



POLICY BRIEFING #14

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Sentencing Remarks *for* Children

A New Approach



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Sentencing children in a rights-respecting way requires a focus on the way in which the sentencing remarks are communicated to children. Sentencing remarks that fulfil the four functions of a 'sentence for children' promote effective participation, help children to perceive the system as just and trustworthy, and support reintegration.



Introduction

1. The right to effective participation is one of the most important rights for children in conflict with the law. It is a right that was first articulated in the European Court of Human Rights' landmark decision in *V v United Kingdom* in 1999.¹
2. Since that decision, attempts have been made to better protect the rights of children appearing as defendants in criminal courts in England and Wales, for example by adapting Crown Court proceedings to reduce distress and intimidation, or through the provision of additional support such as an intermediary to aid their communication and understanding.²
3. However, less attention has been paid to children's participation and engagement during the **sentencing** process and in particular to **how children make sense of sentencing remarks**. A key question for our current research therefore is **whether the form that sentencing remarks take are consistent with children's rights principles and, if not, are judges and magistrates able to adopt new ways of delivering their sentencing remarks for children to ensure that they are**.

Sentencing: Not just the 'what' but the 'how'

4. In 2017 the Sentencing Council produced a revised version of *Sentencing Children and Young People: Definitive Guideline*.³ The overarching principles set out in the Guideline capture key international children's rights principles such as custody as a last resort. The Guideline therefore helps to ensure that judges and magistrates pass sentences that are compatible with children's rights, especially when the Guideline is read alongside the UN Convention on the Rights of the Child and General Comment No 24 of the UN Committee on the Rights of the Child.⁴
5. However, we argue that a children's rights compatible sentence must not only *substantively* comply with children's rights principles (though this is central); it must also adopt a children's rights approach to *how* it is written - in its form, style,

¹ 1999 ECHR 171. See also *SC v United Kingdom* [2004] ECHR 263.

² See the requirements of the Criminal Practice Directions 2015, 3D, 3E, 3F and 3G and the Youth Justice and Criminal Evidence Act 1999, s 33A (inserted by Police and Justice Act 2006, s 47).

³ Sentencing Council (2017) *Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery. Definitive Guideline* (available at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-Young-People-definitive-guideline-Web.pdf>).

⁴ Committee on the Rights of the Child, *General Comment No. 24 (2019) on Children's Rights in the Child Justice System*, CRC/C/GC/24 (18 September 2019).

structure, language and tone; and in ensuring that children are supported to participate and have their voice heard before sentence is passed.

The Law ... and the practice

6. Some of these requirements, particularly in relation to the child's participation at sentencing, are set out in international law and domestic regulations. For example, General Comment No 24 of the UN Committee on the Rights of the Child states that '**Children have the right to be heard directly, and not only through a representative, at all stages of the process**' (para 45). And at a domestic level, the Criminal Procedure Rules require that '[b]efore passing sentence (a) the court must give **the defendant an opportunity to make representations** and introduce evidence relevant to sentence; (b) where the defendant is under 18, the court may give the defendant's parents, guardian or supporting adult, if present, such an opportunity as well.'⁵
7. Yet this is not the experience of many children appearing before the criminal courts. We have carried out in-depth interviews with a small number of children who have appeared as defendants in the criminal courts (mostly Crown Court) to help inform our work. None of those children had the opportunity to speak directly to the judge in any meaningful way. Similarly, children who participated in research carried out by the Howard League for Penal Reform commented that 'It feels as though your views are not taken into account' and 'I feel that we get drowned out due to everything negative said, so [children's] views get overlooked like, who cares?'.⁶
8. Sentencing judges and magistrates are also required to write their sentencing remarks in a concise and clear manner and in a way that can be understood by the defendant,⁷ as recently confirmed by the Court of Appeal in *R v Chin Charles*.⁸ Furthermore, in *SC v UK*, the European Court of Human Rights regarded a child's understanding of the sentence as part and parcel of the right to effective participation.⁹
9. But again, this is not the experience of children in the courts in England and Wales where '**Courts use words we don't understand**'.¹⁰ The children we spoke to did not understand language commonly used in sentencing remarks such as

⁵ See The Criminal Procedure Rules, Rule 25.16(7) (*Trial and Sentence in the Crown Court*); and Rule 24.11(7) (*Trial and Sentence in a Magistrates' Court*).

⁶ See Howard League for Penal Reform (2018) *Children and Sentencing: A guide for adults supporting children facing sentence in the criminal courts*.

⁷ Criminal Procedure Rules, Rule 25.16(7)(b)(iii) (Crown Court) and Rule 24.11(9)(d) (Magistrates' courts).

⁸ [2019] EWCA Crim 1140. Primary legislation, the Criminal Justice Act 2003, s 174, requires courts to give reasons 'in ordinary language.'

⁹ See especially paragraphs 29 and 33-34, above n 1.

¹⁰ Howard League, above n 6 at p 15.

'aggravating', 'mitigating' or 'culpable' as well as words such as 'egregious', 'malevolent' or 'catastrophe'.

Sentencing Children: A New Approach?

10. It is clear that there is a disconnect between the dual obligations on the court to hear children directly and to ensure that children understand the sentencing remarks, and the everyday experiences of children in court. Ensuring the requirements of the Criminal Procedure Rules are met in practice is the first step towards a children's rights approach to sentencing. However, we suggest that the *form* that sentencing remarks take should also go much further in order to be compliant with a children's rights approach.
11. In research Professor Hollingsworth carried out with Professor Helen Stalford of Liverpool University, four functions of child-sensitive (or child-focused) legal judgments ('judgments *for* children) were identified.¹¹ A children's rights compatible sentencing process should also seek to fulfil these functions:
 - i. **Communicative function:** At a basic level, 'sentencing remarks *for* children' ensure that the substance and implications of the decision are conveyed to the child in the clearest of terms. It ensures children can understand the decision, comply with it, and potentially mount an appeal against it. This helps fulfil the requirements of Article 6 ECHR. But it can go beyond this: through the messages it conveys, implicitly and explicitly, the sentence can be pivotal in communicating directly to the child and contributing to a sense of **procedural justice**: it can demonstrate that the judge was neutral, that the child's voice has been heard, and that s/he has been treated with dignity and respect. This can increase the child's trust in the system, and the legitimacy of the decision in their eyes; which in turn helps the child to accept the sentencing outcome.
 - ii. **Instructive function:** Where they are published, sentencing remarks can help to educate the broader public – including other children – about what is and is not acceptable behaviour. But, moreover, through their sentencing remarks, judges can debunk the myths and damaging social constructions that often surround children who offend, ensuring that such children are not ostracised or demonised, and are instead treated and regarded as belonging within our society. This can be achieved where a more caring, understanding or empathic approach is adopted.
 - iii. **Developmental function:** Exposure to positive, rights-affirming legal procedures as a child can have a long-term impact, helping to ensure not only acceptance and reconciliation with the specific decision in question but also

¹¹ See further Stalford, H and Hollingsworth, K "‘This case is about you and your future’: Towards Judgments for Children" *Modern Law Review* (2020, forthcoming).

to contribute to the child's longer term overall development, including as a legal citizen. Children's encounters with the law and with the professionals – including judges – with whom they interact thus become a memorable, potentially formative, experience in and of itself. It provides an opportunity for the law – and the judge in particular as the personification of the legal system – to contribute to the child's development and future wellbeing as a legal citizen (understanding and respecting the law, but also having the framework to identify injustice as well). It also helps to develop the child's 'attitudes to self' – self-worth, self-trust, and self-esteem – thus contributing to the child's developing autonomy.

- iv. **Legally transformation function:** Form and substance are two sides of the same coin and sentencing remarks written *for* children are more likely to pass muster as a children's rights sentence per se in two ways. First, it can prompt a shift in perspective and the judge's approach to the actual adjudication. It requires the judge to consider the sentence from the child's perspective and is likely to encourage (for example) a much deeper engagement with the child's welfare, and the impact of his/her background on his/her offending. Or, if a judge is trying to communicate the sentence to a child with severe communication difficulties, this may prompt the judge to consider further the child's culpability where the child's limited capacity becomes more apparent, and/or the appropriateness (and utility) of particular sentences. Second, a sentence written *for* the child demands more meaningful participation during the proceedings so that the judge can reflect this back to the child and demonstrate that s/he has fully considered all the relevant factors including the child's own views. It therefore supports the participatory approach advocated above.

What do children think of this new approach?

12. As part of this research, we shared the typology of functions set out above with a senior youth magistrate and discussed with him the principles, values and rights underpinning 'sentencing remarks *for* a child'. Following those conversations he wrote a 'Letter to Joe' – an example that reflected our idea of a children's rights approach to sentencing and the typology above (see appendix).
13. We then asked children who have experienced being sentenced in the criminal courts to read each of three different examples of sentencing remarks, highlighting what they like/understand and don't like/understand about them. The first set of sentencing remarks were drawn from those publically available on HMCTS website, and involved a 17 year old sentenced to custody for death by

dangerous driving.¹² The second were the 'exemplar' sentencing remarks re-written by the Court of Appeal in the *Chin-Charles* case, designed to provide guidance to lower courts on how they should write their sentencing remarks. These were short, concise and ostensibly written for the defendant. The third set of sentencing remarks was the 'Letter to Joe' written for a fictional child defendant (in the youth court).

14. All of the young people – from the youngest (14) to the oldest (now 21 but 15 at the time of his own experience in the Crown Court), from those with communication and neuro-disabilities to a highly intelligent young person now studying at a top university – had similar reactions to the remarks.
15. First, they all disliked intensely the first set of remarks. These 'reinforced' the 'hierarchy' between judge and young person; they 'criminalised' the young person; they would 'make you feel like scum'; like there was 'no point trying'; the language was 'flowery' and 'dramatic'; and there were lots of words the children did not understand, for example 'egregious' but also 'aggravating', 'mitigating', 'culpability' and other words that are very commonly found in sentencing remarks.
16. The second set of remarks (the exemplar remarks from the Court of Appeal in *Chin-Charles*) were not viewed quite as negatively but they were still largely incomprehensible to the children: 'full of numbers' (in the calculations of reductions for guilty plea etc); and 'written for lawyers'.
17. But when reading the 'Letter to Joe' the young people were immediately more engaged and more animated. They remarked that:
 - ◆ it broke down the 'judge up there' and the child 'down there' feeling in court;
 - ◆ by recognising 'we all make mistakes' it made the child feel included/understood;
 - ◆ the judge 'asks as well as tells' (that is, he reflects back to the child what he has heard from him, rather than just telling him off);
 - ◆ the judge has made an effort to find out about the Joe and to understand him;
 - ◆ the judge appears to have found alternatives for him (mechanics course) and provided possibilities for reform;

¹² nb. We were limited in the selection of sentencing remarks to those that are published, which are primarily the most serious or high profile cases.

- ◆ the judge holds Joe responsible *but* understands him too (it was re-integrative, rather than shaming);
- ◆ the judge was caring (demonstrating emotionally intelligent judging);
- ◆ and finally, the children felt it would be good to have written version of the comments to take away.

Recommendations

18. We do not wish to be prescriptive in what sentencing remarks that fulfil the functions above should look like; this will vary in each case depending on the characteristics of the individual child and the complexity and circumstances of the offence.

19. Judges can however, be guided by four principles:

- **Clarity:** it should be accessible and use age-appropriate language; obtuse phrases and emotive language should be avoided and technical and legal terms explained;
- **Caring:** judges should employ empathy and give explicit recognition to the child's experiences;
- **Integrity:** judges should be mindful of tone and the messages conveyed through the sentence whilst being legally robust;
- **Informed:** it should be informed by children's rights principles (as reflected in law and guidance), by full information about the child's welfare, and by the child's own experiences.

More specifically, judges can:

- ◆ Gather as much information about the child as possible. This might be done by addressing questions through the YOT if you feel the pre-sentence report does not address this fully, or questions to the child in court (ensuring they are supported to do so) by providing some questions to counsel before the sentence hearing;
- ◆ Use the child's first name and ensure every word of the sentence is understandable for that particular child: remember that even common words in sentencing (like aggravating, mitigating, culpable) are not understood by most children;
- ◆ Ensure that the sentencing remarks show the child that you have listened to them and that you understand why they committed the offence, and the difficulties they have faced;
- ◆ Focus on reintegration not punishment by condemning only the behaviour and not the child; let the child know you think they can move forward positively from their mistakes;

- ❖ Make sure the actual sentence length is crystal clear and not hidden amongst calculations of deductions;
- ❖ Provide the child with a written version of the remarks to take away to digest later with their parents or guardian, and YOT worker.

We would be delighted to hear from you if you have any feedback on this briefing or if you would like to find out more the project.

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Appendix: Letter to Joe

Joe,

You had to come to court because the police said you had punched and kicked a younger boy and stolen his mobile phone. You said you hadn't. I listened to what everybody, including you, had to say about what happened on that day back in August. I thought about it very carefully and I was quite sure that you had punched and kicked the boy and taken his phone. That means you were guilty.

I then had to decide how to sentence you. You will think a sentence is just a way of punishing you but it's more than that. I'll try to explain.

Before deciding what to do, I wanted to know a lot more about you. I asked for reports. I already knew that you were 16. I found out that your mum and dad are always arguing and that your dad sometimes hits your mum. They both love you but they both drink too much and sometimes take drugs. You have an older sister and a younger brother. Your sister sometimes cooks meals for you but often you just mess around on the street and in the park with your mates.

You have been in trouble before, particularly stealing things to eat or to sell and getting into fights. You have been in court before and been given Referral Orders but they didn't work very well and you didn't do them properly. You don't go to school very often and when you do you think it is boring.

I talked to you in court today. You now agree that you did hit the boy and steal his phone. You told me that you now feel really bad about this because he is four years younger than you. I asked how you would feel if someone stole your brother's phone and you said you would be pissed off. You told me that you sometimes hang around with people who are older than you and break the law. You feel you should do the same. You agreed that you are easily led.

I talked to you about your future. You told me you were interested in cars and would like to work in a garage. I enjoyed talking to you. I was interested to hear what you thought and it was very clear to me that you are a bright kid. But it was very stupid of you to attack that

young boy. But we all do stupid things. There is no reason at all why you shouldn't work in a garage if you keep out of trouble. Or you could do some other type of work.

I could have sent you to prison (Young Offenders Institution). That would have punished you. You would have been bullied in prison and met some horrible people who had done much worse things than you. I didn't want to send you there.

I want to help you keep out of trouble and work towards getting a job. You need support. Your mum and dad do love you but they aren't looking after you as well as they should. I made a Parenting Order, so that they can learn how to look after you and your sister and brother. I don't do that often but I think it will help everyone.

So far as you are concerned, I gave you a Youth Rehabilitation Order for two years with a supervision requirement. Rehabilitation means changing your ways and staying out of trouble. You need to stay away from people who break the law. Supervision means that you will have to do what your supervisor (from the Youth Offending Service, YOS) tells you to do. You will need to keep your appointments or you will be brought back to court and could be sent to prison. Your supervisor will help you to stay out of trouble and will help you plan your future. There is a good chance that you will be able to find work in a garage. You may need to go to college. Again your supervisor will help you.

A lot of people are trying to help you, Joe. Your mum and dad and sister want to help. Your YOS supervisor knows how to help you and you must work with them. But the most important person is you yourself, Joe. If you really try you can stay out of trouble and work in a garage or get some other type of job.

I hope you manage to stay out of trouble and that you find yourself a good job and that life works out well for you.

Good luck, Joe! Do your best.

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Stalford H, Hollingsworth K and Gilmore S (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (2017, Oxford: Hart Publishing).

Stalford, H and Hollingsworth, K "This case is about you and your future": Towards Judgments for Children' *Modern Law Review* (2020, forthcoming).

