



RESEARCH BRIEFING

OCTOBER 2023

Sentencing Remarks *for* Children



Professor Kathryn Hollingsworth

I am grateful to Just for Kids Law, Peer Power and Leaders Unlocked for facilitating the interviews with the children and young people taking part in this research; and to Kate Aubrey Johnson and Clare Parkinson.



Research at
Newcastle Law School



In May 2023 in **ZA v R**, the Court of Appeal confirmed that sentencing children requires a 'root and branch' difference of approach from that used for adults. This obligation extends to **sentencing communication** as well as sentence calculation. Sentencing children in a rights-respecting way can promote effective participation, help children to perceive the system as legitimate, and potentially 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 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, 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, structure,

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).

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 during the sentencing process. 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 These findings align with broader research on the failures to ensure children's voices are heard and participation secured in the criminal courts.⁷
8. Sentencing judges and magistrates are also required to communicate their sentencing remarks in a concise and clear manner and in a way that can be understood by the defendant,⁸ as confirmed by the Court of Appeal in *R v Chin Charles*⁹ and in *ZA v R*¹⁰ (specifically in relation to children). Furthermore, in *SC v*

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 See for example, Carmen Robin-D'Cruz (2020) *Young People's Voices on Youth Court* (Centre for Justice Innovation).

⁸ Criminal Procedure Rules, Rule 25.16(7)(b)(iii) (Crown Court) and Rule 24.11(9)(d) (Magistrates' courts).

⁹ [2019] EWCA Crim 1140. Primary legislation, the Criminal Justice Act 2003, s 174, requires courts to give reasons 'in ordinary language.'

¹⁰ [2023] EWCA Crim 596, para [88].

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.¹¹

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'.¹² The children we spoke to did not understand language commonly used in sentencing remarks such as 'aggravating', 'mitigating' or 'culpable' as well as more complex words such as 'egregious', 'malevolent' or 'catastrophe'.
10. Children with speech, language, and communication needs (SLCN) have particular difficulty understanding sentencing remarks and sentence requirements, especially the use of technical legal language such as 'breach'.¹³ Given the high prevalence of children in the criminal justice system with a SLCN – between 70-90% compared to about 10% of the general population¹⁴ – and /or with a neurodisability¹⁵, it is likely that the majority of children will struggle to understand the delivery of sentence without support and without changed judicial practice.

Sentencing Children: Relational factors

11. 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, research suggests that the *form* that sentencing remarks take should go beyond a concern with the clarity of communication in order to be compliant with a children's rights approach.
12. Our recent research with justice-experienced children explored their experiences of sentencing and their responses to different styles of sentencing remarks.¹⁶ The findings suggest that sentencing remarks can have a profound effect on children's welfare (including their feelings of anxiety and stress) and on their perceptions of the fairness of the criminal justice system.

¹¹ See especially paragraphs 29 and 33-34, above n 1.

¹² Howard League, above n 6 at p 15.

¹³ See Crown Court Compendium, Part II Sentencing, Appendix II (Judicial College, 2023), paras [1]-[7] for a brief summary of children with SLCN in the context of sentencing..

¹⁴ YJB and Ministry of Justice (2020) *Assessing the Needs of Sentenced Children in the Youth Justice System 2018-19* (London, May 2020); K. Bryan, J. Freer and C. Furlong (2007) 'Language and communication difficulties in juvenile offenders' *International Journal of Language & Communication Disorders*, 42(5), pp 505-520; K. Bryan, G. Garvani, J. Gregory, and K. Kilner (2015) 'Language Difficulties and Criminal Justice: the Need for Earlier Identification' 50(6), pp 763-75.

¹⁵ 7 See further N. Hughes et al (2012) *Nobody Made the Connection: The Prevalence of Neurodisability in Young People who Offend* (Office of the Children's Commissioner).

¹⁶ This project followed on from earlier research with Professor Helen Stalford of Liverpool University. See Stalford, H and Hollingsworth, K (2020) "This case is about you and your future": Towards Judgments for Children' 83(5) *Modern Law Review* 1030 (available online open access).

13. This is important because research shows that where defendants perceive the criminal justice system to be fair, they are more likely to regard it as **legitimate** and in turn, they are **more likely to desist from future offending**. This is referred to as **procedural justice**.¹⁷ What matters most to individuals is a **perception of the decision-making processes as fair** (having **voice** and the decision-maker being **neutral**) and **perceptions of fair treatment** (**trust** in the decision-maker and **respectful** treatment),
14. Although much of the existing research evidence relates to policing and prisons, there is a growing amount of evidence also relating to the importance of defendants' treatment in court to their perceptions of legitimacy.¹⁸ For example, in Australia, a longitudinal study of young people's perceptions of the sentencing process and subsequent offending outcomes found that those who felt stigmatised or alienated during the court hearing were substantially more likely to reoffend in future.¹⁹
15. Our research helps to illuminate in more granular detail what is important to children and why in relation to how judges communicate their sentencing remarks. We identify three factors as central to children's perceptions of fairness and legitimacy:

- i. **Communication of care:**

Reflecting the procedural justice literature, we found that children value judges who communicate both verbally and non-verbally that they had taken **care over the decision-making process** – that they had listened to the child, explained what they had done, and told them the information they had taken into account; and they valued judges who were **demonstrably caring in how they treated the child**. Specifically, children noted the importance of the following factors:

- ❖ Understanding: "He read like he actually cared and you know, when he was reading you could see that he was understanding a bit more . . . I actually started feeling good. I was still upset, but I was feeling good cause it was like. . . finally, somebody is starting to understand . . ."
- ❖ Empathy " . . . he says we all do stupid things so it's not making it feel like a power difference . . . This judge is being more like 'we' like he's saying like I'm a judge but I've done stupid things"

¹⁷ See for example Jonathan Jackson et al (2012) 'Why do People Comply with the Law? Legitimacy and the Influence of Legal Institutions' 52(6) *British Journal of Criminology* 1051.

¹⁸ There is a wealth of research literature to support this claim in the field of procedural justice. For a recent overview of the literature see Gillian Hunter and Jessica Jacobson, (2021) 'Exploring procedural justice and problem-solving practice in the Youth court' (HM Inspection of Probation, Academic Insights 2021/05) and Amy Kirby and Jessica Jacobson (2022) 'Procedural Justice in the Courts' (Clinks).

¹⁹ Andrew McGrath (2009) 'Offenders' Perceptions of the Sentencing Process: A Study of Deterrence and Stigmatisation in the New South Wales Children's Court' 42(1) *Australian and New Zealand Journal of Criminology* 24.

- ❖ Help/encouragement: "I think [sentencing remarks] could encourage them and say alright I wish you success by giving them that empowerment and that bit of 'yeah you can do this. Come on now, I'm on your side'. I think in this situation it would definitely help."
- ❖ Hope: "Let them know that yes, although you made a mistake, there's still a chance you can make yourself better. Like give them hope. Don't give them the fear, give them hope".
- ❖ Kindness and authenticity: 'I really think that was him speaking from his heart and him really telling everyone the truth about how he felt".

ii. Recognition of their status as child:

Being a child was a crucial part of their sense of their social and personal identity within the court process; and having their status as child recognised by the court increased perceptions of legitimacy. Where this was not recognised, perceptions of fairness and legitimacy were reduced: ". . . at the end of the day, you know, I am still a child and it's like, when you, when I was in the [court] environment, whether I was a child or not didn't matter. That's honestly how I felt."

However, judges can demonstrate they have taken account of the child's status as child in a number of ways:

- ❖ Simplified language, structure and explanations so the child does not think 'it is for adults'; this can include announcing the sentence at the outset to help reduce the child's anxiety and providing written remarks afterwards;
- ❖ Tone and implied communication to avoid children thinking 'they see a young person and they think we are all stupid';
- ❖ Recognising that the vulnerabilities of childhood can reduce agency (especially, for example, the pressures of 'going county');
- ❖ Articulating that because they are a child they deserve a second chance;
- ❖ Clearly explaining that they are owed special duties, and have special rights because they are children.

iii. Feeling 'seen':

Throughout the interviews, the children expressed that they were characterised or painted as a villain, either explicitly (in the sentencing remarks) or implicitly (eg being placed in the dock). They strongly rejected this portrayal, and even though they accepted that they had broken the law, they drew a distinction between themselves and 'proper criminals'; those whose actions reflected a criminal mindset. The 'real them' – their own perceived true or authentic self, (ie their persisting characteristics and character, their values), was not that of a 'proper' criminal; it was instead a child who had either made a mistake or whose choices were so constrained that they could not help but get into criminality. Legitimacy

was increased where they felt **seen in the sentencing remarks** for their true and authentic self rather than stigmatised as a criminal: ' . . .it's like, when I'm with my family, they don't know me to be this person. So it's like, I'm not that person. And you're trying to paint me that person. And it's like, just, yeah, it wasn't fair'.

16. How sentencing remarks are delivered can therefore be fundamental to securing a rights-based system for children. Where child-appropriate language, structure and explanations are used this can help to improve children's **effective participation**; where judges adopt a 'caring' approach, it can reduce anxiety and thus better secure the child's **welfare** (and enable them better to understand); and where judges demonstrate fairness by recognising the child's special status as child, showing they are 'seen' and not stigmatised as a 'proper criminal' and by taking care over the decision-making process and showing they care for the child, then legitimacy is improved and this *may* help to **prevent reoffending**.

Next steps

17. Following on from the research, we have worked with the Judicial College to develop guidance for Crown Court judges on communicating sentences to children in a rights-compatible way to be included in the Crown Court Compendium. The exemplar sentencing remarks in S4 'Disposals for Children' have been rewritten using child appropriate language and clear structure (including signposting), and Appendix II provides guidance for judges when delivering their sentencing remarks. The Appendix includes a glossary of terms suitable for children that was endorsed by the Court of Appeal in *ZA v R*. Whilst this guidance is directed at Crown Court judges it is likely to also be useful to the youth courts.
18. The guidance in the Crown Court Compendium focuses on clarity and simple explanations with less focus on the 'relational factors' set out above. However, there is an excellent example of sentencing remarks delivered by Martin Picton and endorsed by the Court of Appeal in *R v BAZ* that are clearly written and structured and which also address the relational factors. An extract of the sentencing remarks are reproduced in the appendix at the end of this briefing.

Practice points for legal representatives

19. Whilst the responsibility for drafting sentencing remarks lies with judges, legal representatives can support and encourage sentencing courts to adopt a children's rights approach to communicating sentence:
 - ❖ Determine whether the child has any diagnosis or communication needs and what support is necessary for the child;

- ❖ Ensure all relevant information has been obtained and provided to the court, including from the Local Authority; ensure that the child has had the opportunity to read the pre-sentence report before finalised.
- ❖ Ascertain the child's wishes re participation; facilitate participation by ensuring the child is prepared, explaining what is happening and requesting necessary adaptations (eg allow the child to sit with family / supporting adult, breaks to check understanding etc).
- ❖ Use the language you would wish the court to use eg simple vocabulary as set out in the glossary in Table 2 of Appendix II of the Crown Court Compendium Part II: Sentencing.
- ❖ Refer the Court to the guidance in the Crown Court Compendium and to the Court of Appeal's decision in *ZA v R* and request the court use the child-appropriate vocabulary and explanations provided in the Appendix and in the exemplar sentencing remarks;
- ❖ After sentencing remarks have been delivered, check the child has understood;
- ❖ Consider liaising with an intermediary to communicate sentence in a visually/pictorially;
- ❖ Request that the court provide the child with a written copy of the sentencing remarks where possible.

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.

Kathryn.Hollingsworth@newcastle.ac.uk

Appendix: Sentencing remarks in the case of 'Kayla'²⁰

Sentencing Remarks

I am going to deal with sentence in three stages. After I have passed sentence these sentencing remarks will be provided to Kayla, the lawyers and anyone else who wishes to have a copy. It must be remembered that Kayla is a child and, pursuant to an order made under s.45 of the Youth Justice and Criminal Evidence Act 1999, the publication of anything likely to lead members of the public to identify Kayla as a person concerned in these proceedings is prohibited.

The stages by which I am going to deal with sentence are:

Stage 1

The sentence.

²⁰ 'Kayla' is a pseudonym

Stage 2

Reasons set out in terms that Kayla and other interested parties will understand.

Stage 3

Reasons designed for the lawyers to understand.

Stage 1

Kayla – the crime you committed was so serious that I have decided that I must pass a sentence which will affect you for 9 years. That is until you are 24 years old. The sentence is called an extended sentence. There are two parts to this sentence. The first part is a custodial sentence. That is for 5 years. This means that you are going to remain in [name of institution] at least for now. The longest time you will be in custody is 5 years. The shortest time you will be in custody is 40 months, but that includes the time you have already been at [name of institution]. This means the shortest time you will be in custody is about 2 years, which will take you up to around the time of your 18th birthday. Whether you are allowed out after 40 months, or whether you have to stay in custody for the whole 5 years, will depend upon how you behave and whether it is safe for you to be released. When you are told you can leave custody you will be on extended licence for at least 4 years. Being on extended licence means that there are rules, or conditions, that you will have to follow. If you break those rules whilst you are on licence you may have to go back into custody.

This means the total length of your sentence – the custody part and the licence part – is 9 years.

[speaks about the victim and the crime and goes on to say the following. . .]

I have read and reread the letter you wrote to me. Your letter shows me that you understand the harm you have done and that you are sorry for what you did. It is right that you feel like that. It shows you do have a heart and that you could still have future worth living . . . I know that you have had a terrible life up until now. You have experienced things that no one should have to do. You have been hurt and you have been damaged. I also thought very carefully about your age, that you are only 15 now and were only 14 when you committed this crime.

I also had to think about a lot of things when I decided that you should be on licence for an extra 4 years. That is, for how long you should have to follow rules when you come out of custody. I thought again about everything I know about you. I thought especially about how you struggle to control yourself at times and the risk that you might again hurt someone very badly.

I could have decided to sentence you to a what is called detention for life. This would have meant you would not know how long you would be in custody. Some people will think you deserve a life sentence because those who loved [name of victim] will have a life sentence of grieving. But I thought about your age

and your circumstances and I do not think you should have a life sentence. But you should understand that the crime was so serious that I could have given you a life sentence and very nearly did.

I want to know how you get on during this sentence. I am ordering that the youth offending team send me a report every three months telling me how you have been doing. I would be really pleased to hear that you are working hard at your studies, growing up and behaving sensibly. I would also be really pleased to hear that you are keeping out of trouble with the others at [name of institution] and showing that you can be a better person. You need to make yourself responsible for your future. You now have choices. You need to make the right ones.

I was grateful for the letter that you wrote to me. It meant I could have some idea of who you are and who you might become. It meant I wasn't just seeing you through the words of doctors, probation officers, lawyers and police. If you wanted to write to me now and then to tell me how you are doing that would be good. I am not saying you have to, it is up to you. It is one of those choices you can make, but if you do write I will read what you say and I will be grateful to you.

Kayla – the rest of what I have to say is going to be in lawyer speak. Even if you do not follow it today you will have it in writing and you will understand it in time. I will also ask that your lawyers make sure that you understand the sentence and the reasons as I am now going to explain them. . . .

Professor Kathryn Hollingsworth



Kathryn Hollingsworth is a Professor of Law at Newcastle Law School. Her research focuses on children's rights in the youth justice system and she is also involved in a range of advisory activities relating these interests.



kathryn.hollingsworth@newcastle.ac.uk



Stalford, H and Hollingsworth, K (2020) "This case is about you and your future": Towards Judgments for Children' *Modern Law Review* (2020) 83(5) 1030

Crown Court Compendium Part II: Sentencing, Appendix II (written by Kathryn Hollingsworth, Kate Aubrey Johnson, and Clare Parkinson).