnerable	When you are easily hurt, either physically, emotionally or mentally.
Welfare	Your safety and wellbeing. For example, "I have a duty to have regard to welfare" means "I need to think about what you need and what is best for you".

"You have breached your order"	You haven't followed the rules you've been given and that may mean you have to go back to court.
"You must refrain"	You must not do…
Youth caution	When you have been arrested by the police and agree you did a crime, but they say you do not have to go to court. You do not have a criminal conviction. This information will be put on your criminal record and could be shared with employers, colleges, universities and immigration.[283]
Youth conditional caution	When you have been arrested by the police and agree you did a crime, but they say you do not have to go to court so long as you keep out of trouble. You have to go to appointments in the community and follow certain rules. This information will be put on your criminal record and could be shared with employers, colleges, universities and immigration. If you miss any appointments or break the rules, you will be sent to court and may have a criminal conviction.
Youth rehabilitation order (YRO)	This is a community order. It means you do **not** have to go to custody, but you do need to follow some rules.

[283] The government has passed legislation that is not yet in force that will mean youth cautions are no longer on children's criminal records.

Table 3: Disabilities with a high prevalence in young people in the criminal justice system

Disability	Description of need
Attention deficit hyperactivity disorder (ADHD)	A persistent pattern of inattention and/or hyperactivity – impulsivity that interferes with functioning or development.
Autism spectrum disorder (ASD)	Persistent difficulties with social communication and social interaction and restricted and repetitive patterns of behaviours, activities or interests. Other common factors include over or under-sensitivity to light, touch, sound and taste, and extreme anxiety.
Developmental language disorder (DLD)	Severe, persistent difficulties understanding or using spoken language. DLD was previously known as specific language impairment (SLI).
Dyslexia	Difficulties with reading, writing and spelling.
Post-traumatic stress disorder (PTSD)	A type of anxiety disorder which is triggered by experiencing or witnessing traumatic events. PTSD can have effects on memory and attention.
Social, emotional and mental health needs (SEMH)	Difficulty managing emotions and behaviour. SEMH are often concurrent with communication needs.
Traumatic brain injury (TBI)	An acquired disability which commonly impacts on memory, executive function, attention, social communication and behaviour.

Table 4: Strategies to support those children with language and communication difficulties to understand and engage with the sentencing process

Communication need	Implications	Strategies to support
Attention and listening skills	Unable to focus for the full sentencing hearing. Disengagement with the process. Unable to maintain "appropriate" body language for the duration.	• Give an estimate of the length of time the session will take, eg "we will be here until lunchtime, but we will have two breaks before that". • Assure that you understand that it is difficult to listen for a long time. • Consider allowing a break after a given amount of time (eg 20 minutes). • Consider allowing a "fiddle" object to support focus. • Be aware that many children are unable to tell the time on analogue clocks.
Understanding and processing language	Unable to understand or may misunderstand key information. May disengage from the process due to not understanding.	• Use simple, everyday vocabulary wherever possible. • Avoid sarcasm, irony and idioms. • Avoid double negatives. • Provide a written glossary of terms for reference. • Encourage asking for help – suggest that they can alert you if there is a word they do not understand by raising their hand or directly asking. • Break information down into shorter "chunks", leaving pauses. • Alert the child when you are starting a new topic, eg "I've spoken about X, now I'm going to talk to you about Y". • Provide a written summary to support spoken information.
Social communication	Child's body language or facial expressions may be misinterpreted. For example, lack of eye contact may seem "rude" or fixed eye contact may seem "threatening".	• Be aware that social communication skills are a common difficulty amongst children in the criminal justice system. Try not to pass judgement on body language that may appear "rude" or "lazy". • Be aware that many children in the justice system are significantly worse at facial affect recognition (Cohen et al, 2019) and therefore may not respond as expected. • For some people with autism spectrum disorder, eye contact can induce anxiety. These children should not be asked to maintain eye contact.

Communication need	Implications	Strategies to support
Time concepts	Misunderstanding key information.	• Be aware that time concepts are a common difficulty for children with communication difficulties. For example, they may not know the order of the days of the week and the months of the year, and may not be able to tell the time on an analogue clock. • Give concrete examples when talking about lengths of time, wherever possible. For example: “Two years and 60 days, that is two years and two months. You will be 15 years old in two years and two months”.
Sensory	Difficulties with lighting or sounds may affect ability to “tune in” to what is being said.	• Consider any adaptations that may be possible where this is an issue, eg seating/lighting/microphones etc.
Reading and writing	Misunderstanding key information.	• Enquire about the child’s ability to read and write. • Ensure that written materials are fully explained.

S13 Appendix III Use of s.66 Courts Act 2003

Blackstone's Criminal Practice – D2.17, D3.21, D6.38, D10.29, D10.30, D21.17, D23.40

[Note: S2.1A addresses the new powers to remit cases to the magistrates' court contained within s.25A SA 2020 that has been introduced by s.11 Judicial Review and Courts Act 2022]

Power of Crown Court judges to sit as a district judge (magistrates' courts)[284]

1. The criminal jurisdiction of the magistrates' courts is to be found in Part I of the Magistrates' Courts Act 1980. It can be exercised by justices of the peace who are either lay justices or a district judge (magistrates' court).[285]
2. Each of the following judicial office holders are authorised to exercise the powers of a district judge (magistrates' court):[286]
   a. High Court judge
   b. Master of the Rolls
   c. A judge of the Court of Appeal
   d. Senior President of Tribunals
   e. Deputy High Court judge
   f. Circuit judge
   g. Deputy circuit judge
   h. Recorder
   i. The Chamber or Deputy Chamber Presidents of a Chamber of the Upper or First-tier Tribunal
   j. Judges of the Upper Tribunal (including transferred in judges)
   k. A deputy judge of the Upper Tribunal
   l. The Senior Masters/Registrars of the divisions of the High Court, the Chief Taxing Master and the Chief Insolvency and Companies Court judge
   m. High Court Masters
   n. County Court district judges (including deputies)
   o. Judges of the First-tier Tribunal (including transferred in judges)
   p. Employment judges
   q. A judge advocate (but only in relation to criminal causes and matters).

   The same office holders are entitled to sit as a member of a youth court in appropriate cases.[287]

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284 With grateful thanks to Matt Jackson, Cloisters Chambers, London who was persuaded to "volunteer" to produce this guide.
285 There is some jurisdiction for magistrates' court legal advisers to exercise the courts' criminal jurisdiction, but they are unlikely to arise in Crown Court matters.
286 Section 66 (2) Courts Act 2003.
287 Section 66 (3) Courts Act 2003

3. It is important when either invited to sit as a district judge (magistrates' courts) or considering doing so of one's own motion, that proper consideration be given to the appropriateness of doing do. As Lord Justice Edis put it in *Gould and others*:[288]

> "[this] involve[s] consideration of the relationship between the jurisdictions of the Magistrates' Courts and the Crown Court. This relationship is an essential part of the criminal justice system. In the modern era it is governed by a formidably complicated battery of statutory provisions which have been supplemented and amended by Parliament frequently over many years. The issue involves consideration of the extent to which Crown Court judges may use the powers of a District Judge (Magistrates' Court)…while at the same time respecting the jurisdictional limits of the different courts."

4. It is worth recalling that the powers to sit under s.66 are not limited to the purely "criminal" jurisdiction,[289] but those proceedings are beyond the scope of this work. One of the most common usages of the power under s.66 has been to correct mistakes in charging by the Crown Prosecution Service, or to remedy defects in procedure by a magistrates' court sending a defendant for trial or committing for sentence (or both). What is of paramount importance in deciding whether to exercise the s.66 jurisdiction is ascertaining whether there is power to do so in any particular case.

Is the case in the Crown Court and on what basis?

5. In any case where the power under s.66 might be exercised, two questions must be answered. (1) Is the case in the Crown Court and (2) if so on what basis is it there? This is of particular importance because, as emphasised by *Gould*, if a magistrates' court has validly committed or sent a defendant to the Crown Court, there is no power either in the magistrates' court or a Crown Court judge sitting under s.66 to send a case afresh (unless the defendant seeks to vacate a plea – see below). The magistrates' court is functus officio.

6. That position has changed slightly in respect of valid committals or sendings, with effect from 28th April 2022. The new s.46ZA Senior Courts Act 1981[290] allows a Crown Court judge to remit to the magistrates' court **for trial** a case which has been **sent** by the magistrates' court for trial under subsection (1) **subject to the restrictions in the rest of the section. That does not change the general position under s.66, however**.

7. **Ultimately, it is a matter for judicial discretion whether to proceed under s.66 or s.46ZA in any particular case, but the new jurisdiction is expressly in relation to remitting matters for trial – as noted above there are other provisions dealing with sentencing cases.**

8. **Absent a direction under s.46ZA, the position remains that the magistrates' court no longer has any jurisdiction unless there is some obvious error on the face of the record.** The Crown Court has no power to quash an order made by the magistrates' court that is either ultra vires or otherwise irregular. If the effect of a particular order is that the matter was never in fact before the Crown Court, the position is different.

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288 [2021] EWCA Crim 447

289 Applications for Sexual Harm Prevention Orders, Closure Orders, applications under the Proceeds of Crime Act 2002 in respect of the detention and forfeiture of cash etc can be made to a magistrates' court but it is unlikely that a Crown Court Judge will be called upon to sit in such proceedings incidentally to normal duties.

290 Inserted by s.11 Judicial Review and Courts Act 2022. As of a date to be appointed, s.51 of the Crime and Disorder Act 1998 will be amended by s.10 of the Judicial Review and Courts Act 2022. The amendment primarily allows a defendant to be sent for trial without a hearing taking place but also includes changes for related offences to be sent (or not) as the case may be with a primary offence.

9. **The importance of the two questions posed above, and so whether cases are validly before the Crown Court, is illustrated in two recent cases: *Butt & Jenkins*[291]** and *R (DPP) v the Crown Court at Luton, Toner and Thompson intervening*.[292] Both restate the effect of *Gould* and also provide additional guidance on how resulting errors on Common Platform will need to be resolved.

10. The thrust of the decision in *Butt & Jenkins* is:

    (1) that what power was exercised by the magistrates' court is a question of fact, and the sending sheet is presumptively an accurate record, but not conclusively so.[293]

    (2) What matters is what jurisdiction the magistrates' court had, not what it stated it used.[294]

    (3) The effect of an error in procedure (for example committing for sentence a defendant who has neither pleaded guilty nor been convicted after trial, or sending for trial a defendant who has indicated a guilty plea during the mode of trial procedure) depends on the nature of the error.[295]

    (4) If the error is that a defendant is committed for sentence despite neither indicating (or pleading) guilty and without having been convicted after a trial, the case is not properly before the Crown Court.[296]

    (5) If the error is that the mode of trial procedure is not undertaken at all in respect of either-way offences, again the matter is not properly before the Crown Court.[297]

    (6) If, however, the error is that a defendant is sent for trial for offences, including at least one indictable-only offence, so there is no mode of trial process, but the subsequent indictment-only charges either-way offences, that does not invalidate the magistrates' court proceedings and the case is properly before the Crown Court.

11. Do not forget that Crown Court judges are permitted to vacate guilty pleas, in appropriate cases, where a defendant has been properly committed for sentence. Doing so does not "quash" the committal or involve a decision about the validity of the magistrates' court proceedings, but the proceedings would then have to be recommenced in the magistrates' court.[298]

When might the s.66 power be used?

12. It has become settled law that a judge exercising the s.66 jurisdiction has the complete power of a district judge (magistrates' court).[299] This includes laying new charges, completing the mode of trial procedure, sentencing, committing for sentence and all other ancillary matters that might arise on a criminal charge in the magistrates' court. In cases such as those above, where a procedural error leads to the case never validly being before the Crown Court, that can include acting under s.142 Magistrates' Court Act (MCA) 1980 to re-open a case to rectify a mistake – provided the warnings in *Gould* are heeded.

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291 [2013] EWCA Crim 1131
292 [2013] EWHC 2464
293 Per Edis LJ at [66]
294 Ibid [78]
295 Ibid [80]
296 Ibid [81]
297 Ibid [82 i]
298 Or before a judge sitting under s.66 in an appropriate case.
299 Save for judge advocates whose powers are limited to criminal causes and matters.

13. While this guide cannot be comprehensive, it is designed to deal with the most common scenarios that are likely to arise before judges in the Crown Court. The court clerk should have access to the relevant magistrates' court case management system to record any relevant decisions taken or charges laid/discontinued. It may, however, be prudent to check this before embarking on any hearing using the s.66 power.

14. In circumstances where a judge exercises the power under s.66, it is important that the fact of so doing is made clear ("I am now sitting as a DJ(MC) and…").

Example 1 – Exercising powers under s.66 Courts Act 2003

Both parties in this case agree that the charges were sent in error. Everyone agrees that if the charges came fresh before the magistrates' courts, that court would have power to send them properly to this court. Where that is the case, s.66 of the Courts Act 2003 gives this court the power to exercise the powers appropriate to the magistrates' courts to ensure that charges are sent to the Crown Court.

I will now sit as a district judge (magistrates' courts). I exercise the power under s.142 (1) of the Magistrates' Court Act 1980 to set aside the previous order made in error and the Crown will lay these fresh indictable-only charges in the magistrates' court. I am obliged to send you to the Crown Court for trial under s.51(1) of the Crime and Disorder Act 1998 on each charge. I must declare that I send you [on bail/in custody].

In the remaining part of this hearing, I revert to my powers as a Crown Court judge. These charges now being properly sent to this court, and received in this court, we can proceed to arraignment. Would the defendants please stand…

Laying a new charge

15. Where a judge is sitting as a district judge (magistrates' court), and is asked to accept a new charge, it is important to ensure that the charge is in fact "new" in the sense that it does not replicate existing charges from the magistrates' court. In most cases, where the matter has been properly sent for trial, an amendment to the indictment will cure any defect as long as the offence can properly be added to an indictment.

16. New charges can be laid before a judge exercising the s.66 jurisdiction, regardless of whether they are summary-only, either-way or indictable-only. There are, however, limits on whether those new charges can be "joined up" with existing cases before the Crown Court. The following guide is premised on the basis that the prosecutor is alleging an offence against a single or jointly charged defendant(s), all of whom are over the age of 18[300] and who is/are due to attend, or attend(s) the court, in response to another allegation and the decision has been taken to sit under the s.66 jurisdiction.[301] The guide is not designed to deal with entirely new proceedings for offences brought by a "private"[302] prosecutor who must apply for a summons to institute proceedings under s.1 MCA 1980.

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300 Special rules apply to offences for youths (charged jointly with or separately to other youths) who would normally be tried in the youth court even for indictable only offences, unless a "grave crime". There are further different rules where a youth is jointly charged with an adult. Care must be taken if you are invited to exercise the s.66 jurisdiction for any person aged under 18 at the time the new charges are to be laid. See further on this topic, Youth Defendants in the Crown Court, published by the Judicial College.

301 See rule 7.1 (1) (d) Criminal Procedure Rules.

302 ie not a "relevant prosecutor" under Part IV Criminal Justice Act 2003.

17. In circumstances where, once in the Crown Court, it is discovered on a committal for sentence that the offence that is subject of the committal was incorrectly laid (for instance, where the offence charged is a substantive offence rather than an inchoate offence), the court may exercise the powers under s.66, take a plea in respect of the new charge, commit the offender's case for sentence, and then, exercising the powers of the Crown Court, vacate the plea in respect of the incorrectly laid charge.[303]

Summary-only offences

18. Summary-only offences are, generally, only to be brought within six months of their commission.[304] There are some offences[305] where a different period is specified, and these are exceptions to the general rule.

19. There is no formal requirement for a summary-only charge to be in writing before a plea is taken; however, it is good practice to do so. As soon as is practicable, the prosecutor must either set out in writing an additional allegation in ordinary language, identifying any legislation that creates it as well as particulars to make clear the offence, or describe the same information orally to the court with a written statement of the allegation.[306] The prosecutor must also demonstrate they have the necessary consent if required by the legislation.[307]

20. Once a new charge has been laid, for a summary-only offence a defendant must be asked to enter either a guilty or not guilty plea. It would generally be bad practice to proceed directly to a summary trial of any offence over a defendant's objection as it deprives them of a number of rights, including to serve a defence statement if they wish to do so,[308] and potentially the right to initial details of the prosecution case (IDPC).[309]

21. If a defendant pleads guilty, there are provisions permitting committal for sentence under Chapter 2 of the Sentencing Code. These will generally only apply if there is some other either-way or indictable-only offence that is being committed for sentence or sent for trial at the same time.[310]

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303 See *Chalk; Chaplin* [2022] EWCA Crim 433.

304 See s.127 (1) MCA 1980. Where an offence is a continuing one, any prosecution can be started at any point until six months after the offence ceases to be committed – Hertfordshire County Council v National Grid Gas plc [2007] EWHC 2535 (Admin), [2008] 1 WLR 2562.

305 See for example offences specified in schedule 1 Road Traffic Offenders Act 1988 and under s.31 Animal Welfare Act 2006 (both to be brought within six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to their knowledge and the latter also to be brought within three years of the commission of the offence – these are only examples and are not exhaustive).

306 Rule 7.3 (1) and (3) Criminal Procedure Rules 2020 – in practice in the magistrates' court the new or additional charges are still written down. This is not a rule of law however.

307 Ibid

308 Recalling that giving a defence statement in the magistrates' court is voluntary rather than mandatory – s.6 Criminal Procedure and Investigations Act 1996.

309 See Part 8 Criminal Procedure Rules 2020

310 Section 20 Sentencing Act 2020.

Either-way offences[311]

22. If a new charge is, or includes, an either-way offence, as well as the formalities under the Criminal Procedure Rules, the charge **must** be written down and read to the accused.[312] The mode of trial procedure **must** then be completed.[313] Failure to do so in accordance with s.17A MCA 1980 leaves any action after that liable to be quashed by the High Court or later determined to be a nullity – see *Butt & Jenkins* above.[314]

23. It is suggested that the following wording can be used. It does not matter who puts the charges to the defendant, it can be said either by the judge or court clerk:[315]

Example 2 – Mode of trial

Judge: I remind all parties that at this point I am exercising the powers of the magistrates' court under s.66 Courts Act 2003.

Judge/Clerk: In a moment, I will ask you to indicate whether you will plead guilty or not guilty to this charge/these charges. If you indicate a guilty plea, it will be treated as if you have been through a trial and convicted and I/the judge will decide whether you can be sentenced in the magistrates' court or sent to the Crown Court for sentence if the magistrates' court powers are insufficient.

If you indicate a not guilty plea or make no indication of plea, I/the judge will decide whether your trial is suitable to take place in the magistrates' court or the Crown Court. If I/the judge decide(s) that your trial is suitable for the magistrates' court, you can still decide to have your trial in the Crown Court before a judge and jury.

I am now going to ask you to indicate your plea(s).

You are charged with [offence(s)] and the particulars of the offence are that [particular(s)]. Do you wish to indicate a guilty plea, a not guilty plea, or make no indication as to plea? [Repeat this final paragraph as required for each offence.]

311 Take care with criminal damage, and aggravated vehicle taking where the only aggravation is causing damage and the value is under £5,000 where there is a special procedure that treats the offence as summary only under s.22 MCA 1980. Thefts from shops, stalls etc with a value under £200 are also subject to a different procedure, s.22A MCA 1980.

312 Section 17A(3) MCA1980.

313 This is subject to the rules under s.51B and 51C of the Crime and Disorder Act 1998 relating to complex fraud cases and cases involving children where proceedings are transferred to the Crown Court. It is unlikely that these cases will arise in practice once proceedings have already reached the Crown Court, but care must be taken.

314 There is a separate procedure for an absent accused who is absent due to their disorderly conduct, s.17B MCA 1980.

315 This wording can also be used under the procedure in paragraph 7 of schedule 3 to the Crime and Disorder Act 1998 (with the appropriate modifications for the fact that indications of a guilty plea are treated as a plea to the indictment rather than a plea in the magistrates' court – not guilty pleas still go through the same "mode of trial" procedure) where a "main offence" is no longer proceeded with in the Crown Court but an either way offence remains – such as a robbery charge that is quashed in a dismissal application and is replaced with a theft and/or a separate either way assault offence.

25. If there are any charges for which there is no indication of plea, or a not guilty plea indicated, representations must be sought from both prosecution and defence as to whether the case is, or is not, suitable for summary trial.[316] Reference must also be made to the Sentencing Council's Definitive Guideline on Allocation.[317]

Case suitable for summary trial

26. If the determination is made that the case **is** suitable for summary trial, the defendant must be offered the opportunity to consent to summary trial. In the absence of any such consent a defendant **must** be sent for trial.[318] There is a requirement that the opportunity to elect trial by jury is explained in ordinary language as well as the fact that the defendant can still be committed for sentence after magistrates' court trial in the same ordinary language.[319] Although in the magistrates' courts, this process is often led by the legal adviser, the clerk in the Crown Court may be unfamiliar with the process. The following wording could be used by the judge:

Example 3 – Putting the defendant to election

I have decided that your trial can take place in the magistrates' courts. You can agree to your trial taking place in the magistrates' court or you can decide to have your trial in the Crown Court before a judge and jury.

If you decide to have your trial in the magistrates' courts and you are convicted, you can still be sent for sentence to the Crown Court if the magistrates' courts sentencing powers are insufficient.

Do you want your trial to stay in the magistrates' courts or go to the Crown Court?

27. The defendant is entitled to ask for, although is not **entitled** to receive,[320] an indication of sentence and if one is given the procedure for indicating a plea must be restarted.

Case not suitable for summary trial

28. If the determination is that a case is not suitable for trial in the magistrates' court, the defendant does not have a right to a trial in the magistrates' court. The defendant must be sent for trial under s.51(1) Crime and Disorder Act (CDA) 1998. The defendant must be told that the decision has been taken for a trial on indictment.[321]

Example 4 – Jurisdiction declined

I have decided that the case is not suitable to be tried in the magistrates' courts and so you will be sent for trial on indictment under s.51(1) of the Crime and Disorder Act 1998. I must declare that you are sent [on bail/in custody].

That being the case I now revert to my powers as a Crown Court judge.

316 Section 19(3) MCA1980.
317 Ibid. The guideline is available online at Allocation: Determining whether cases should be dealt with by a magistrates' court or the Crown Court
318 Section 20(8) MCA 1980 – see also s.23 where the accused is absent.
319 Section 20(2) MCA 1980.
320 See s.20 MCA, in particular, s.20(5)-(7).
321 Section 21 MCA 1980.

Indictable-only offences

29. As the name suggests, if there is any offence that is indictable-only, it **must** be sent for trial under s.51(1) CDA 1998.

Defendants absent for a reason other than disorderly conduct

30. There is power to conduct a mode of trial procedure in the absence of the accused (but only where legally represented and with the representative's consent) under s.23 MCA 1980.

At least one charge sent for trial

31. Where there is at least one charge sent for trial, some charges may be sent for trial or committed for sentence at the same time. Where a defendant is charged with an either way offence "related to" the charge(s) sent for trial, the magistrates' court must[322] send that related offence for trial.

32. Where there is at least one charge sent for trial and there is a summary only offence "related to" the charge sent for trial that is either punishable by imprisonment or involves obligatory or discretionary disqualification,[323] that either must be sent,[324] or may be sent for trial[325] depending on the circumstances.

Sentence

Committals for sentence

33. It is perfectly acceptable in principle to commit offences for sentence as a district judge (magistrates' court) and then hear that committal immediately afterwards.[326] Depending on whether the offence(s) are either-way or summary-only, and whether charged with other offences or subsequent to offences already committed for sentence, that may be with the magistrates' court powers or the Crown Court's powers.

34. It is vital to take care to ensure the correct section is selected for committal following proper consideration of the relevant factors. Failure to do say may result in either a defective committal, or a sentence outside the statutory powers of the Crown Court.

Sentencing as a district judge (magistrates' court)

35. For offences retained in the magistrates' court, subject to the usual considerations such as adjournments for reports, it is unobjectionable in principle to sentence in the magistrates' court. Any sentence imposed as a district judge (magistrates' court) is subject to appeal to the Crown Court.

Bail when a not guilty plea indicated or there is no indication

36. When taking pleas to new charges in the magistrates' court, whether summary-only, either-way or indictable-only a decision must be made on whether the accused is to be remanded on bail or in custody. As they are new charges, the usual rules about new bail applications

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322 Section 51(3)(a) CDA 1998.
323 Section 51(3)(b), (4), (5), (6)(b), (8)(b) and (11) CDA 1998.
324 In the case of charges relating to the same defendant.
325 In a number of other cases including jointly charged defendants appearing on separate occasions, see ss. 51(3) to (8) CDA 1998.
326 Ensuring of course that the relevant condition in chapter 2 of part 2 of the Sentencing Code is considered.

apply.[327] More care must be taken with offences that are not imprisonable or where there is no realistic prospect of a custodial sentence as they do not usually appear before the Crown Court. Schedule 1 Bail Act 1976 provides where a person may or may not be remanded in custody for those cases.

37. Although it is highly unlikely that a new charge of murder would be laid under the s.66 procedure, there is no power to grant bail in the magistrates' court.[328]

38. A first remand in custody for offences that remain in the magistrates' court (either because the offences are summary-only or either-way and suitable for summary trial) cannot exceed eight days, and unless proceeding directly to trial, there must be a further hearing in the magistrates' court to consider bail within that period.[329]

Criminal Justice Act 1988

39. The procedure for adding various counts to an indictment under s.40 Criminal Justice Act 1988 does not require intervention by anyone in the magistrates' court. It is a procedure by which a count can, subject to s.40, be added to an indictment on the same evidence when any other offence is sent for trial.

Amending an incorrect charge

40. Care must be taken in such cases to ensure that there is in fact an incorrect charge, rather than, for example, a lack of particulars which does not require a change of the charge itself. It is also worth repeating that the Crown Court has no power to "remit" charges of any kind to the magistrates' court unless it is for trial or sentence in prescribed circumstances, and the Crown Court may not "amend" a charge that has been properly sent either for trial or as a related summary-only offence.[330]

41. The power under s.66 must not be used to "amend" charges that are properly before the Crown Court. If it is proper to do so, new charges can be laid under the s.66 procedure, but it can only join other matters in the Crown Court if there is jurisdiction to do so. For more details, see Laying a new charge above.

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327 With a presumption in favour of bail (subject to statutory exceptions) and the bail application not being a second (or subsequent) application.

328 Section 115(1) Coroners and Justice Act 2009 – the restriction does not apply to attempted murder or conspiracy to murder.

329 Sections 128-128A Magistrates' Courts Act 1980. That should normally be in the relevant Magistrates' Court rather than reserved.

330 See for example *Gould* at [80 (i)]. Note the distinction between purporting to "quash" a properly made order and a declaration that no proper order was ever made in subparagraph (ii).