

Reducing remands to the secure estate

A good practice guide

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The **NAYJ** is a registered charity (no. 1138177) and membership organisation campaigning for the rights of – and justice for – children in trouble with the law.

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● Introduction

One recurring (and widely-remarked) feature of the youth justice system in England and Wales over the past 30 years has been the fluctuating use of the secure estate¹. We can see this clearly from the way the number of custodial sentences² imposed on children fluctuated throughout that period³. The use of such sentences fell from 7,900 in 1981 to 1,700 in 1990 but then rose sharply between 1992 (4000 approx) and 2000 (7500 approx), remaining at a high level until 2009/10, since when there has been a welcome reduction.⁴ These fluctuations occurred notwithstanding the fact that the number of children in trouble with the law (per 100,000 of the population) fell by 16%⁵ – and they raise the issue of whether deprivation of liberty was used as a ‘last resort’ as required under international law to which the Westminster Government is a signatory.⁶ Indeed this was a specific issue commented upon by the United Nations Committee on the Rights of the Child in their reporting round of 2008.⁷

Concerns about the use of placements in the secure estate led to a focus on it by the Youth Justice Board (YJB), youth offending teams (YOTs) and some third sector organisations⁸ in the early 2000’s. The Prison Reform Trust (PRT) secured support from the Diana Princess of Wales Memorial Fund for a five year long ‘Out of Trouble’ programme from 2007-2012. Managed by Penelope Gibbs, the project aimed to reduce the number of children in secure estate placements. It published a number of reports which are all available free to download.⁹ The funds were also used to undertake studies in particular localities to identify local ‘drivers’ of the rate of use of placements in the secure estate, and to suggest strategies to reduce a high rate or perpetuate a low one. Reports for the local YOTs were delivered (but not published) and a conference organised to disseminate learning from these exercises.

This paper focuses on the use of remands to the secure estate; a problem which has received less attention than custodial sentencing but which is arguably even more worrying¹⁰. It is produced in partnership with PRT and draws on the work of the ‘Out of Trouble’ programme as well as in-depth studies (using a similar methodology and supplemented by feedback from children) undertaken by Nacro Cymru Youth Offending Unit in two areas in Wales.¹¹

The NAYJ welcomes the fact that the placement of children in the secure estate has fallen sharply in recent years at both the sentence and remand stage. We discuss those falls in the next section of this paper, which then goes on to consider how YOT practice might contribute to ensuring that such reductions are maintained and further reductions achieved – particularly so far as remands are concerned. The paper argues that systemic factors are as important to understanding the level of remands to the secure estate as are the behaviour and circumstances of the children about whom remand decisions are made. It attempts to identify key points for practice that can influence those systemic processes.

¹ Throughout this paper the term ‘the secure estate’ is used for all remands and court sentences which result in a placement where the liberty of the child is physically restricted. This is because terminology has varied over time, for example ‘remand to custody’ had a strict, legal meaning resulting in placement in a Young Offenders Institution (YOI) until such a placement became one of the three options of a remand to youth detention accommodation.

² Sentences involving placement in any part of the secure estate – see previous footnote.

³ Although changes in the definition of the secure estate – and in the ways its use is measured – make it difficult accurately to compare one period with another.

⁴ Dr. Bateman, T (2014) Children in conflict with the law: an overview of trends and developments – 2013 NAYJ available at www.thenayj.org.uk

⁵ Children’s Society Advisory Committee on Juvenile Custody and its Alternatives (1993) “A false sense of Security: The Case Against Locking Up More Children” London, The Children’s Society

⁶ United Nations (1989) “The United Nations Convention on the Rights of the Child” New York, United Nations Article 37(b)

⁷ UN Committee on the Rights of the Child “Consideration of Reports submitted by States Parties under Article 44 of the Convention: United Kingdom of Great Britain and Northern Ireland” 49th Session, CRC/C/GBR/CO/4, Geneva, United Nations

⁸ The custody rate is still a ‘high level’ performance indicator for YOTs

⁹ These are all available at www.prisonreformtrust.org.uk/ProjectsResearch/Childrenandyoungpeople

¹⁰ A second paper focussing on the use of the secure estate on sentence is planned and will be published later.

¹¹ Nacro (2011) “Reducing custody: Merthyr Tydfil London, Nacro available at <https://www.nacro.org.uk/data/files/merthyrtydfil-custody-study-mar11-905.pdf> Nacro (2011) “Reducing custody: Bridgend” London, Nacro available at <http://www.nacro.org.uk/data/files/bridgend-custody-study-mar11-904.pdf>

• Recent remand trends

Since 2008 there have been significant reductions in the use of secure facilities for both sentenced children and those denied bail. However it can be seen that the decline has not followed the same pattern in both cases. The numbers of those denied bail remained high for some three years before a more rapid decline commenced.

Table 1 Legal Basis for placement of under 18's in the secure estate¹²

	Detention and Training Order (DTO)	Long term sentences*	Remand to secure placement
March 2009	1508	528	589
March 2010	1149	437	594
March 2011	1105	378	544
March 2012	1103	344	356
March 2013	726	274	279
March 2014	643	260	254
March 2015	540	243	221

* These comprise ss90 & 91 Powers of the Criminal Courts (Sentencing) Act 2000, ss226 & 228 Criminal Justice Act 2003

Data for the past six years (Table 1, above) indicate that between 2009 and 2015, both the sentenced and remand populations in the secure estate fell by 63%. The reduction for remands dates from March 2011, whilst that for sentenced children is spread over the whole time period. One possible concern arising from the data is that the detailed monthly figures indicate a levelling out of the use of the secure estate for all of the above three categories.¹³ The seeming intractability of figures for placements in the secure estate of children denied bail led the Prison Reform Trust (PRT) to undertake their study 'Children: Innocent until proven guilty', published in 2009, as part of their 'Out of Trouble' campaign,¹⁴ leading to a series of workshops with YOTs/groups of YOTs, focussed on reducing placements in the secure estate of children denied bail. These workshops also helped to inform this paper.

One effect of the steady fall in DTOs during the period¹⁵ was an increase from 23% to 27% in the proportion of children in the secure estate who were denied bail between March 2009 and March 2011. Subsequently however this fell back – to 22% by March 2015. These figures should be seen against that of around 14.3% for adults at the end of June 2014.¹⁶ It is still unclear how significant a role was played in this reduction by the implementation, in December 2012, of the remand to youth detention accommodation provisions in the Legal Aid Sentencing and Punishment of Offenders Act 2012¹⁷. These are detailed below in the section 'Remand to Youth Detention Accommodation' (page 20). The changes arguably set more stringent criteria for the use by the courts of secure placements when bail is refused, to try to ensure its use as a 'last resort'. It has been suggested that although the use of secure placements when bail was refused was already falling, the implementation of the new criteria in December 2012 may have reinforced and possibly accelerated the existing downward trend.

Almost inevitably, the use of secure placements – both when bail is denied and on sentence – appears to vary significantly from one locality to another. These local

12 YJB "Monthly Youth Custody Report – July 2014" available at <https://www.gov.uk/government/statistics/youth-custody-data>. These figures are 'snapshots' as at the last Friday in the month.

13 Available at www.gov.uk/government/publications/youth-justice-statistics

14 Gibbs, P. And Hickson, S. (2009), "Children: Innocent until proved guilty" London, Prison Reform Trust

15 Detailed scrutiny shows there was a 'blip' after the civil disturbances in August 2010, with an increase of 129 children locked up followed the after the death in Tottenham of

16 Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/339023/offender-management-jan-mar-2014.pdf

17 ss98 – 9 Legal Aid Sentencing and Punishment of Offenders Act 2012

variations in outcomes are a well-known feature of the youth justice system and are frequently referred to by the shorthand term 'justice by geography'. In one important study of the phenomenon, Bateman and Stanley found some

evidence that localities with high level of sentencing to the secure estate also tended to exhibit high levels of secure estate placements when bail was denied.¹⁸ However PRT, in their study undertaken in 2006/7, found that this, too, varied widely between localities¹⁹. In some places, the rate of remands was three times that of sentences; elsewhere it was less than a half, which raises the question of whether placement in the secure estate is genuinely required to minimise the risk of offending and protect the public.

More recent figures from the Ministry of Justice, which tracked individual cases through to completion, showed how 'conversion rates' (ie the proportion of secure remands which were *not* followed by detention in the secure estate upon sentence) varied between the different types of court. (See Table 2, below.)

Table 2 Percentage of remands to the secure estates which did not lead to immediate detention in the secure estate on completion²⁰

	2009/10	2010/11	2011/12	2012/13	2013/14
Magistrates' courts	36	26	28	25	25
Crown court	64	64	63	62	60
All courts	37	41	43	35	38

It is apparent that in 2013/14, 62% of the children who were placed in the secure estate while on remand did not subsequently receive a disposal involving the secure estate. Over the five year period, the proportion receiving a non-custodial sentence rose from 28% to 37% whilst those acquitted rose from 15% to 25%. Notwithstanding the slight difference between the thresholds for the use of the secure estate on adjournment and the statutory requirement for a sentencing court to consider one of the 'alternative to custody' community sentences, these figures clearly raise the question of whether a remand to the secure estate was necessary or justified in these cases.

• Developing an effective Remand Management Strategy

One important requirement for YOTs wishing to reduce the use of remands to the secure estate is to have a clear and well-publicised remand management strategy, which should be shared with and understood by the courts and partner agencies. An effective remand strategy commences from the point at which children come into contact with the youth justice system. It is not something that just focuses on court.

- The broad principles underpinning such a strategy are:²¹
- Avoiding the criminalisation and prosecution of children wherever possible.
- Promoting the use of the least restrictive option at all stages of the youth justice system consistent with the alleged offences and the child's circumstances.
- Avoiding the denial of bail – both by the police and the courts – wherever possible.
- Where bail is denied, avoiding detention (by the police) or placement in the secure estate pre-sentence (by the courts) wherever possible.

¹⁸ Bateman, T and Stanley, C., "Patterns of Sentencing: Differential Sentencing across England and Wales" London, Youth Justice Board

¹⁹ Gibbs, P. and Hickson, S. (2009), "Children: Innocent until proved guilty" London, Prison Reform Trust

²⁰ Table 6.5 Supplementary Tables YJB Youth Justice Annual Statistics 2013 - 2014 available at www.yjb.gov.uk

²¹ pp6-7 Ecotech (2003) *Remand Management* London: Youth Justice Board

- Making use of all available options – including transfer to local authority accommodation (from the police station) and remands to non-secure local authority accommodation (from court).
- Promoting community-based alternatives to police detention and remand to the secure estates.
- Developing a proactive strategy that is evidence-led, informed by analysis of local data and which maximizes the potential to influence decision-making at relevant points rather than responding once decisions have been made.
- Ensuring that staff responsible for implementation have a good knowledge and understanding of the legislation in relation to pre-court diversion/prosecution, police denial of bail and detention, and court bail in order to maximise the potential for effective intervention.
- Ensuring the availability of resources to support children and their families in ways that reduce the risk of criminalisation, prosecution and denial of bail (without usurping parental responsibility).
- Ensuring the availability of packages of intervention that are able to address the concerns of the police and courts and that might otherwise lead to the denial of bail, including the provision of suitable remand accommodation.

A remand management strategy can be usefully promoted by the use of joint training with other personnel working in the courts. Youth remand law is relatively complex by comparison with that which applies to adults and a shared understanding of the legislation – and local practice responses to it – amongst YOT staff, magistrates and other court users – including defence and prosecution lawyers – can help embed the remand strategy and prevent inappropriate remands to the secure estate.

Practice points

- Develop a local remand strategy and promote it with local agencies. Where possible the strategy should be agreed with the police and the courts
- Ensure that any staff who deal with remand issues in the police station or in court fully understand the law.
- Include within remand training liaison between the YOT and other agencies, including the police, defence solicitors, the Crown Prosecution Service and the court
- Ensure that any intervention offered, whether ‘voluntary’ or ‘enforceable’, is at the right level, ie ensure that it addresses any objections to bail and is not more intensive than necessary.
- Set up training events for local magistrates, prosecutors, clerks, defence practitioners and relevant police personnel. Use relevant data to demonstrate what decisions are being made throughout the system.
- Ensure that full modified Looked After Children planning processes are followed for children remanded to the secure estate and that staff are familiar with these requirements including local participation policies and practice for children and parents and the responsibilities of local authorities towards former looked-after children in custody.²² ■

²² See revised Children Act Guidance and Regulations on Care Planning on for example placement and case review, Planning transitions to adulthood, securing sufficient accommodation for looked after children, Local authority responsibilities towards former looked after children in custody, Independent Reviewing Officers Handbook, available at www.gov.uk

• The role of diversion in reducing demands to secure facilities

It is a truism that if a child is diverted from formal court proceedings then they cannot be remanded to a secure facility. Also the principle of prosecution of children as a 'last resort' is consistent with the United Nations Convention on the Rights of the Child, to which the Westminster government is a signatory.²³ Accordingly, the aim should be to avoid prosecution wherever possible and to ensure the minimum level of disposal consistent with the nature of the offending and the child's circumstances and previous history.

The NAYJ believes that this is best achieved by a rise in the age of criminal responsibility and the use of non-criminal justice measures to maximise diversion from formal proceedings.²⁴ The Association argues for a shift from a punishment-oriented perspective to viewing a child's problematic behaviour as a symptom of adolescent 'risk taking' and/or experimentation and/or disadvantage, as opposed to an indicator of innate criminality. In short, such behaviour is often indicative of failings in the systems around the child (eg family, school, community, peer group, justice system) rather than of the child himself or herself. Such a shift in perspective would ameliorate the worrying tendency for the arrest, conviction and criminalisation of a child to undermine the capacity of mainstream services to provide for and deal with children who display difficult behaviour. The NAYJ draws attention to the damaging effects of a labelling process which inhibits the process of 'growing out of crime' and adversely affects future life chances; the label making it more difficult to access conventional social environments and so impeding structured opportunities for legitimate advancement.

There is considerable scope for increasing diversion within the existing legislative framework. A clear rationale for maximising diversion from the formal youth justice system emerges from evidence showing an inverse correlation between the rate of diversion and the use of detention. This means that as the rate of diversion rises, the use of the secure estate on sentence falls and vice versa.²⁵ Moreover, the Edinburgh Study of Youth Transitions and Crime has demonstrated the criminogenic nature of system contact.²⁶ The findings challenge some of the principles which policy-makers have drawn-on to justify the evolving models of youth justice in England and Wales and clearly support a diversionary approach. The Study argues that to deliver justice, systems need to acknowledge four key facts about youth crime: serious offending is linked to a broad range of vulnerabilities and social adversity; early identification of at-risk children is not an exact science and runs the risk of labelling and stigmatizing; pathways out of offending are facilitated or impeded by critical moments in the early teenage years, in particular school exclusion; and diversionary strategies facilitate the desistance process.

Diversion from prosecution can be achieved in a variety of ways and the potential for diverting children has expanded with the replacement of the rigid final warning scheme by a more flexible system of youth cautioning. The revised pre-court structure gives enhanced police discretion and more opportunities for diverting a child from the formal system than the previous 'three strikes' regime. The NAYJ has published a briefing paper written by Dr Di Hart detailing the new arrangements.²⁷ Diversion may now be achieved by, among other things:

- A decision to take 'no further action'. Such a decision may be supported by involvement from non-criminal justice system services or the involvement of a YOT 'triage' service

²³ United Nations (1989) "The United Nations Convention on the Rights of the Child" New York, United Nations Article 37(

²⁴ Bateman, T. (2012) "Criminalising children for no good purpose: The age of criminal responsibility in England and Wales" available at www.thenayj.org.uk

²⁵ Nacro Youth Crime Briefing (2006) *Reducing custody: a systemic approach* London: Nacro

²⁶ McAra, L & McVie, S 'Youth Crime and Justice: Key Messages from the Edinburgh study of Youth Transitions and Crime' Criminology and Criminal Justice, 2010, 10: 211-230 available at http://www.research.ed.ac.uk/portal/files/8195355>Youth_crime_and_justice_Key_messages_from_the_Edinburgh_Study_of_Youth_Transitions_and_Crime_Criminology_and_Criminal_Justice.pdf

²⁷ Hart, D. (2014) "Pre-court arrangements for children who offend" NAYJ available at http://www.thenayj.org.uk/wp-content/files_mf/nay/briefingprecourtarrangementsfeb14.pdf

- A 'community resolution'. This is a non-statutory measure which takes into account the victim's wishes, to which the child must agree and which may involve the use of restorative strategies.
- A youth caution; a statutory measure with YOTs determining the need for assessment and intervention
- A youth conditional caution; a statutory measure with proportionate rehabilitative, punitive and reparative conditions as an alternative to prosecution

A strategic approach to remand management should ensure that all the opportunities for informal and formal pre-court diversion that are in place locally are used fully before formal proceedings are initiated.

Increased scope for discretion inevitably creates the possibility of greater inconsistency – eg between different localities ('justice by geography' again). This was possible even under the rigid 'three strikes' regime. Indeed a recent inspection of casework by the Crown Prosecution Service Inspectorate found instances both of cases being prosecuted which should not have been and others being diverted which they considered should have been charged.²⁸ However this should not inhibit or prevent the necessary use of discretion to promote the use of non-criminal justice measures when promoting pre-court diversion as part of a remand management strategy.

It is important to note, in this context, that figures for informal disposals such as community resolutions and triage services are not published, and that triage services are not necessarily available in all localities. So while formal pre-court measures provide one indicator of diversionary activity, significant elements of such activity are not necessarily captured in the data. There is wide variation in the use of formal pre-court disposals. As shown in Table 3, convictions constitute 87% of substantive youth justice disposals in London but only 54% in the South West. However it is difficult to ascertain to what extent this discrepancy reflects differences in local diversionary activity. Further research into this relationship would be beneficial.

Table 3 Use of formal diversion measures
(reprimands, warnings, youth cautions and youth conditional cautions) as a proportion of all substantive youth justice disposals 2013/14²⁹

2013/14	
Area	% Formally diverted
England and Wales	36
East Midlands	40
Eastern	39
London	18
North East	42
North West	31
South East	37
South West	53
Wales	46
West Midlands	35
Yorkshire	38

The welcome expansion in the range of diversionary possibilities does contain some potential risks however. Each diversionary 'pathway' requires that the child admits their guilt, and raises the possibility that children might admit to things they have not done to avoid entering the formal system and to resolve matters quickly. It has to be noted that

²⁸ HM Crown Prosecution Service Inspectorate (2013) "Thematic review of youth offender casework follow up inspection report October 2013" London: HMCPSI

²⁹ Taken from Youth Justice Annual Statistics 2013 to 2014 Regional Tables available at <https://www.gov.uk/government/publications/youth-justice-statistics>

the safeguards that exist around cautions – ie the requirement for an appropriate adult and entitlement to free legal advice – do not apply to community resolutions.

Practice points

To maximise opportunities for diversion YOTs need to ensure that:

- the full range of diversionary activities is available.
- there is a shared understanding of what is available locally and what pathways should be followed in particular circumstances.
- monitoring structures are in place to ensure accountability, transparency, consistency and support for decision-makers.
- agreed mechanisms are in place governing the exchange of information between the police and the youth offending team, including information on all children subject to informal diversionary disposals.
- YOT staff are confident to intervene in the decision-making process where appropriate and have a shared understanding of what services should be offered as an alternative to formal action or prosecution in individual cases.■

One example of an approach that builds on the increased use of police discretion within the current system is the Bureau model used in South Wales. Originating in Swansea, it aims to achieve rapid resolution, minimal intervention and where possible a 'non-criminal' outcome. Consistent with the 'All Wales Youth Offending Strategy'³⁰, it stresses the ethos of child first, offender second. Following the arrest – and provided the child meets the core criteria –they will be bailed to participate in a Bureau clinic two weeks later.³¹ During those two weeks there is a comprehensive information-gathering process and a YOS Pre-Court Officer undertakes an holistic assessment with the child, to identify the causes of offending and propose tailored interventions to tackle them.³² The Victim Support Officer from the YOS contacts the victim to gather their views which are shared with the child during their assessment process. The multi agency Bureau Panel (comprising Police Officer, Bureau Coordinator and one trained 'lay volunteer') meets, considers the assessment and makes a provisional decision over what course of action to follow. This ranges from Non-Criminal Disposal (NCD) through all the options to Prosecution. Additionally the Panel can consider individualised, child-focussed (as opposed to offence-focussed) support packages for a child and their parents. These can include referral to YOT services (eg anger management, substance use), non-criminal justice system prevention programmes (eg Youth Inclusion Programmes or their current equivalent) peer mentoring, community-based provision such as Duke of Edinburgh Award Scheme, social and recreational activities. The interventions are all voluntary. Once the Panel process is completed, the Clinic is convened. It comprises the panel members, the child and their parents/carers.

The Swansea Bureau has been evaluated and is said to have made a valuable contribution to reducing first-time entrants to the criminal justice system. The authors characterise the principles of the approach as:

... (re-) engaging parents/carers in the behaviour of their children, giving explicit place to hear the voices of young people and decoupling the needs of the victim from the responses to the child³³.

³⁰ Welsh Assembly Government & YJB (2004) *All Wales Youth Offending Strategy* London: WAG & YJB

³¹ The criteria are the child admits the offence, the offence has an offence gravity score on the ACPO gravity scoring of 1-3 and they are a First Time Entrant (FTE) or if they have received a Police Reprimand or Warning two years have elapsed and the child is considered to have FTE status

³² Information will be collected from Police, YOS, Social Services, Anti-Social Behaviour Youth team, Schools and the Local Education Authority

³³ Haines, K et al "The Swansea Bureau: A model of diversion from the Youth Justice System." International Journal of Law, Crime and Justice. Vol XX (2013) pp.1-21, <http://dx.doi.org/10.1016/j.ijlcj.2013.04.002>

However, this is not to say that victims are ignored: their views are elicited, but the plan of action is not dependent on their agreement. Instead, parents and children are encouraged to identify their own solutions to problematic behaviour on the understanding that victims' needs should be addressed separately.

Table 4 First time entrants in Swansea by outcome 2008/9-010/11³⁴

Disposal	2008/9	2009/10	2010/11	Change 2008/9 to 2010/11
Non criminal	N/A	110	123	N/A
Police reprimand	117	93	98	-16%
Final Warning	45	32	22	-51%
Prosecution	47	34	27	-43%

Another example of a scheme that focuses on the positive use of police discretion is the YOT 'Triage' service offered by Hull YOS. YOT officers were placed in the main police station custody suite for 14 hours a day, seven days a week, to triage all children and young people brought by the police to the station with the aim of diverting those who were accused of committing minor offences and helping ensure that those charged were not detained overnight by the police where there was a risk of refusal of bail. A member of YOT staff undertakes an assessment and has access to services to compile a support package which can address the reasons for the denial of bail. If the police do detain the child overnight, YOT officers start work immediately on preparing a bail package, to prevent the child being remanded to a secure place on first court appearance. The YOT manager, Nick Metcalfe indicated in a verbal presentation to the YJB Convention in Newport in 2010 that since the introduction of triage it has experienced a decline in remands and sentences to the secure estate which they attribute to increased diversion.

• Preventing the overnight detention of children in the police station

Under the Police and Criminal Evidence Act (PACE) 1984, when a decision is made to detain a child or young person under the age of 17 after charge there is a clear statutory duty on staff in the custody suite to make arrangements for that child or young person to be transferred to local authority accommodation, unless this is not practical.³⁵ There is also a reciprocal statutory duty on local authorities, to "receive, and provide accommodation for, children whom they are requested to receive"³⁶ under PACE. In this context the statutory Children Act guidance on the requirement for local authorities to provide sufficient accommodation to meet the diverse needs of looked after children – including those transferred to local authority accommodation – is particularly relevant.³⁷

The NAYJ has produced two detailed briefing papers on this subject of the overnight detention of children in the police station. The first, by Dr Di Hart, focussed on the work undertaken by the Howard League in trying to ascertain the numbers so detained and on the joint inspectorate thematic inspection of appropriate adult provision and children in detention after charge in six YOT and police force areas.³⁸ The second paper, by Dr Tim Bateman, focussed on the frequent failure of agencies to comply with their statutory duties in this regard³⁹.

³⁴ Haines, K et al "The Swansea Bureau: A model of diversion from the Youth Justice System." International Journal of Law, Crime and Justice. Vol XX (2013) pp.1-21, <http://dx.doi.org/10.1016/j.ijlcj.2013.04.002>

³⁵ s38(6) Police and Criminal Evidence Act (1984)

³⁶ s 21, 2(b) Children Act (1989)

³⁷ Available at www.gov.uk

³⁸ Hart, D (2012) *Children in Police Detention* NAYJ available at <http://thenayj.org.uk/campaigns-and-publications-2/>

³⁹ Bateman, T *Detaining children at the police station: a failure to comply with legislation* NAYJ available at <http://thenayj.org.uk/campaigns-and-publications-2/>

The Howard League for Penal Reform found that in 2008 and 2009, at least 53,000 children under the age of 16 were detained in police cells overnight⁴⁰. Worryingly, this is likely to be a significant under-estimate, as it only refers to data provided by approximately half of all police forces in England and Wales, and excludes 16 and 17 year olds. Dr. Hart cites the joint H.M. Inspectorate of Constabulary (HMIC) and H.M. Inspectorate of Prisons (HMIP) report quoting a custody officer saying '*Eight out of ten times I don't even bother to phone the local authority for accommodation because it's just not worth it; there is no accommodation available*'.⁴¹ Further in-depth case-analysis undertaken for the report revealed that there was no attempt to transfer in two-thirds of cases (33 of 49) where police bail was denied.

Dr Bateman found that both local authorities and custody officers were failing to meet their statutory duties by failing to arrange for the transfer to local authority accommodation of children detained after charge. He cites the HMIC/HMIP report as saying that when trying to arrange transfer to local authority accommodation custody officers '*...were always informed none was available*'.⁴² *Further they maintained that the duties of the police and the local authority had been '...reduced to a short (or no) call to local authority staff requesting secure accommodation, followed by the now standard response that none is available...*'⁴³

It is unclear to what extent the problem identified by the Inspectorates is caused by a lack of knowledge among custody officers, or the inadequate response of local authorities, or both. What is clear is that overnight detention in police stations is being used for children in a way that was never originally intended – and the intended transfer to more appropriate accommodation is not happening. Eliminating overnight detention wherever possible is particularly relevant to reducing remands to the secure estate because being held in the police station overnight can:

- 'fast-track' children into court, putting time-pressure on YOTs when preparing bail support packages.
- mean that children and young people held in police stations before a court appearances then enter court from the police custody suite, accompanied by custody officers. This sends a clear message to the court, arguably making it more likely that the question of bail starts with bail-denial as the 'default' position when considering status on adjournment.

It follows that where a child faces prosecution, an effective remand strategy involves minimising the risks that he or she will be denied bail by the police and – where bail is denied – detained overnight in the police station. Minimising those risks requires an understanding of the relevant legislative provisions in order to be able to develop the capacity for pro-active intervention.

There is a statutory presumption in favour of unconditional bail except when the child has a previous conviction for murder, manslaughter, rape and other serious sexual offences **and** the child is charged again with one of these offences.⁴⁴

For all other offences unconditional bail can only be refused (ie conditions imposed or bail denied) where the police have reasonable grounds for considering one or more of the criteria below are satisfied.⁴⁵ This means unconditional bail **must** be granted unless the police have reasonable grounds:

⁴⁰ <http://www.howardleague.org/childreninpolicecells/> <http://www.howardleague.org/childreninpolicecells/>

⁴¹ p40 HMIC (2011) *Who's looking out for the children: a joint inspection of appropriate adult provision and children in detention after charge*

⁴² Her Majesty's Inspectorate of Constabulary/Her Majesty's Inspectorate of Prisons (2013) *Report of an inspection to police custody suites in Essex London HMIC*.

⁴³ Ibid

⁴⁴ In the case of Manslaughter the previous case must have resulted in long term detention under s91 Powers of the Criminal Courts (Sentencing) Act 2000

⁴⁵ s4(1) Bail Act 1976

- for doubting information given by the child about their identity and where they live **or** the child's name and address cannot be ascertained.
- for believing the child would not attend court.
- in the case of an imprisonable offence, for believing the child would commit further offences whilst on bail.
- in the case of a non-imprisonable offence, for believing that detention is necessary to prevent the child from causing physical injury to any person , or loss or damage to property.
- for believing that detention is required to prevent interference with the administration of justice, or the investigation of an offence.
- for believing that detention is necessary for the child's protection or is in their interests⁴⁶.

Where it has not been 'practicable' to arrange a transfer, the police are required to complete a certificate explaining why,⁴⁷ which should accompany the child when they appear in court. However, it appears that these duties are rarely carried-out. Similarly, many local authorities provide no accommodation for children who should be transferred. The protocol described below is designed to ensure that both agencies comply with their legislative duties and provisions.

There are restricted circumstances in which the police can insist that transfer must be to secure accommodation. These are:

- the child is aged 12-16 years inclusive
and
- The police consider that 'keeping the child in other local authority accommodation would not be adequate to protect the public from serious harm from him or her' where 'serious harm' means '...death or serious personal injury, whether physical or psychological, occasioned by further such offences committed by him'⁴⁸

Given the above, one would expect such requests to be made sparingly. Should the police certify that secure accommodation is required, the local authority does not have an absolute duty to provide it, but they cannot ignore the request or refuse to provide it on the grounds of cost.⁴⁹ However the local authority would have to satisfy itself that the statutory grounds for the use of secure accommodation are met and make an assessment independent of the police request.⁵⁰

Related to the issue of local authority accommodation is appropriate adult (AA) provision, particularly out-of-hours. A lack of AA provision can lead to delays in police decision-making and to children and young people being detained for longer than necessary. YOTs have been responsible for AA provision since 1998. A recent thematic report on Appropriate Adult provision recommended that YOTs work with their AA provider to '*ensure call-out arrangements are designed such that children and young people are detained in police cells for the minimum amount of time*'⁵¹.

It can be seen, then, that it is essential anyone acting as an Appropriate Adult on behalf of the YOT should have a thorough knowledge of legislation in relation to the granting

⁴⁶ s38(1) Police and Criminal Evidence Act (1984)

⁴⁷ s38(7) Police and Criminal Evidence Act (1984)

⁴⁸ s38(6) Police and Criminal Evidence Act (1984)

⁴⁹ R (on the application of M) v Gateshead Council (2006) EWCA Civ 221

⁵⁰ These are that "any accommodation other than that provided for the purpose of restriction of liberty is inappropriate because: (a) The child is likely to abscond from such other accommodation, or (b) The child is likely to injure himself or other people if he is kept in any such other accommodation". Additionally if the child is 13 or under, the approval of the Secretary of State is required. Paras 4 & 6 Secure Accommodation Regulations 1991 as amended by the Children (Secure Accommodation) regulations 2012

⁵¹ Criminal Justice Joint Inspectorate (2011) *Who's looking out for the children? A joint inspection of Appropriate Adult provision and children in detention after charge*

or denial of bail, and the provisions that apply following charge if bail is refused. They should also possess the necessary personal qualities and be appropriately trained so they feel comfortable to challenge police decisions where required. They clearly should attempt to influence the police so that unconditional bail is not refused unnecessarily, and to ensure that any conditions attached to bail address issues relate to the offending and are reasonable and proportionate. They should be well supported when acting in the role (and at all other times) and be familiar with the local processes and procedures for requests for and placement in the different types of local authority accommodation and should be clear about what role (if any) they may have in them.

To minimise the risk of the police refusing bail, it is suggested that it is imperative that a protocol to ensure proper communication between each of the relevant parties is in place that deals explicitly with the issues of bail. Such protocols will obviously reflect local circumstances but should as a minimum:

Practice points

- include a requirement that the police notify the YOT (whether or not the latter provide the Appropriate Adult service) at the earliest opportunity of any cases where there is a prospect that bail may be refused and detention after charge is likely. The information should provide for the effective monitoring of overnight detention of children refused police bail and include
 - personal details inc age, gender and ethnicity
 - alleged offence(s)
 - who acted as AA (YOT officer, volunteer scheme, parents)
 - legal representation
 - outcome
 - reasons if bail refused
 - reasons if transfer not made and child detained in police station
 - whether a support package was offered and, if so, what it involved

This should be done for **all** cases where the child is refused bail after charge and is detained pending court, including cases where family members or carers acted as AA.

- identify a YOT point of contact, particularly for 'out of hours' referrals, even if they are not responsible for AA provision during this period. Early notification will allow the YOT to make representations regarding the granting of bail; develop a bail support package where that is appropriate which will meet the grounds for objection to unconditional bail; identify suitable accommodation in the event bail to a home address is denied; find out what secure accommodation is available where the criteria for such a placement are satisfied.
- ensure there is ready access ie through 'out posted' staff/Triage services⁵² to bail support package services at the point of police decision making at all times for children detained in a police investigation
- ensure the local authority provides 'looked-after' placements for PACE transfers. This may be more viable via joint commissioning with neighbouring authorities where capacity is an issue – in which case it is essential that the joint commissioning agreement specifies the arrangements for escorting and supporting children – to placements and to subsequent court appearances.
- ensure the routine completion of the certificate that custody-suite staff must

⁵² See p 9

complete for the court every time a child is detained overnight. This makes it clear to courts that the reason for the overnight detention was solely the lack of accommodation and not risk to the public.

- encourage local authority 'out of hours' staff to engage with custody officers and challenge requests for secure accommodation where non-secure accommodation would be appropriate. It may be possible to involve your YOT police staff in relationship-building.
- develop a system of 'post – mortems' for cases not transferred to see whether the detention was compliant with the legislation and anything could have been done to meet objections to transfer. Post-mortems should involve meeting with the Police and CPS to discuss how more children could be given bail and should examine the use of bail support and identify any gaps in service provision.
- ensure that Appropriate Adult training includes a thorough knowledge of legislation in relation to the granting or denial of bail, and the provisions that apply following charge if bail is refused. Appropriate Adults should have the necessary personal qualities and be appropriately trained so they feel comfortable to challenge police decisions where required.
- ensure that the issue of transfer to local authority accommodation – and the processes to achieve this – are included in the training of appropriate adults so they are aware of the issues.
- give clear guidance on the role of volunteer AAs in negotiating with the police on behalf of the local authority in relation to bail and requests for transfers under s38(6) Police and Criminal Evidence Act (1984) after charge. Where the volunteer is not expected to engage in such negotiations, the mechanisms by which the police can make the requests should be clear and explicit.
- indicate where the responsibility lies within the local authority for identifying accommodation, to allow transfer in accordance with National Standards and ensure the 'sufficiency requirement' under Children Act Guidance is met.⁵³ ■

The NAYJ has proposed, as a minimum, the following strategies to prevent overnight detention⁵⁴.

- Fully implement the change in the law resulting from the judicial review bought by Just for Kids Law and the amendment to the Police and Criminal Evidence Act (1984) which raised to the age of 18 years those defined as an 'arrested juvenile'.⁵⁵
- Increasing the clarity of the provisions and their **mandatory** nature of transfer to local authority accommodation by the production of national guidance which will:
 - make explicit the presumption that it will happen
 - emphasise that 'impracticable' equates to physical impossibility, not difficulties in identifying local authority provision
 - re-state the high threshold that exists for police requests for secure accommodation
- Establishing a comprehensive national monitoring of the extent to which children are held in police cells overnight by the Police in conjunction with local YOTs.
- Ensure there are detailed protocols giving the procedures and responsibilities of each of the relevant agencies to ensure proper communication and cooperation. They should deal explicitly with the issue of bail and the mechanisms available for effecting transfer to local authority accommodation.

⁵³ Available at www.gov.uk

⁵⁴ Bateman, T.,(2013) "Detaining children at the police station: a failure to comply with legislation" NAYJ Briefing available at www.thenayj.org.uk

⁵⁵ R (HC) v Secretary of State for the Home Department [2013] EWHC 982 (Admin); [2014] 1 W.L.R. 1234; [2013] Crim. L.R. 918; [2013] A.C.D. 94

● Monitoring remand decision-making in the court

Because their staff already collect extensive data, YOTs have a useful overview of court decision-making in each locality. This gives them a unique advantage over other agencies so far as monitoring remands is concerned. Other agencies may have members of staff who take a 'lead' in youth matters but they are not youth court/youth justice specialists. Lay magistrates may specialise but rarely if ever sit in the court every week. Thus YOT staff are in a unique position to analyse patterns of bail decisions, identify specific trends and develop strategies to reduce bail refusal. Their analysis of patterns of remand outcomes should be disseminated to partner agencies where relevant.

In some cases the YOT may not currently collect all the following data. In that event, an effective remand strategy will involve the development of systems that allow such recording. Moreover the following list is not intended to preclude monitoring of other information that may be relevant in the local context: eg whether child is supported in court by an adult. If you don't have this information, you might want to create recording systems, to help you start collecting the information you need.

The key data to collect **and analyse** are:

- Data on **all** bail decisions ie:
 - cases disposed-of at the first hearing so there is no bail decision
 - cases where bail is granted and whether it is unconditional bail, conditional bail with no YOT involvement or conditional bail with YOT intervention
 - cases where bail is refused, ie remands to local authority accommodation and remand to Youth Detention Accommodation
- Age, gender, ethnicity and looked-after status of child in each case
- Who accompanied the child in court
- What the offence was (or, where there were more than one, the most serious)
- Whether any offences were committed whilst on bail
- Previous offending history
- The name and status of the court (Youth Court, Magistrates Court, Crown Court) and whether the court was the defendant's 'home' court or (s)he was appearing elsewhere
- Which day of week the child appeared
- The magistrate(s), district judge or Judge before whom the child appeared
- The CPS representative and whether they are a specialist Youth Prosecutor
- The reasons given in court if bail was refused. (It can sometimes be useful additionally to note the court officer's perception of why bail was refused. For example the grounds for refusing bail may be the risk of failure to answer to bail, but the lack of accommodation may be the determining underlying reason for the court deciding there was such a risk.)
- Whether a bail support package was offered on the first appearance and, if so, what were the components of the package
- Whether a bail support package was subsequently offered, what was in it and what was the outcome
- Whether a remand to local authority accommodation was canvassed and what support package (if any) was offered
- If so, the reasons given by the court for not accepting it
- The length of the remand to secure placement when bail was refused.

- The final disposal

Routine analysis of the above will allow the YOT and its partners to determine:

- Patterns of bail decisions – eg the proportion of remand decisions that result in particular remand and sentencing outcomes.
- Comparison with national bench marks.
- Offence types and/or previous individual histories that put young people at risk of bail refusal.
- The profile of children at particular risk of bail refusal.
- Any court-related factors that may help to explain patterns of bail-refusal; for example the court, court-type, specific days of the week or certain personnel.
- The association (if any) between the grounds and/or reasons given for a refusal of bail and the particular circumstances of the children in question.
- The YOT performance – how often was support offered, how often was the offer accepted and what forms of support package are most successful in preventing a potential refusal of bail.
- The average length of remand.
- Changes over time in relation to all of the above.

Consideration should also be given to what data should be circulated to partner agencies in the youth justice system to encourage informed decision-making.

Practice points

- Establish effective monitoring systems.
- Dedicate time for staff, particularly court staff, to collect data and to contribute to its interpretation.
- Circulate key points to YOT Management Board and partner agencies in the local youth justice system. ■

• Ensuring full and thorough preparation for the first court appearance

The YOT's ability to influence the court's decision-making in relation to remands is enhanced by a full and thorough preparation for a first court appearance. Such preparation requires a thorough knowledge of the basis on which the court will make its decision. In deciding whether or not to grant bail, the court will consider a range of information including:

- The nature and seriousness of the offence (and the probable means of dealing with the child for it).
- The character, associations and community ties of the child.
- The child's previous record (if any) of complying with the requirements of bail.
- The strength of evidence against the defendant (except where the adjournment is for a pre-sentence report).

- Whether the alleged offence is indictable or triable either way in the case of an adult and the defendant was on bail in criminal proceedings on the date of the offence
- Any other factor the court considers relevant

Based on the above information the court then makes a judgement about whether there are substantial grounds for believing that the child would:

- Fail to surrender (but if the offence is non-imprisonable there has to have been a previous failure)
- Commit a further offence
- Interfere with witnesses or obstruct the course of justice

If such grounds exist, the court may deny bail – although it is not obliged to do so.

The court may also deny bail if the court is satisfied:

- That the young person should be kept in the secure estate for his/her own protection, welfare or interests
- The young person is already serving a sentence in the secure estate
- There is insufficient information on which to make a decision about the granting of bail
- The young person has been released on bail and subsequently arrested for absconding, breaching bail conditions or because a surety has been withdrawn
- When a case is adjourned for enquiries or a report and it appears to the court to be impracticable to undertake these without keeping the young person in the secure estate

The interaction between 'fact' and 'judgement' can be seen where a child has been thrown out of home and is moving between temporary stays with different friends. Although being of 'no fixed abode' is not in itself one of the grounds for refusing bail, the court's judgement may be that this increases the probability of a failure to surrender to bail at the next appearance. Such a situation may also raise difficulties should a court wish to impose a curfew as a condition of bail.

Knowledge of circumstances like those described above provides a framework for preparing for the court hearing. The YOT should identify those cases where the child's circumstances are such that the court may consider refusing bail and then prepare to intervene in order to address objections to bail. For example should there be previous instances of failure to comply with bail conditions, then gathering information as to why this occurred will be important and allow YOT staff to consider how the court might be reassured that it is unlikely to happen again. So in the particular circumstances described above, involving accommodation difficulties , the fact that the child's parents ejected them from the family home is relevant to the court's decision and good practice would involve the YOT indicating to the court what services can be provided to facilitate and support a return home or to find suitable alternative accommodation.

Although appropriate intervention will reduce such cases to a minimum, children refused bail by the police are likely to be at risk of having bail refused at their first court appearance. Those denied bail by the police must appear in court on the next sitting day and arguably this puts pressure on YOT resources and processes with little time to undertake the assessments required and explore what options can be offered to the court. It would be wrong, however to assume that the court will necessarily refuse bail simply because the police have done so. Care should be taken, prior to the first court appearance, to identify all children who might be at risk of bail denial. This should be done routinely at planning meetings held before 'routine' youth court days.

Should a child be denied bail or have disproportionate conditions imposed, then an appeal should be considered. YOT staff should discuss the matter with the child's legal representative, highlighting how the grounds for the denial of unconditional bail would be addressed within a bail support package. Notice of intention to appeal must be given orally at the conclusion of the court proceedings, with written confirmation served on the court within two hours of the end of the hearing. The child will be denied bail until the appeal is heard. The crown court must hear the appeal within 48 hours of the oral declaration of intent being made. It should be noted that the prosecutor can also appeal against the granting of bail, but only if he or she made representations against the granting of it before the court made its decision.⁵⁶

For children at risk of remand to the secure estate, assessments for suitability for bail support should be completed in advance of remand hearings. National Standards state that for children remanded into secure placement those involved in the case should "...consider a Bail Support Scheme or Remand to Local Authority Accommodation package and, if appropriate, present it at the next court appearance or before a judge in chambers".⁵⁷ Indeed under the Legal Aid Sentencing and Punishment of Offenders Act, magistrates must consider all alternatives before making a remand to the secure estate.⁵⁸ To ensure that children don't end up remanded to the secure estate whilst awaiting a bail support assessment these should be completed as soon as possible.

Practice points

The YOT should:

- Ensure that there are effective communication systems in place to ensure that they are made aware of any child refused bail by the police prior to their court appearance. This information should include the offence(s) the child is charged with, the grounds for the police refusal of bail and whether or not the child was legally represented. (If not, the YOT should ensure that the child will have legal representation in court.) It should also include details of any possible accommodation difficulties; it may be important to contact the child's family/carers in advance of the hearing to ensure their attendance – especially if they did not attend at the police station – and confirm they are happy to have the child home or whether there is the possibility of accommodation within the wider family.
- Ensure that all bail support assessments are completed swiftly and reports are submitted to court alongside the bail application by the defence solicitor, as per YJB case management guidance. Such reports must be in writing "where custody is being considered" and should be in all cases.⁵⁹
- Undertake the same exercise prior to the first court appearance of any child granted bail at the police station where there is considered to be a risk of denial of bail by the court.
- Prepare for court by identifying all children who may be at risk of having bail refused and, where possible, begin work on the assessment (or update an existing one) in order to develop a support package that addresses the likely objections to unconditional bail and supports the granting of bail or a remand to local authority accommodation in an open placement. This may involve flexibility in the duty system to cover weekend courts, evening investigations and early mornings prior to court.
- Produce a support package for the first appearance in all cases where there may

⁵⁶ Bail Amendment Act 1993 s1

⁵⁷ National Standards for Youth Justice Services NS 3.14 p15

⁵⁸ ss98 & 99 Legal Aid Sentencing and Punishment of Offenders Act 2012

⁵⁹ Case Management Guidance Section 3: Bail and remand management

be a denial of bail, especially where there is a possibility of this leading to a secure placement. If the court does not accept the initial proposal, an attempt should be made to have the case adjourned so that the package can be modified and re-presented later the same day.

- Ensure that all support packages offer the least restrictive option consistent with and proportionate to the child's offending and circumstances. A support package should only be offered if it is clear that one is needed.
- Ensure that Conditions of Bail are:
 - Exact, which will assist the child in compliance and the YOT in establishing breach.
 - Enforceable, which will also assist in compliance and establishing breach.
 - Effective, in addressing the grounds for objections to bail.
- develop local agreements with the local CPS, particularly the youth specialist prosecutor and other prosecutors who regularly appear in the youth court, under which discussions take place prior to the court sitting in relation to all children at risk of bail refusal. YOT staff may then be able to discuss objections to the granting of unconditional bail and negotiate with the CPS for the withdrawal of any recommendation for refusal of bail/ remand to the secure estate, offering instead an appropriate support package which directly addresses the grounds of the prosecution's objection to bail. If the CPS still recommend refusal of bail, YOT staff should ensure that they have a remand placement with support package available to avoid a remand to the secure estate. This should be discussed with the CPS.
- Defence solicitors can have a huge influence over a remand decision. If they have sufficient information, and a strong bail package to present, they have every chance of persuading the bench to grant bail. It is therefore important to develop a good working relationship with the defence solicitors appearing most regularly in the local Youth Court(s). It may be helpful to meet with them before all court bail decisions – especially where there is a risk of a child being denied bail – and to give the defence as much relevant information as possible in advance of the court hearing, including details of the bail support packages and other (non-secure estate) remand options available. PRT's Out of Trouble programme commissioned Just for Kids Law to produce information and training for defence solicitors.
- Consider the prospects for appeal in all cases of remand to a secure placement or where disproportionate conditions are imposed. ●

● Ensuring full use of all the alternatives when bail is denied

The grounds for the denial of bail are set out in the preceding section. If a court decides to deny bail then the 'default' position for all children aged 10-17 is that they are remanded to local authority accommodation and placed in open accommodation provided by the local authority.⁶⁰ The child becomes looked-after by the local authority, and should receive the full range of services to which other looked-after children are entitled. The designated local authority, identified by the court and named on the remand warrant, has responsibility for ensuring the child appears before the court. The authority has discretion as to where to place the child, although the court may impose a condition that the child should not be placed with a named person to prevent placement at home.

A child made the subject of a remand to Local Authority Accommodation can otherwise be placed back at home as the local authority has full placement discretion. The NAYJ is of the view that practitioners should be mindful that the court will have considered this possibility (and rejected it) in the bail decision and take account of the reasons. NAYJ also considers that if the intent is for a child to return home, then the YOT should ask for bail with support. It has to be remembered that for a child to be remanded to Local Authority Accommodation, bail must have been denied and technically they appear as if from a secure placement, even though they have not been placed in one. Accordingly if a child who has been remanded to Local Authority Accommodation is to be placed at home this should only be where there are overwhelmingly good grounds to do so, which are clear and defensible and which should be explained to the decision-making court. Of course the court can prevent such a placement by making a condition not to live with a named person or people or by placing a suitably-worded requirement on the local authority which prevents this happening.

Any condition that can be placed on a child on bail can be placed on a child remanded to Local authority accommodation (RLAA). The court can also place requirements on the designated local authority, although this provision is rarely used. Breaching any of the conditions renders the child liable to arrest without warrant to be detained to be placed before the next available court for reconsideration of the remand decision.

Most under-18s do not need specialist accommodation when on bail or remand, but some will be living in unsuitable accommodation or are, to all intents and purposes, homeless. Such children when charged with an offence are potentially at risk of remand to the secure estate because they are homeless, although having no fixed address is not in itself grounds for bail denial. In fact they are likely to meet the criteria of the Southwark judgement which states that vulnerable homeless children should be both accommodated and looked-after⁶¹. There are other children, such as those accommodated in bed and breakfasts and hostels, those in residential care and those with family problems, whom the court will not want to bail to the 'home' address at which they were previously resident. There is very little specialist accommodation for those on bail, though some areas offer fostering by specially trained carers and others well-supported hostels. It is important that local authorities should consider the development of such services. Because it is necessary to respond very quickly to the need for a place it is important that any provision remains 'dedicated' for the use of children in trouble with the law and does not, over time, become absorbed into the wider 'looked after' system of the local authority. Although for an individual local authority the numbers requiring such a service may be low, such a service may be viable if commissioned on a 'cross authority', 'consortium' basis.

Examples of longstanding single authority remand fostering schemes exist in Blackburn-with-Darwen (which re-commissioned its service in April 2014) and Sheffield, whilst the charity Action for Children has been offering remand fostering placements in Hampshire, Portsmouth, Southampton and the Isle of Wight (previously Wessex YOT) since 1998. Foster carers and staff there are specifically recruited to meet the needs of children in the youth justice system, and are expected to accommodate electronic tagging and curfews where these are conditions of the remand, accompany the child to court and act as an appropriate adult if needed.

In 2010, York University published an evaluation of the YJB Intensive Fostering Pilots in Wessex, Stafford and London.⁶² Although this involved children who had been sentenced, it showed that children placed in the three Intensive Fostering (IF) pilots were far more likely to be in education or training one year after entering their placements (70%) against the comparison group who were living in the community at that point (30%). Re-

⁶¹ The Southwark Judgement made by the Law Lords in May 2009, obliges children's services to provide accommodation and support to homeless 16 and 17 year olds. So a homeless teenager should now have section 20 looked after status.

⁶² Biehal, N., et al 2010 "A Report on the Intensive Fostering Pilot Programmes" London, YJB

offending rates in the 12 months after sentence for 'substantive' offences (ie excluding breach) for the IF group were just over half that for the comparison group, and in the 12 months after the start of interventions the community based group committed five times the number of substantive offences that the IF group did, with an average gravity score of twice that of the IF group. However there was evidence that over time after the children had left their foster placements, the effects of the intervention diminished with eventually no significant difference in reconviction rates.

Since 2002 there has been a big reduction in the use of remand to non secure local authority accommodation. This remand option fell from 2.24% of all decisions in 2002/03 to 1.6% in 2012/13, with a fall in the number of episodes of 14% between 2009/10 and 2012/13.⁶³ This suggests that courts were not making full use of all the options available to them when making decisions about bail refusal and this may in turn be a consequence of concerns on the part of the court that children remanded to local authority accommodation are frequently returned home.⁶⁴ If the use of remand to the secure estates is to be reduced to a minimum it is incumbent on YOTs and local authorities to ensure that services are in place to make RLAA a credible remand option with the court.

Remand to youth detention accommodation

Where a child aged 12-17 years is refused bail, the court can order a remand to youth detention accommodation providing that additional criteria are met.⁶⁵ Such a remand is only available where the court considers such a placement is necessary to protect the public from death or serious injury or to prevent the child committing further imprisonable offences. The child must also usually be legally-represented although there are exceptions to this.⁶⁶ To qualify for a remand to youth detention accommodation the case must satisfy one of the two following sets of criteria:

First condition

- the offence has to be a violent or sexual offence or one for which the maximum sentence in the case of an adult is 14 years or more

Second set of conditions

- the offence is an imprisonable one
- it appears to the court that there is a real prospect that the child will be sentenced to a custodial sentence for the offence mentioned in section 91(1) for one or more of those offences.
- the child has a history of:
 - absconding whilst remanded to local authority accommodation or youth detention accommodation and committing one or more offences whilst so remanded
 - being involved in other offences (alleged or convicted) which form a history of committing imprisonable offences whilst on bail, remanded in local authority accommodation or remanded to youth detention accommodation

Children made subject to a remand to youth detention accommodation are treated as

63 Youth Justice Statistics 2012 – 13: Supplementary Tables available at <https://www.gov.uk/government/publications/youth-justice-statistics>

64 Anecdotally it has been suggested placements back home described above have, in the past, led to the status of RLAA into a degree of disrepute, which possibly has influenced its use

65 Children aged 10-11 can only be placed in secure accommodation before conviction if they are RLAA and the local authority applies for a secure accommodation order under s25 Children Act 1989. This is a complex procedure

66 If not represented this is because:

- their conduct or
- because it appeared the child's financial resources were such that the child was not eligible for such representation – they applied for representation but it was refused because it appeared the child's financial resources were such that the child was not eligible for such representation
- after they were informed of the right to apply for such representation and having had the opportunity to do so, the child refused or failed to apply.

becoming 'looked-after',⁶⁷ with modified Children Act regulations governing their access to the services generally available to looked-after children.⁶⁸ There are specific sections in Children Act Guidance relating to those subject to a remand to youth detention accommodation.⁶⁹ Youth detention accommodation (YDA) is defined as secure children's homes (SCHs), secure training centres (STCs), young offender institutions (YOIs) or any accommodation specified by order of the secretary of state⁷⁰.

Notwithstanding the 'looked-after' status of a child subject to such a remand, the actual placement decision is made by the YJB Placements team. The different types of YDA, with differences in their regimes and staffing levels, mean practitioners must be scrupulous in ensuring that any relevant information relating to the child's vulnerability is recorded on the YJ 'Placement Information Form' (PIF). As this includes making an 'initial placement recommendation' it is crucial that any matters that could present a risk of harm to self and/or risk of harm to others be recorded to support any recommendation, as the PIF is the only document used in determining the most suitable placement for a child. (It explicitly states that other documents will not be considered.) All children under 15 and older girls and young women are placed in SCHs and STCs, not YOIs. It is important that where YOTs consider that a boy aged 15 and above would be vulnerable if placed in a YOI the concerns are made explicit to the YJB Placements team at the earliest opportunity. This is because of the removal by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 of the power of the court to determine whether it considers such a boy vulnerable.⁷¹ If it did determine the boy vulnerable the court would have the power to make a court-ordered remand to the secure estate if a place in a STC or LASCH was available.

If a place were not available then the court would have to remand to a young offender institution, but the status of being determined vulnerable could be used by practitioners to seek a shorter remand period, particularly if there was likely to be a suitable place the next day or within a few days. In this context the suggestion from the Placements Team that practitioners should contact them for early discussion where there is a possibility of a remand to youth detention accommodation has particular significance in obtaining the most appropriate placement for such vulnerable children. Local policies relating to participation for children and their parent should be followed.

Reviews of placements can be requested.⁷² Within this review procedure is the facility for anyone **directly** involved in the case to seek a review if they are unhappy with the placement decision.⁷³ Should an applicant remain dissatisfied after review, there is a further right of review on application to the YJB Deputy Chief Executive – Community or, in the case of children in Wales, to the Head of YJB Cymru.⁷⁴

The local authority meets the cost of remand placements to youth detention accommodation; arrangements for which can be found in the Ministry of Justice (MoJ) and YJB document "Payment and cost recovery arrangements in respect of children detained on remand in youth detention accommodation".⁷⁵

⁶⁷ s 104 Legal Aid Sentencing and Punishment of Offenders Act 2012.

⁶⁸ DfE (2014) "Looked after children and youth justice: Application of the Care planning Placement and Case Review (England) regulations 2012 to looked after children in contact with youth justice services" available at www.gov.uk/government/publications

⁶⁹ Such as those relating to Care Planning, Transitions to Adulthood, securing sufficient accommodation for looked after children, Local authority responsibilities towards former looked after children in custody, Independent Reviewing Officers Handbook, available at www.gov.uk

⁷⁰ s102(2) Legal Aid Sentencing and Punishment of Offenders Act 2012

⁷¹ s23 Children and Young Persons Act 1969 as amended by the Crime and Disorder Act 1998 and the Criminal Justice and Police Act 2001

⁷² Details available at <http://www.justice.gov.uk/downloads/youth-justice/custody/placement-review-process.pdf>

⁷³ Defined as the child and/or their parents, the designated local authority (remand only), the local authority where the child is subject to a care order, the establishment the child is placed in, the child's Legal representative, the Youth Offending team – acting on behalf of the child.

⁷⁴ Para 14.5 <http://www.justice.gov.uk/downloads/youth-justice/custody/placement-review-process.pdf>

⁷⁵ Available at <http://www.justice.gov.uk/downloads/youth-justice/custodial-remand/payments-cost-recovery-children-remand.pdf>

Practice points

- Always present a non-secure RLAA package at the earliest point for those who have been refused bail.
- A child remanded to local authority accommodation should only be placed back at home where there are overwhelmingly good grounds for doing so. Those grounds should be clear and defensible and should be explained to the decision-making court.
- Try to ensure that children are not ‘set up to fail’ where conditions are associated with a RLAA. This can happen if too many conditions are imposed or the conditions are unrealistic.
- Endeavour always to provide a stable address for those who are homeless. Bed and Breakfast establishments should not be used.⁷⁶
- Try to understand any concerns the court may have about the child’s existing accommodation and offer solutions that may involve extra support for the child and/or work with the family or exploring alternative addresses.
- Ensure that looked-after children whose placements have broken down are provided with an alternative by the responsible local authority
- Develop some dedicated, specialist accommodation – either remand fostering or beds in well-supported hostels – where places will be available at minimal notice and staff are trained to work with this group of children. Because of numbers this may be more practical to undertake on a cross authority commissioning, consortium basis.
- Where concerns about possible gang activity are a consideration for the remand decisions of your local court, talk to your local authority about commissioning suitable accommodation placements out-of-area. Cross-authority commissioning could also play a role here.
- Whenever there is a remand to youth detention accommodation, representation should be made to the YJB Placements Team over any concerns about a child’s vulnerability and clearly stating what type of accommodation is considered most appropriate to meeting their specific needs.
- When there are concerns about the appropriateness of a placement the provisions of the review process should be used. ■

● Reducing breach of bail and remand conditions

It is inevitable that some children on bail or RLAA will breach, either by committing another offence or by failing to comply with their bail conditions. Once a child breaches conditional bail a court has to reconsider the granting of bail and what conditions it considers it should impose. A child is more likely to be given a remand to the secure estate - and more likely to get a sentence with placement in the secure estate - if there are repeated breaches of conditions. It is important to consider the validity of what the child has to say about the reasons for the breach. For example, it can clearly be problematic if a child has reporting conditions to a place which is seen as the ‘territory’ of a group or ‘gang’ to which they are not affiliated. Non-association conditions can also be potentially problematic – especially where children live a few houses away from each other.

⁷⁶ See the statutory Guidance from the DfE (2010) “*Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation*” para 2.10 Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/8260/Provision_20of_20accommodation.pdf

Practice points

- Ensure conditions are as simple and comprehensible as possible and check that they are understood by the child.
- Listen to the reasons given by the child for a condition being breached.
- Ensure that those most likely to breach are placed in suitable accommodation and well-supported and supervised.
- Ensure that children are accompanied to court where there is an assessed risk of non-attendance.
- Where there is a record of compliance with bail conditions, remand review should consider whether conditions can be relaxed in any way during the pre-sentence period (see below).
- Ensure that the conditions are clearly linked to the reasons for refusal of unconditional bail
- Where there is repeated breach of a particular condition but no further offending, consider whether it is a necessary condition or whether it can be dispensed-with
- Analyse the rate of breach of conditions and court outcomes to see if there is any patterning to which conditions are breached. ■

• Ensuring a high quality service for all children

There are groups of children who are over-represented within the youth justice system as detailed below.

Looked-after children

The over-representation of looked-after children – throughout the youth justice system and especially within the secure estate – is well documented⁷⁷. Within that population of looked-after children there are a number of children placed away from their home area who are subsequently arrested, charged and in some cases detained by the police ‘out-of-area’. They may appear before a court with which their YOT has few or no links, or whose court duty service is provided by a YOT that has little knowledge of them and their background. Even if these children are known to their home YOT, there is no guarantee that the YOT will know about their court appearance with the result that, when they appear in court – either for a bail decision or for the case to be heard – the court may have little information about them. One can see all too easily how such children might be at elevated risk of being denied bail and placed in a secure facility.

It is important that children who are already looked-after are not more likely to end up in a secure placement whilst remanded because their care status means the option of RLAA with an open placement is seen as in some way ‘exhausted’. Regrettably, we cannot say exactly what proportion of the children so placed are looked-after children; the information is apparently not routinely collated. However, strong anecdotal evidence suggests that a disproportionately high number of those on remand in the secure estate are, or were previously, looked-after children. Some of those so remanded may have been charged with an alleged offence committed in their placement, possibly removing what would ordinarily be their bail address. Frequently, links between looked-after children’s services and the YOT are weak. Strengthening them may help reduce remands to the secure estate. Attendance of the case-holding social worker at the remand hearing, to represent the corporate parent, could prove significant in avoiding a remand to the secure estate. They would have detailed knowledge of the child’s care plan and the

⁷⁷ Nacro (2012) “Handbook on reducing Offending by Looked After Children” Nacro, London;

ability to structure it to respond to any concerns the court might have over granting bail, and reassure the court that the corporate parent is aware of its responsibilities.

Practice points

For children dealt-with by the YOT in their home area

- Analyse what proportion of denials of bail comprise children with a history of being looked after.
- Talk to senior children's services management about how to reduce remands to the secure estate.
- Have the subject considered by the YOT Management Board at regular intervals.
- Encourage the child's key social worker to attend the remand hearing, and be prepared to present a care plan to accommodate and supervise the child while on bail that complements any package offered by the YOT.
- Ensure that the court knows that the child is looked-after and has the full support of children's services.
- Ensure that normal practice is not to routinely close a child's placement if they offend, particularly if the placement is with a provider external to the local authority itself. This should be part of any service level agreement with the provider.

For children looked after by other local authorities, where the YOT is acting as a 'host'

- Analyse how many out-of-area cases result in remands to the secure estate. This applies equally to 'your' children placed in other areas and those from elsewhere appearing in your court – who may be known to other YOTs. Work out which other YOTs are most often involved.
- Do as you would wish to be done-by. Give out-of-area children represented by your staff as good a service as possible. Inform their YOT as early as possible. Encourage them to email you information, and offer a bail package. If the police refused bail, find out why and ask for an adjournment if you have insufficient information.
- Set up a protocol with the other YOTs most frequently dealing with your children (and vice versa). Detail how and when information will be shared and what service will be offered by the YOT.
- Where possible, get a member of your YOT to attend the relevant out-of-area court if it looks likely that bail will be refused.■

Black and minority ethnic (BME) children

As with looked-after children, the over-representation of children from BME communities has been well documented over many years and the reasons for it endlessly debated.⁷⁸ Within this general trend, in recent years, we have seen a growing over-representation of Muslim children.⁷⁹ More recently still it has been shown that the over-representation of children from ethnic minorities at the point of entry to the system is largely (though not

⁷⁸ For example Pitts, J., (1986) "Black young people and juvenile crime: some unanswered questions" in Matthews, R., and Young, J., (eds) "Confronting Crime" London, Sage; Home Office (1992) "Race and the criminal Justice System" London, Home Office; Penal Affairs Consortium (1996) "Race and criminal Justice" Lindon, Penal Affairs Consortium; Chigwada-Bailey, R. (1997) "Black Women and the Criminal Justice System" Winchester, Waterside Press; Dholakhia, N. And Sumner, M., (1993) "Research, Policy and Racial Justice" in D. Cook and B. Hudson (eds) "Racism and Criminology" London, Sage

⁷⁹ HM Inspectorate of Prisons/Youth Justice Board *Children and Young People in Custody 2012-13* Norwich, TSO

quite entirely) preserved as those children pass through the system. As a result, children from BME communities are more likely to 'progress' rapidly through the system and enter the secure estate.⁸⁰

It may be significant, when considering their over-representation at the point of entry into the system, that children from BME communities are more likely to be stopped and searched by the police. This, too, has been well-documented over many years but if anything the problem appears to be getting worse. One recent study, conducted over a two-year period, found that searches of white children had risen by a third whilst searches of children from ethnic minorities had doubled.⁸¹ Whilst there are no conclusive research findings as to the 'why', it is NAYJ's firm view that the overrepresentation of children from ethnic minorities is one of the most pressing issues affecting the youth justice system and undermines its claim to be delivering genuinely just outcomes. Accordingly YOTs should ensure that their monitoring systems are able to identify and address local patterns of over-representation.

Practice points

- Monitor the ethnicity of all children who are subject to bail decisions by local courts and establish the extent of any disproportionate outcomes, especially where bail is refused and among those remanded to youth detention accommodation.
- Establish a process where all cases of BME children remanded to youth detention accommodation are examined in detail, at a senior level, to better understand what is happening in them.
- Use the results of the above enquiry to work with practitioners and partner agencies in the court to understand the reasons for dis-proportionality and find ways of reducing it.
- Use the results of the above enquiry to inform discussion by the YOT Management Board at regular intervals. ■

Mention here should be made of the YJB Diversity Toolkit, available at <http://www.justice.gov.uk/downloads/youth-justice/yjb-toolkits/disproportionality/disproportionality-toolkit-aid.pdf>

This provides an easy to use 'Assess and Improve Document' the results of using which can be shared with partner agencies in the local youth justice system.

Table 6 Percentage of white and BME groups in the wider population and the youth justice system⁸²

	White	Asian/Asian British	Black/ Black British	Mixed Heritage
Under 18 population 2011	79.6%	9.2%	4.7%	4%
Youth offending Population	81.4%	4.3%	8.1%	3.5%
Court population	78.7%	4.7%	10.1%	4.3%
Custodial population	68.9%	6.5%	16.8%	6.3%
Long term detention	51.7%	8.9%	30.6%	6.3%

80 Feilzer, M and Hood, R.,(2004) "Differences or Discrimination?" London, Youth Justice Board

81 Fitzgerald, M., Stockdale, J. E., and Hale, C., "Young People and Street Crime: Research into Young People's Involvement in Street Crime" London, Youth Justice Board; May, T., Gyateng, T., Hough, M., et al (2010) "Differential treatment in the youth justice system" London, Equality and Human Rights Commission; May, T., Gyateng, T., and Bateman, T., (2010) "Exploring the needs of young and Black and Minority Ethnic offenders and the provision of targeted interventions" London, Youth Justice Board

82 Bateman, T. (2014) "Children in conflict with the Law – 2013" NAYJ available at: http://thenayj.org.uk/wp-content/files_mf/ayjbriefingchildreninconflictwiththelaw1.pdf

Girls and young women

It has become increasingly apparent that girls and young women enter the formal youth justice system with less serious and less frequent offending behaviours and with fewer opportunities for informal diversion. It has also become clearer that the formal system has a decided male bias in terms of intervention design and responses to children in trouble with the law.⁸³ There remains a tendency to use custodial remand for girls and young women as a substitute for a secure placement based on welfare needs.

Other groups

Whilst there is clear evidence that looked-after children and children from BME communities are over-represented in the youth justice system, they are not necessarily the only groups affected. There is increasing anecdotal evidence from some localities that East European migrants are now overrepresented within the system. Elsewhere, the same appears to be true of children from travelling families who are significantly less likely to be granted bail by the police. Unaccompanied asylum-seeking minors have also allegedly been the subject of discriminatory treatment in a few localities.

We know too that a high proportion of those who enter the youth justice system have learning difficulties/disabilities, emotional and mental health problems and speech and language difficulties. The presence, in large numbers, of such children within the youth justice system presents a serious problem for all the agencies in that system. It is also a clear indication of a wider failure to protect and meet the needs of our most vulnerable children and demonstrates the need to think beyond the confines of youth justice when seeking to improve matters. Too often, the youth justice system is an inappropriate – and sometimes harmful and dangerous – prerequisite to accessing assessment and mainstream services.

The NAYJ believes YOTs should take all possible steps to ensure equity of access to justice and to combat over-representation and discrimination. This is an over-arching general principle but it applies particularly to remands.

In considering how best to act on this principle, it is important to bear in mind that the groups' worst- affected are not mutually exclusive. Take the example of an unaccompanied asylum-seeking 14 year old girl from the Sudan, who speaks no English. She would feature in monitoring reports as female, as a child from a BME community, as a looked-after child and as a child with speech and language difficulties – with the added potential for emotional difficulties having recently arrived in a new culture.

The crucial requirement here is for YOTs to be aware of the potential for overrepresentation; to actively seek to understand why it arises and how it operates at a local level, and to take whatever steps it can – on its own initiative and in partnership with others – to tackle the causes. Monitoring alone will not deliver equity of justice for vulnerable children.

• Reducing refusal of bail for children appearing in adult courts

The NAYJ takes the view that no child should appear before the adult courts. The reality, however, is different. Where children are refused bail by the police, they may make their first court appearance in an adult court, before magistrates with little or no youth training or experience - particularly if they appear on Saturdays or Bank Holidays. Saturday and Bank Holiday 'remand' courts can be doubly problematic if a District Judge is sitting with court practitioners who also have little youth court experience.

⁸³ Williams, J (2009) "Real Bad Girls. The origins and nature of offending by girls and young women involved with a court youth offending team and systemic responses to it" Doctorate thesis University of Bedfordshire

A similar problem arises when a child is jointly charged with an adult. If this involves a matter that eventually goes up to the Crown Court it is possible for a child to reach sentence without ever having appeared before a Youth Court. Given that magistrates outside the youth court have less knowledge of the complexities of child remand law, and of the potential vulnerabilities of under-18s in trouble with the law, Adult Courts are not best-placed to make decisions as to whether a child should be denied bail and placed in a secure placement. Most youth court magistrates are opposed to the practice of an 'all adult-trained' bench remanding children to the secure estate decisions.

The NAYJ considers there should always be a YOT presence in any adult court where a child is appearing - with access to the full range of services which would be available in a regular Youth Court.

Practice points

- Monitor carefully remand decisions made on children appearing in adult courts and establish what proportion result in a remand to the secure estate.
- Work with the Chair of the youth bench, the Chair of the adult bench and the bench legal manager to set up a system to ensure there is at least one youth court representative on every bench making a potential secure estate decision.
- Ensure a YOT representative is in any court in which a bail decision involving a child is being made. Where more than one YOT is in the catchment area of a particular court it is possible that this could be undertaken on a collaborative basis.
- Ensure that all bail options available to a regular Youth Court are also available to the adult courts when children appear in them. This should ensure that remand to a secure placement is not used as a 'stop-gap' until these options are available. ■

• The Review of bail decisions, and influencing placements

The NAYJ considers that in any case where a child has not been granted unconditional bail a process of Remand Review should take place before each subsequent court appearance. The purpose of this review is to consider whether any restriction of liberty can be relaxed. Clearly the more serious the initial restriction of liberty the more important the review but the process should operate not only where bail is denied and a child is remanded to youth detention accommodation but in all cases where bail is either denied or granted subject to conditions and restrictions. The aim is that wherever there has been a community-based intervention prior to sentence, the child should have the opportunity to appear for sentencing with a proven ability to respond to community-based options.

Practice points

- Once a child has had a degree of restriction of liberty placed on them during court proceedings then, before each subsequent court appearance relating to that case, consideration should be given to applying for a relaxation of the restrictions.
- Particular attention should be given to those denied bail and placed in a secure placement – and to the reasons given by the court when making this decision. A new bail or remand to local authority accommodation support package should be prepared which addresses those reasons.
- Particularly for those denied bail and placed in a secure placement the Remand review should consider the possibility of appeal to a higher court.

- For children denied bail and placed in secure facilities, remand review should consider returning the case to court as soon as practicable.
- If a child needs a mental health or other form of specialist assessment, reassure the court that this can be completed adequately while they are on bail.
- If a child has already been assessed as having special needs, make sure the bail package presented is appropriate to those needs. ■

● Conclusions

The NAYJ welcomes the reduction in the use of secure placements on sentence in recent years, and the more recent reduction in their use prior to conviction. Undoubtedly this is the outcome of the interplay of a number of factors; there has been no ‘magic bullet’ and it is still unclear what impact the change in criteria introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012 has had. (It is possible that the scrutiny its provisions invited had a greater impact than the provisions themselves⁸⁴.)

The NAYJ feels strongly that constant effort is required to maintain the downward trend and to promote greater equity in decision-making. Here, the role of YOTs and youth justice practitioners is crucial. They must continue to exercise their influence on decision-making through pro-active practice, rigorous monitoring and effective working relationships with other key players. As Andrew Jackson said in his farewell address on March 4 1837 ‘... eternal vigilance by the people is the price of liberty...’.

⁸⁴ This is known as the ‘Hawthorne’ effect, after the results of a work study experiment at Western Electric’s Hawthorne plant in the late 1920s and 1930s when changes in the workers conditions to maximise their output culminated in it peaking when conditions reverted to what they had been at the outset thus demonstrating the impact on the ‘observed’ of the observers