

Sentencing Youths – Overarching
Principles and Offence-Specific Guidelines
for Sexual Offences and Robbery
Consultation

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Consultation

Published on 12 May 2016

The consultation will end on 3 August 2016

A consultation produced by the Sentencing Council.

This information is also available on the Sentencing Council's website:

www.sentencingcouncil.org.uk

About this consultation

To:

This consultation is open to everyone including members of the public, judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.

Duration:

From 12 May 2016 to 3 August 2016

Enquiries (including requests for this paper in an alternative format) to:

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Additional ways to feed in your views:

This consultation exercise is accompanied by a resource assessment and an online questionnaire, all of which can be found at:

www.sentencingcouncil.org.uk

A series of consultation meetings is also taking place. For further information please use the 'Enquiries' contact details above.

Response paper:

Following the conclusion of this consultation exercise, a response will be published at:

www.sentencingcouncil.org.uk

Freedom of Information:

We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.

In addition, responses may be shared with the Justice Committee of the House of Commons.

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Contents

Introduction	5
Part one: Overarching issues and the context of the guidelines	7
Part two: Overarching principles	10
Part three: Developing the offence-specific guidelines	37
Part four: Sexual offences guideline	39
Part five: Robbery guideline	48
Annex A: List of consultation questions	53
Annex B: Background to guidelines	56
Annex C: Draft guidelines	58

Introduction

What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines for the courts to use when passing a sentence. Part of the Council's remit¹ is to conduct public consultations on guidelines for the sentencing of offenders.

Why youths?

The predecessor body to the Sentencing Council, the Sentencing Guidelines Council (SGC) published a definitive guideline *Overarching Principles – Sentencing Youths*, in November 2009. It also produced offence-specific guidelines for youths within its definitive robbery guideline, published in July 2006, and within Part 7 of its definitive guideline on the Sexual Offences Act 2003 which was published in April 2007.

In December 2013 the Sentencing Council published new adult guidelines for sexual offences and in January 2016 new adult robbery guidelines. In producing both of these adult guidelines the Council decided that it would be inappropriate to produce new youth guidelines as part of the same project as it was considered that sentencing youths required a different approach. The existing SGC youth sexual offence guidelines, and robbery guidelines, therefore remain in force. The Council recognised that youth sentencing guidelines have now become piecemeal and dated and so committed to reviewing youth sentencing as a stand alone project in order to produce up to date, consolidated guidance.

As part of this package the Council decided to review and update the *Overarching Principles* document, to provide a comprehensive and accessible document on the general principles to be applied when sentencing youths.

Which offences are covered by the guideline?

The *Overarching Principles – Sentencing Youths* guideline covers general principles for sentencing a youth for any offence.

The offence-specific guideline on sexual offences covers **all** sexual offences committed by a person under 18, and will replace the guidelines produced by the SGC in 2007 that covered only those offences which have a lower maximum penalty when committed by a person under 18.

The offence-specific robbery guideline covers **all** types of robbery offending committed by those under 18 and will replace the SGC youth robbery guideline, produced in 2006.

¹ ss.118 – 136 Coroners and Justice Act 2009

What is the Council consulting about?

The Council has produced this consultation paper in order to seek the views of as many people as possible interested in the sentencing of young offenders.

However, it is important to clarify that the Council is not consulting on the legislation upon which youth sentencing is based. The relevant legislation is a matter for Parliament and is, therefore, outside the scope of this exercise.

A summary of the consultation questions can be found at Annex A.

What else is happening as part of the consultation process?

This is a 12 week public consultation. During the consultation period, the Council will host a number of consultation meetings to seek views from groups with an interest in this area as well as with sentencers. Once the consultation exercise is over and the results considered, a final guideline will be published and used by all courts.

Alongside this consultation paper, the Council has produced an online questionnaire which allows people to respond to the consultation questions through the Sentencing Council website. The Council has also produced a resource assessment. The online questionnaire and these documents can be found on the Sentencing Council's website: www.sentencingcouncil.org.uk

The review of the youth justice system

In September 2015 Charlie Taylor was asked to lead a departmental review of the youth justice system for the Ministry of Justice. The purpose of the review is to examine evidence on what works to prevent youth crime and rehabilitate young offenders, and how this is applied in practice. The review is also expected to look at how the youth justice system can most effectively interact with wider services for children and young people; and question whether the current delivery models and governance arrangements remain fit for purpose and achieve value for money.

In February 2016 the terms of the review were extended to examine the way young offenders are dealt with in court, and the sentences that are available to tackle their offending.

The Sentencing Council will carefully consider the final report, due to be published in July 2016 alongside the responses to this consultation.

Part one: Overarching issues and the context of the guidelines

Principles for sentencing youths

The principles surrounding the sentencing of youths differ significantly from the sentencing of adults. In particular, when dealing with young offenders sentencers must have regard to:

- the principal aim of the youth justice system which is to prevent offending by children and young people; and
- the welfare of the young offender.

Sentencers also have at their disposal different sentencing options designed to address the needs of the youth justice system.

Background to *Overarching Principles*

There is currently an existing *Overarching Principles – Sentencing Youths* guideline, published by our predecessor body the Sentencing Guidelines Council (SGC) in 2009.

Initial social research showed that this guideline is generally well received by sentencers although there were limitations on its functionality and accessibility. Therefore the aim of the Sentencing Council in reviewing this guideline was not to alter significantly the content but rather to update the guideline, and make it more accessible by adding flowcharts and tables that are easy to use. This research also indicated that although the guideline was liked it was not always used as it did not provide full guidance on all sentencing matters. Therefore the Council was keen to ensure that this revised guideline is comprehensive, in order to be the most useful tool possible for sentencers and practitioners.

While this draft *Overarching Principles* guideline does not apply to any specific offence it should be applied when sentencing for any offence that involves an offender aged under 18. Robbery and sexual offences are dealt with separately within this draft and these guidelines should be used in conjunction with these overarching principles.

The draft guideline provides information on the key principles of the youth justice system, allocation, determining a sentence, sentences available to the Court and breach of orders.

The development of the guideline was supported by research, including social research with sentencers, to help inform both the content and the structure of the guideline. Input was also provided by key stakeholders throughout the drafting process.

Background to offence-specific guidelines

Sexual Offences

There are currently six youth sexual offence guidelines which were produced by the SGC in April 2007. They cover the following offences.

- Sexual activity with a child.
- Causing or inciting a child to engage in sexual activity.
- Engaging in sexual activity in the presence of a child.
- Causing a child to watch a sexual act.
- Sexual activity with a child family member.
- Inciting a child family member to engage in sexual activity.

The SGC produced these guidelines as the Sexual Offences Act 2003 created lower statutory maxima of five years for these offences when committed by a youth (when committed by an adult the maxima are 14 years or 10 years, depending on the offence).

The Sentencing Council produced new adult sexual offences guidelines in December 2013. During the process of drafting the adult guidelines the Council considered amending the six youth guidelines and asked consultees for their views. Most consultees agreed that there should be new guidelines for youth sexual offences, but many felt that the Council should produce them as part of wider work covering the issues of youth sentencing. In addition a number of consultees felt that a direct adaptation of the adult guidelines would be inappropriate. For these reasons the Council chose to leave the guidelines as they were and come back to them under this project.

Robbery

There is currently a youth robbery guideline, published by the SGC in July 2006. This guideline sets out 'factors to take into consideration' for young offenders and includes a sentencing table which replicates the SGC's adult robbery guideline but with reduced sentences. The sentencing table is to be used for sentencing 17 year old offenders; where the court has a younger offender before them the guideline advises reducing the starting point in recognition of the offender's age or immaturity.

In drafting the new robbery and sexual offences guidelines the Council considered adopting a similar approach to that devised by the SGC for robbery, but concluded that such a guideline does not usefully assist a court in sentencing offenders younger than 17. In addition the Council wanted to ensure that sentencers had a framework to use that allowed a consistent approach to be adopted but did not prevent the sentencer from taking a very individual approach to sentencing, accounting for the offender's age and/or maturity, their previous offending behaviour, and their personal background.

Both the SGC robbery and sexual offence youth guidelines will be replaced by these new guidelines once they are implemented.

Applicability of guidelines

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this draft guideline. Following consultation, when a definitive guideline is produced it will apply to all offenders aged under 18, who are sentenced on or after the date that the guideline comes into force, regardless of the date of the offence.

Section 125(1) Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court -

- (a) must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender’s case, and
- (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”

The Council’s aims

In preparing this draft guideline, the Council has had regard to the purposes of sentencing and to its statutory duties. The Council’s aim throughout has been to ensure that all sentences are proportionate to the offence committed and in relation to other offences.

Approach to victims

The Council is required to consider the impact of sentencing decisions on victims of offences. The harm caused by an offence is considered at step one of the guidelines, as a principal factor of the offence. In the development of this guideline, the Council gave very careful thought to how to reflect the often devastating impact these offences can have on victims and their families. The Council considered this issue individually in the context of both types of offences that the draft guideline covers, as the offences differ very significantly.

Data analysis and research

The Council has drawn on research it undertook with youth court sentencers in 2012 to understand the general approach taken to sentencing youths. It conducted further research in 2014 using an online survey to explore the themes identified in the earlier interviews. The principal research tool was an online (self-completion) survey which sought the views of youth court magistrates and district judges on current guidance and preferences for future guidance. To supplement that research, meetings have been held with a small number of sentencers, practitioners and legal advisers.

Part two: Overarching principles

The Council is seeking specific views on aspects of the draft *Overarching Principles – Sentencing Youths* guideline that are detailed in this section. However, a complete version of the draft guideline can be found at Annex C and consultation respondents are invited, at question 17, to provide additional comments on any section not explicitly dealt with.

The Overarching Principles – Sentencing Youths guideline should be considered when sentencing any offence committed by an offender aged under 18.

If a custodial sentence is being considered for any offence where youth offence-specific guidance is not available then it may also be helpful for sentencers to refer to the adult guideline for the offence (more information regarding this can be found at page 32).

General principles

Section one focuses on the general approach to sentencing youths. The general principles are long established in legislation and sentencing practice. Paragraph 1.9 discusses the possibility of considering deterrence when sentencing youths. This does not negate the principal aim of the youth justice system (as set out in the Crime and Disorder Act 1998, section 37(1)) which is to prevent re-offending in young people and does not detract from any consideration that should be given to the welfare of the offender; therefore it is highlighted that deterrence should only be considered in the most serious of cases, and even then in conjunction with the offender's welfare.

Sentencing principles

- 1.1 When sentencing an offender aged under 18 at the date of conviction, a court must have regard to:
 - the principal aim of the youth justice system (to prevent offending by children and young people); and
 - the welfare of the offender.
- 1.2 While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and offender focused, as opposed to offence focused. For an offender under 18 the sentence should focus on the rehabilitation of the offender where possible. A court should also consider the effect the sentence is likely to have on the young person as well as any underlying factors contributing to the offending behaviour.

- 1.3 It is important to avoid ‘criminalising’ young people unnecessarily; the primary purpose of the youth justice system is to foster a sense of responsibility for others and promote re-integration into society rather than to punish.
- 1.4 It is important to bear in mind any factors that may diminish the culpability of a young offender. Young people have not attained full maturity and as such may not fully appreciate the effect their actions can have on other people. They may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Young people are also likely to be susceptible to peer pressure and other external influences. It is important to consider the extent to which the offender has been acting impulsively and the offender’s conduct has been affected by inexperience, emotional volatility or negative influences.
- 1.5 For these reasons young people are likely to benefit from being given an opportunity to address their behaviour and may be receptive to changing their conduct. They should, if possible, be given the opportunity to learn from their mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the young person and hinder their re-integration into society.
- 1.6 Offending by a young person is often a phase which passes fairly rapidly and so the sentence should not result in the alienation of the young person from society if that can be avoided.
- 1.7 The impact of punishment is likely to be felt more heavily by a young person in comparison to an adult as any sentence will seem longer due to their young age. In addition penal interventions may interfere with a young person’s education and this should be considered by a court at sentencing.
- 1.8 Any restriction on liberty must be commensurate with the seriousness of the offence. In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.
- 1.9 Section 142 of the Criminal Justice Act 2003 sets out the purposes of sentencing for offenders who are over 18 on the date of conviction. That Act was amended in 2008 to add section 142A which sets out the purposes of sentencing for offenders under 18, subject to a commencement order being made. The difference between the purposes of sentencing for those under and over 18 is that section 142A does not include as a purpose of sentencing ‘the reduction of crime (including its reduction by deterrence)’. Section 142A has not been brought into effect. Unless and until that happens, deterrence can be a factor in sentencing young offenders although normally it should be restricted to serious offences and can, and often will, be outweighed by considerations of the offender’s welfare.

Q1

Do you agree with the general principles for sentencing youths? Are there any additional principles that should be included?

Welfare

As discussed above, legislation dictates that the welfare of a young offender must always be considered during sentencing. The SGC guideline detailed some specific factors to be taken into account when considering welfare, for example the background of the young person or the mental disorders and/or learning disabilities the young person may have. All of the factors detailed in the existing guideline have been retained but the guidance in relation to some of these factors has been extended. For example, there is ample evidence that ‘looked after’ children are disproportionately represented in the youth justice system (a ‘looked after’ child is any child who has been in the care of the local authority for more than 24 hours). The Council considered that additional consideration is needed when dealing with such young people as they are often particularly vulnerable and their welfare needs may be more difficult to meet.

Welfare

- 1.10 The statutory obligation to have regard to the welfare of a young person includes the obligation to secure proper provision for education and training, to remove the young person from undesirable surroundings where appropriate and the need to choose the best option for the young person taking account of the circumstances of the offence.
- 1.11 **In having regard to the welfare of the young person, a court should ensure that it is alert to:**
- **the high incidence of mental health problems amongst young people in the criminal justice system;**
 - **the high incidence of those with learning difficulties or learning disabilities amongst young people in the criminal justice system;**
 - **the effect that speech and language difficulties might have on the ability of the young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction;**
 - **the reasons why a young person may conduct themselves inappropriately in court, e.g. due to nerves, a lack of understanding of the system, a belief that they will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity, etc;**
 - **the vulnerability of young people to self harm, particularly within a custodial environment;**
 - **the extent to which changes taking place during adolescence can lead to experimentation; and**
 - **the effect on young people of experiences of loss and neglect and/or abuse.**
- 1.12 Additional factors regularly present in the background of young offenders include deprived homes, poor employment records, low educational attainment, early experience of offending by other family members, experience of abuse and/or neglect, negative influences from peer associates and the misuse of drugs and/or alcohol.

- 1.13 Evidence shows that ‘looked after’ children are over-represented in the criminal justice system. When dealing with a young person who is ‘looked after’ the court should also bear in mind the additional complex vulnerabilities that are likely to be present in their background. For example, looked after children may have no or little contact with their family and/or friends, they are relatively likely to have special educational needs and/or emotional and behavioural problems, they may be heavily exposed to peers who have committed crime and they are likely to have accessed the care system as a result of abuse, neglect or parental absence due to bereavement, imprisonment or desertion. The court should also bear in mind that the level of parental-type support that a looked after child receives throughout the criminal justice process may vary, and may be limited.
- 1.14 The court should always seek to ensure that it has access to information about how best to identify and respond to these factors and, where necessary, that a proper assessment has taken place in order to enable the most appropriate sentence to be imposed.
- 1.15 The requirement to have regard to the welfare of a young person is subject to the obligation to impose only those restrictions on liberty that are commensurate with the seriousness of the offence; accordingly, a court should not impose greater restrictions because of other factors in the young person’s life.
- 1.16 When considering a young offender who may be particularly vulnerable, sentencers should consider which available disposal is best able to support the young offender and which disposals could potentially exacerbate any underlying issues. This is particularly important when considering custodial sentences as there are concerns about the effect on vulnerable young offenders of being in closed conditions, with significant risks of self harm, including suicide.
- 1.17 The vulnerability factors that are often present in the background of young offenders should also be considered in light of the offending behaviour itself. Although they do not alone cause offending behaviour – there are many young people who have experienced these circumstances but do not commit crime – there is a correlation and any response to criminal activity amongst young people will need to recognise the presence of such factors in order to be effective.

These principles do not undermine the fact that the sentence should have regard to the seriousness of the offence. Further guidance on assessing the seriousness of an offence can be found at section four.

Q2

Do you agree with the factors that should be taken into account when considering the welfare of a young person? Are there any additional factors that should be included?

Allocation

Section two covers allocation. The first section highlights the general principle that the most appropriate venue for a youth is nearly always the youth court. It then goes on to discuss the exceptions to this principle, with the first substantive exception being when the dangerousness provisions apply.

Allocation

(See also the allocation charts at pages 18 – 20 when reading this section.)

2.1 **Cases involving young people** and in particular those under 15 years of age should, wherever possible, be tried in the youth court. It is the court which is best designed to meet their specific needs. A trial in the Crown Court with the inevitably greater formality and greatly increased number of people involved (including a jury and the public) should be reserved for the most serious cases.

This section covers the exceptions to this requirement.

2.2 A youth must always appear in the Crown Court for trial if:

- charged with homicide;
- charged with a firearms offence subject to a mandatory minimum sentence of three years (and is over 16 years of age at the time of the offence); or
- notice has been given to the court (under section 51B or 51C of the Crime and Disorder Act 1998) in a serious or complex fraud or child case.

Dangerousness

2.3 A case should be sent to the Crown Court for trial if the offence charged is a specified offence **and** it seems to the court that if convicted the young person would meet the criteria for a sentence under the dangerous offender provisions.

2.4 A sentence under the dangerous offender provisions can only be imposed if:

- the young person is convicted of a specified violent or sexual offence **and**
- the court is of the opinion that there is a significant risk to the public of serious harm caused by the young person committing further specified offences **and**
- a custodial term of at least four years would be imposed for the offence.

2.5 A 'significant risk' is more than a mere possibility of occurrence. The assessment of dangerousness should take into account all the available information relating to the circumstances of the offence and **may** also take into account any information regarding previous patterns of behaviour related to this offence and any other relevant information relating to the offender. In making this assessment it will normally be necessary to obtain a pre-sentence report.

2.6 Young offenders may change and develop within a shorter time than adults and this factor, along with their level of maturity, may be highly relevant when assessing probable future conduct and whether it may cause a significant risk of serious harm.

2.7 In anything but the most serious cases it may be impossible for the court to form a view as to whether the defendant would meet the criteria of the dangerous offender provisions without greater knowledge of the circumstances of the offence and the offender. In those circumstances jurisdiction for the case should be retained in the youth court. If, following conviction, the dangerousness criteria are met then the defendant should be committed for **sentence**.

Grave crimes

Paragraphs 2.8 – 2.10 cover grave crimes. In 2015, section 53 of the Criminal Justice and Courts Act 2015 (the 2015 Act) introduced a new power to commit youths to the Crown Court for sentence. Previously, for grave crimes, the power to commit for sentence only existed if the youth pleaded guilty; otherwise they could be sent to the Crown Court for trial only. Under the 2015 Act, if a youth is convicted in a youth court of a grave crime and the court subsequently determines it has insufficient powers to deal with the sentence, it can commit the case to the Crown Court for sentence.

However, section 51A(2) & (3) (b) of the Crime and Disorder Act 1998 still applies, meaning that if a court should conclude before trial that it ought to be possible to sentence an offender under section 91(1) of the Powers of Criminal Courts (Sentencing) Act 2000, i.e. if there is a ‘real prospect’² of a sentence of, or in excess of, two years’ detention being imposed for the grave crime offence, then the case should be committed for trial.

The *R (on the application of DPP) v South Tyneside Youth Court*³ judgment recently dealt with this complex area of legislation, concluding that ‘*the requirements of Section 51A of the [Crime and Disorder Act 1998] are still mandatory*’. However, when making this initial allocation decision the court is no longer required to take the prosecution case at its highest,⁴ when considering if there is a ‘real prospect’ of a sentence of two years or more being imposed if convicted. The judgment concludes that “*in most cases whether there is such a “real prospect” will generally be apparent only when the court has determined the full circumstances of the offence and has a greater understanding of the position of the offender*”. Therefore it is expected that the vast majority of cases will be retained in the youth court, with the assessment being considered once more information about the offender and the offence is available to the courts. This does not undermine the mandatory requirement to commit the case to the Crown Court for trial if it is apparent that there is a ‘real prospect’ of the sentence exceeding the powers of the youth court but it is expected that this decision could be made rarely, in only the most serious of cases.

Grave crimes

2.8 Where a young person is before the court for an offence mentioned in section 91(1) of the Powers of Criminal Courts (Sentencing) Act 2000 and the court considers that it ought to be possible to sentence him to more than two years’ detention if found guilty of the offence, then he should be sent to the Crown Court. The test to be applied by the court is whether there is a **real prospect** that a sentence in excess of two years’ detention will be imposed.

² *R (H, A and O) v Southampton Youth Court* [2004] EWHC (Admin) 2912

³ *R (on the application of DPP) v South Tyneside Youth Court* [2015] EWHC 1455 (Admin)

⁴ There was previous precedent (set by *R (W and M) v Oldham Youth Court* [2010] EWHC 661) that in order to determine whether there was a real prospect of the appropriate sentence being in excess of two years then “the evaluation [...] must take account of the prosecution case at the highest as it may reasonably be viewed by a court.”

2.9 Before deciding whether to send the case to the Crown Court or retain jurisdiction in the youth court, the Court should hear submissions from the prosecution and defence. As there is now a power to commit for sentence the Court should no longer take the prosecution case at its highest when deciding whether to retain jurisdiction. In most cases it is likely to be impossible to decide whether there is a real prospect that a sentence in excess of two years' detention will be imposed without knowing more about the facts of the case and the offender. In those circumstances the youth court should retain jurisdiction and commit for sentence if it is of the view, having heard more about the facts and the offender, that its powers of sentence are insufficient.

2.10 An offence comes within section 91 where:

- it is punishable with 14 years' imprisonment or more for an adult (but is not a sentence fixed by law);
- it is an offence of sexual assault, child sex offences committed by a child or young person, sexual activity with a child family member or inciting a child family member to engage in sexual activity; or
- it is one of a number of specified offences in relation to firearms, ammunition and weapons which are subject to a minimum term but in respect of which a court has found exceptional circumstances justifying a lesser sentence.

Where the court decides that the case is suitable to be dealt with in the youth court it must warn the young person that all available sentencing options remain open and, if convicted, the young offender may be committed to the Crown Court for sentence.

A young person aged 10 or 11 should only be sent for trial or committed for sentence to the Crown Court when charged with or convicted of an offence of such gravity that, despite the normal prohibition on a custodial sentence for a person of that age, a sentence exceeding two years is a realistic possibility.

A young person aged 12 – 17 (for which a detention and training order could be imposed) should be sent for trial or committed for sentence to the Crown Court only when charged with or convicted of an offence of such gravity that a sentence substantially beyond the two year maximum for a detention and training order is a realistic possibility.

Q3

Are you content that the guidance on grave crimes clearly and accurately reflects the relevant legislation and case law? If you disagree please state why.

The allocation section also covers youths charged alongside an adult and remittal from the Crown Court.

Charged alongside an adult

2.11 The proper venue for the trial of any youth is normally the youth court. Subject to statutory restrictions, that remains the case where a youth is jointly charged with an adult.

If the adult is sent for trial to the Crown Court, the court should conclude that the youth must be tried separately in the youth court unless it is in the interests of justice for the youth and the adult to be tried jointly.

2.12 Examples of factors that should be considered when deciding whether to send the youth to the Crown Court (rather than having a trial in the youth court) include:

- whether separate trials will cause injustice to witnesses or to the case as a whole (consideration should be given to the provisions of sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999);
- the age of the youth; the younger the youth, the greater the desirability that the youth be tried in the youth court;
- the age gap between the youth and the adult; a substantial gap in age militates in favour of the youth being tried in the youth court;
- the lack of maturity of the youth;
- the relative culpability of the youth compared with the adult and whether the alleged role played by the youth was minor; and/or,
- the lack of previous findings of guilt on the part of the youth.

2.13 The court should bear in mind that the youth court now has a general power to commit for sentence (as discussed at paragraph 2.9); in appropriate cases this will permit a sentence to be imposed by the same court on adults and youths who have been tried separately.

2.14 The court should follow the plea before venue procedure (see flowcharts on pages 18 – 20) prior to considering whether it is in the interest of justice for the youth and the adult to be tried jointly.

Remittal from the Crown Court

2.15 If a young person is convicted before the Crown Court of an offence other than homicide the court must remit the case to the youth court, unless it would be undesirable to do so. In considering whether remittal is undesirable a court should balance the need for expertise in the sentencing of young offenders with the benefits of the sentence being imposed by the court which determined guilt.

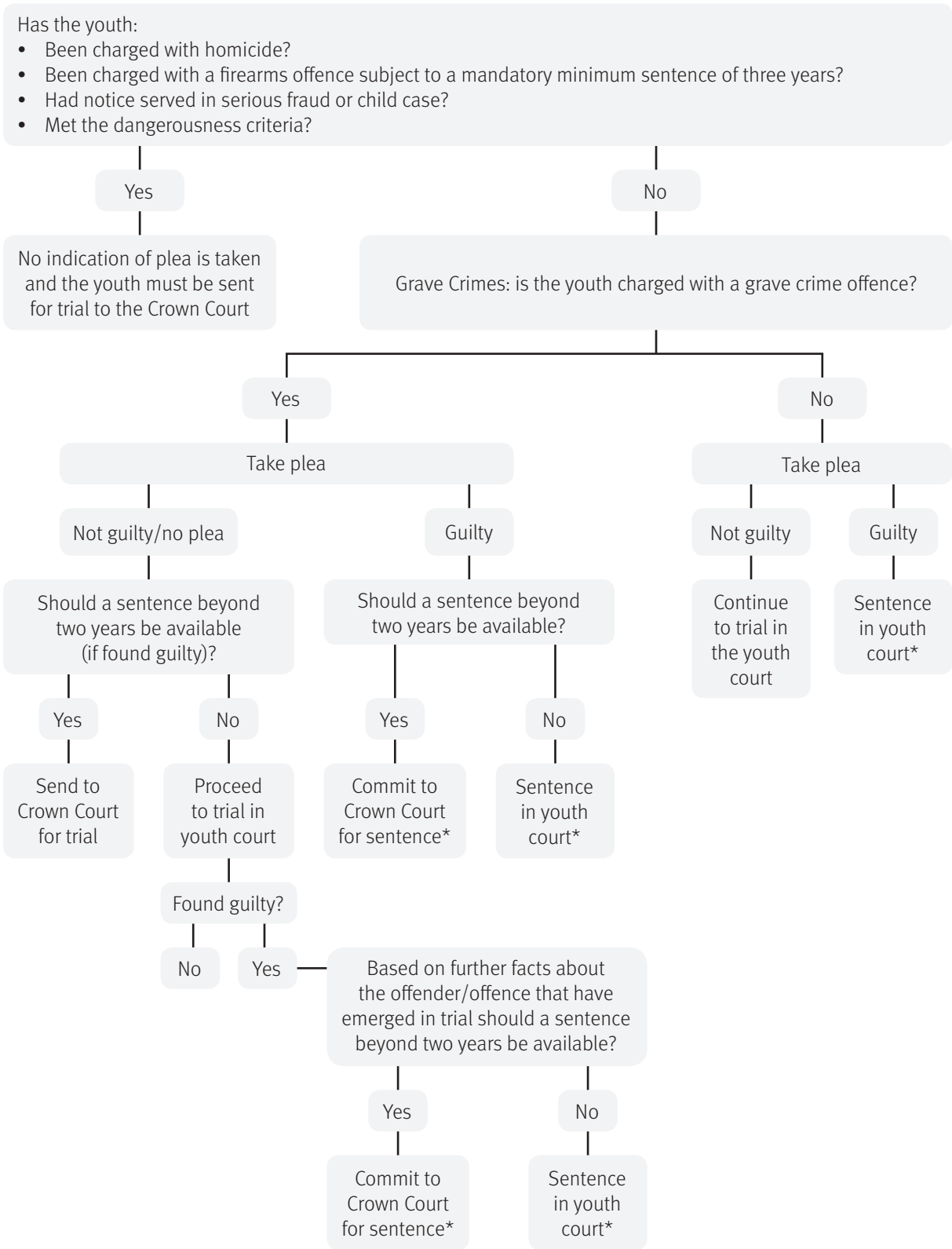
2.16 Particular attention should be given to young offenders who are appearing before the Crown Court only because they have been charged with an adult offender; referral orders are generally not available in the Crown Court but may be the most appropriate sentence.

Q4

Does the allocation section include all the necessary considerations? Do you have any general observations on this section?

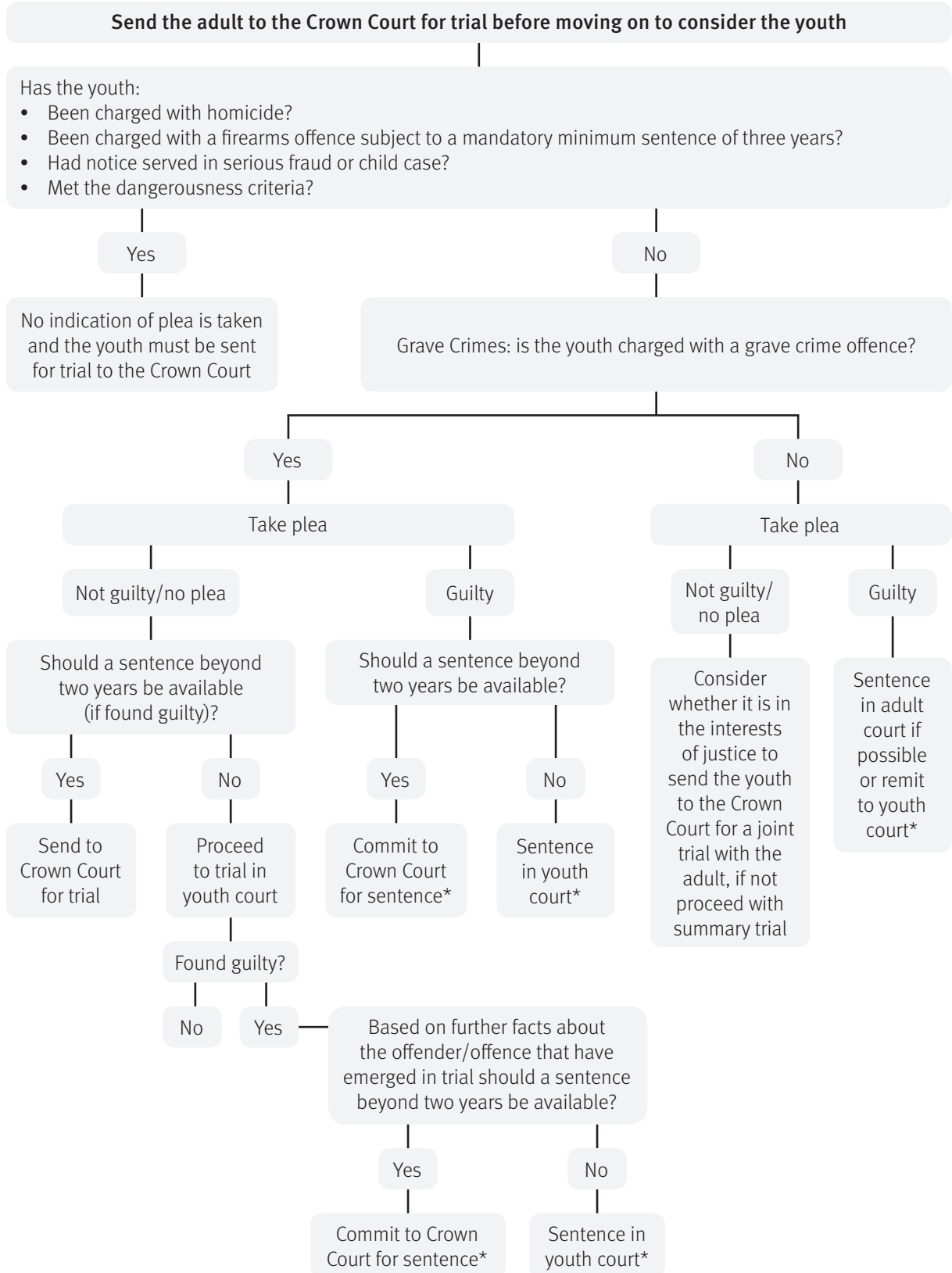
Flowcharts have been incorporated into this section, to give sentencers a quick reference tool when dealing with this complex area.

Youth charged alone or with other youths



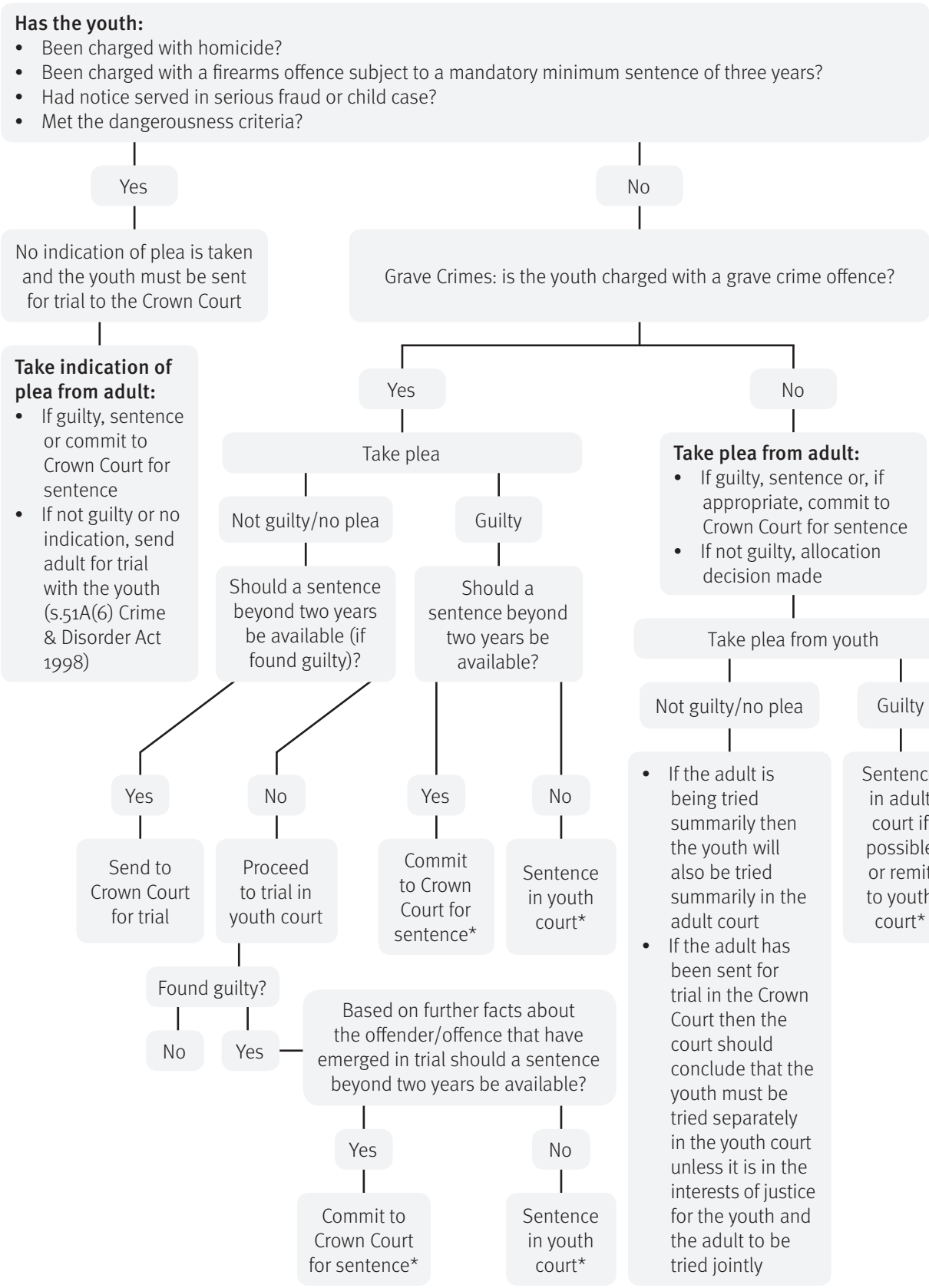
* If the dangerousness provisions are satisfied the court must commit for sentence

Youth and Adult charged as co-defendants where the adult is charged with an indictable only offence (or an offence where notice is given to the court under s.51B or s.51C Crime & Disorder Act 1998)



* If the dangerousness provisions are satisfied the court must commit for sentence

Youth and adult charged as co-defendants where the adult is charged with either way offence



* If the dangerousness provisions are satisfied the court must commit for sentence

Q5

- a) Do the flowcharts include all the necessary considerations for allocation?
- b) Do you think you would refer to these flowcharts on a regular basis when considering sentence levels (legal practitioners/sentencers)?
- c) Do you have any general observations about these flowcharts?

Seriousness of the offence

Section four discusses the assessment of the seriousness of an offence. This section has significantly expanded the guidance available in the existing guideline, offering a more structured approach to assessing seriousness. This contributes to the overall aim of making the guideline more accessible and functional as it can be referred to as a stand alone section when dealing with various offences committed by youths. It also uses a structure similar to that of other Sentencing Council guidelines, with which sentencers are familiar.

The majority of Sentencing Council adult guidelines approach the assessment of seriousness in the same manner: detailing various levels of culpability and harm based on the factors most pertinent to that particular offence, identifying sentence starting points and ranges based on which of these categories the offence falls into and then setting out a non-exhaustive list of aggravating and mitigating factors in order to determine the appropriate sentence.

As the *Overarching Principles* are not offence-specific they will be applied to all offences, covering the full range of gravity. Different offences, even ones that tend to carry similar sentences, have very different factors that inform culpability and harm and therefore the Council decided that it would be impossible and unhelpful to replicate fully the approach of its offence-specific guidelines. Instead, this guideline offers some general background information for sentencers to consider when assessing seriousness, but no specific culpability and harm factors or sentencing tables are proposed. The guideline does list some aggravating and mitigating factors, which the Council decided are of more general application, relevant to various offences and, being non-exhaustive, sentencers still have the option to use their discretion based on the facts of the case.

In drafting the aggravating and mitigating factors the Council considered the highest volume offences amongst youths⁵ and also factors referred to in transcripts and news stories involving young offenders.

In these lists, and throughout the *Overarching Principles* and offence-specific draft guidelines 'previous convictions' are referred to as 'previous findings of guilt' in order to comply with section 59 of the Children and Young Persons Act 1933.

5 Source: Court Proceedings Database, Ministry of Justice

Section four: Determining the sentence

- 4.1 In determining the sentence, the key elements to consider are:
- the seriousness of the offence;
 - the age of the offender (chronological and emotional);
 - the likelihood of further offences being committed;
 - the extent of harm likely to result from those further offences; and
 - the principal aims of the youth justice system.

The seriousness of the offence

- 4.2 The seriousness of the offence is the starting point for determining the appropriate sentence; the sentence imposed and any restriction on liberty must be commensurate with the seriousness of the offence.
- 4.3 The approach to sentencing young offenders should always be individualistic and the court should always have in mind the principal aims of the youth justice system.
- 4.4 There is an expectation that in general a young person will be dealt with less severely than an adult offender although this distinction diminishes as the offender approaches age 18, subject to an assessment of maturity and criminal sophistication. In part, this is because young people are unlikely to have the same experience and capacity as an adult to understand the effect of their actions on other people or to appreciate the pain and distress caused and because a young person may be less able to resist temptation, especially where peer pressure is exerted.
- 4.5 In order to determine the seriousness of the offence the court should assess the culpability of the offender and the harm that was caused, intended to be caused or could foreseeably have been caused.
- 4.6 In assessing **culpability** the court will wish to consider the extent to which the offence was planned, the role of the offender (if committed as part of a group), the level of force that was used in the commission of the offence and the awareness that the offender had of their actions and its possible consequences.
- 4.7 In assessing **harm** the court should consider the level of physical and psychological harm caused to the victim, the degree of any loss caused to the victim and the extent of any damage caused to property. (This assessment should also include a consideration of any harm that was intended to be caused or could foreseeably have been caused in the committal of the offence.)
- 4.8 The Court should also consider any aggravating or mitigating factors that may increase or reduce the overall seriousness of the offence. **If any of these factors are included in the definition of the committed offence they should not be taken into account when considering the relative seriousness of the offence before the court.**

Factors increasing seriousness

Statutory aggravating factors:

Previous findings of guilt, having regard to a) the **nature** of the offence to which the finding of guilt relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the finding of guilt

Offence committed whilst on bail

Other aggravating factors:

Steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution

Victim is particularly vulnerable due to factors including but not limited to age, mental or physical disability

Restraint, detention or additional degradation of the victim

Prolonged nature of attack

Attempts to conceal/dispose of evidence

Established evidence of community/wider impact

Failure to comply with current court orders

Attempt to conceal identity

Involvement of others through peer pressure or bullying

Commission of offence whilst under the influence of alcohol or drugs

History of antagonising or bullying the victim

Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intent of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups

Factors reducing seriousness or reflecting personal mitigation

No previous findings of guilt **or** no relevant/recent findings of guilt

Remorse, particularly where evidenced by voluntary reparation to the victim

Good character and/or exemplary conduct

Unstable upbringing including but not limited to time spent 'looked after', exposure to drug and alcohol abuse, lack of attendance at school, lack of familial presence or support, victim of neglect and/or abuse, exposure to familial criminal behaviour

Involved through bullying or peer pressure

Limited understanding of effect on victim

Serious medical conditions requiring urgent, intensive or long-term treatment

Mental disorder or learning disability

Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

Reduction for guilty pleas

The Court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Q6

Do you agree with the approach taken to the assessment of seriousness? Is the approach useful and does it provide you with greater structure when assessing seriousness?

Q7

Do you agree with the aggravating and mitigating factors included? Please state which, if any, should be removed or added.

Persistent offenders

The existing *Overarching Principles* offer the following guidance regarding ‘persistent offenders’:

“ i) in most circumstances, the normal expectation is that the offender will have had some contact with authority in which the offending conduct was being challenged before being classed as “persistent”; a finding of persistence in offending may be derived from information about previous convictions but may also arise from orders which require an admission or finding of guilt – these include reprimands, final warnings, restorative justice disposals and conditional cautions; since they do not require such an admission, penalty notices for disorders are unlikely to be sufficiently reliable;

ii) a young offender is certainly likely to be found to be persistent (and, in relation to a custodial sentence, the test of a being a measure of last resort is most likely to be satisfied) where the offender has been convicted of, or made subject to a pre-court disposal that involves an admission or finding of guilt in relation to, imprisonable offences on at least 3 occasions in the past 12 months.”

There is no legal definition of a ‘persistent offender’. The Council was therefore reluctant to assign an arbitrary number to the number of previous findings of guilt that can be defined as persistent, as this would detract from the individual nature of youth sentencing. The Council was however mindful of considerations set out by the Court of Appeal. The proposed guidance states that a young offender who is before the court for their second offence cannot reasonably be classed as a ‘persistent offender’ and offenders with a higher number of previous findings of guilt should not automatically be classed as one; in these cases the nature of the offending, the time between the offences, the circumstances surrounding the offender and the offence and any patterns in offending would all need to be taken into consideration. If the court finds that an offender is ‘persistent’ then certain sentences may become available to it that would not usually apply to an offender of that age. However, it is not mandatory that these sentences are applied and all the usual considerations of youth sentencing should be considered when determining the sentence (e.g. the purposes of sentencing and the consideration of the youth’s welfare).

Persistent offenders

- 5.4 Some sentences can only be imposed on young offenders if they are deemed a ‘persistent offender’. A youth **must** be classed as such for one of the following to be imposed:
- a YRO with intensive supervision and surveillance when aged under 15;
 - a youth rehabilitation order with fostering when aged under 15; and
 - a detention and training order when aged 12 – 14.

- 5.5 The term ‘persistent offender’ is not defined in statute but has been considered by the Court of Appeal. In general it is expected that the young offender would have had previous contact with authority as a result of criminal behaviour. This includes previous findings of guilt as well as admissions of guilt such as reprimands, final warnings and conditional cautions.
- 5.6 A young offender who has committed one previous offence cannot reasonably be classed as a ‘persistent offender’, and a young offender who has committed two or more previous offences should not necessarily be assumed to be one. To determine if the behaviour is persistent the nature of the previous offences and the lapse of time between the offences would need to be considered.
- 5.7 Courts may also wish to consider any evidence of a reduction in the level of offending when taking into account previous offending behaviour. Young offenders may be unlikely to desist from committing crime in a clear cut manner but there may be changes in patterns of criminal behaviour (e.g. less frequent offending or longer lengths of time between offences) that indicate the offender is attempting to desist from crime.
- 5.8 If there have been three findings of guilt in the past 12 months for imprisonable offences of a comparable nature (or the youth has been made the subject of orders as detailed above in relation to an imprisonable offence) then the court could certainly justify classing the youth as a ‘persistent offender’.
- 5.9 When a young offender is being sentenced in a single appearance for a series of separate, comparable offences committed over a short space of time then the court could justifiably consider the offender to be a ‘persistent offender’, despite the fact that there may be no previous findings of guilt.
- 5.10 Even where a young person is found to be a persistent offender, a court is not obliged to impose one of the optional sentences. The approach should still be individualistic and all other considerations still apply. Custodial sentences must be a last resort for all young offenders and there is an expectation that they will be particularly rare for offenders aged 14 or under.

Q8

Do you agree with the Council’s approach to ‘persistent offenders’? If you disagree, please give your reasons why.

Q9

Should there be any other considerations taken into account when assessing whether a young offender should be categorised as a ‘persistent offender’?

Available sentences

We next discuss the various sentences that are available to the court when sentencing young offenders. The section begins with a breakdown of the various sentences by age; this is designed to be an easy point of reference for sentencers.

Different sentences can also have very different long-term effects on a young offender; when considering whether the sentence is commensurate with the seriousness of the offence and the welfare of the young offender, these effects should be taken into account. For example, absolute and conditional discharges, despite entailing a finding of guilt, do not count as convictions outside of court proceedings and referral orders are spent on the last day of the order. In comparison to orders that are treated as convictions outside of court proceedings and/or have longer rehabilitation periods, there are obvious implications in terms of a young person's future opportunities and so the Council felt that it was important to highlight this in the *Overarching Principles*.

Sentences available by age:

Sentence	Age of youth		
	10 – 12	12 – 14	15 – 17
Absolute or conditional discharge or reparation order	✓	✓	✓
Financial order	✓	✓	✓
Referral order	✓	✓	✓
Youth Rehabilitation Order (YRO)	✓	✓	✓
Detention and training order	x	✓ For 'persistent offenders' only	✓
s.91 PCC(S) Act detention (grave crime)	✓	✓	✓
Extended sentence of detention*	✓	✓	✓

* If convicted of a specified violent or sexual offence and the court is of the opinion that there is a significant risk to the public of serious harm caused by the child or young person committing further specified offences.

5.11 Some sentences have longer rehabilitation periods than others, for example referral orders are spent on the last day on which the order is to have effect and other sentences could have a longer term impact on the future of young offenders than others; for example absolute or conditional discharges are not deemed to be treated as convictions other than for the purposes of criminal proceedings. This should be taken into account when considering if the sentence is commensurate to the seriousness of the offence.

Q10

Is the table helpful? Are you likely to use it as a quick reference tool?

Q11

Do you agree that the varying long-term effects of different sentences should be taken into consideration when determining the sentence?

Referral orders

The Powers of the Criminal Courts (Sentencing) Act 2000 dictates that a court must make a referral order for all first time youth offenders who have pleaded guilty to an imprisonable offence. The only time a mandatory referral order does not apply is if the committed offence carries a sentence fixed by law, if a custodial sentence is more appropriate (i.e. in very serious cases), when a hospital order is more appropriate or when an absolute or conditional discharge is more appropriate (i.e. in less serious cases).

The same Act (section 17(2)) also gives courts the power to make discretionary referral orders when a young offender has previous findings of guilt but pleads guilty to at least one offence.

This means that, in theory, there is no limit to the number of referral orders that a young offender can receive. The Council was therefore keen to provide some guidance as to when it would become inappropriate to impose a further referral order. As the youth justice system requires careful consideration of each offender and their circumstances (more so than is required in the adult justice system) it would not be prudent to attach a 'rule' or number to this and so the Council proposes the following:

“Before a court imposes a further referral order it must be satisfied that the sentence is commensurate with the seriousness of the offence and that the imposition of such a sentence has a reasonable prospect of preventing re-offending.”

This captures young offenders who may have received numerous referral orders for similar offences as it is unlikely that the court will find this disposal has a reasonable prospect of preventing re-offending (one of the statutory aims of the youth justice system) if it has failed to do so on a number of previous occasions. However, by refraining from applying a particular number to this, it allows sentencers to apply discretion based on the further details of each specific offence and/or offender.

Unlike the existing guideline, the proposed guidance also includes a breakdown of suggested lengths of referral orders based on the seriousness of the offence.

Referral orders

- 5.19 A referral order is the mandatory sentence in a youth court or magistrates' court for most first time offenders who have pleaded guilty to an imprisonable offence. Exceptions are for offences where a sentence is fixed by law or if the court deems a custodial sentence, an absolute or conditional discharge or a hospital order to be more appropriate.
- 5.20 A discretionary referral order can also be given if the above conditions are not met but the offender has pleaded guilty to at least one connected offence. If the offender does not plead guilty to any offence then a referral order is not available to the court.
- 5.21 There is no restriction to the number of times a young offender can be sentenced to a referral order, or the number of referral orders that can be imposed, or the number of previous findings of guilt a young offender receiving a referral order can have. However before a court imposes a further referral order it must be satisfied that the sentence is commensurate with the seriousness of the offence and that the imposition of such a sentence has a reasonable prospect of preventing re-offending.

5.22 The court determines the length of the order but a Referral Order Panel determines the requirements of the order.

Offence seriousness	Suggested length of referral order
Low	<ul style="list-style-type: none"> • 3 – 5 months
Medium	<ul style="list-style-type: none"> • 5 – 7 months
High	<ul style="list-style-type: none"> • 7 – 9 months • 10 – 12 months

A court should be prepared to use the whole range of periods; orders of 10 – 12 months should be made only for the most serious offences.

Q12

Is there sufficient guidance offered on the suitability of discretionary referral orders, in particular when they may no longer be the most suitable disposal for preventing re-offending?

Youth Rehabilitation Orders

A Youth Rehabilitation Order (YRO) is a community order made up of various requirements. As with all sentences it should only be imposed if it is commensurate with the seriousness of the offence but the offence does not have to be an imprisonable one to warrant this conclusion. The exception to this is a YRO with Intensive Supervision or Surveillance (ISS) or with fostering; these are designed to be alternatives to custody and so can only be imposed for an imprisonable offence. A court is required to consider a YRO with ISS or fostering when the custodial threshold has been passed and if custody is imposed it is required to state why a YRO with ISS or fostering would not have been a suitable alternative.

During informal discussions some sentencers suggested that they felt comfortable identifying the circumstances when a YRO would be the most appropriate sentence to impose but they felt less confident imposing the requirements of the order. The Youth Offending Team (YOT) will propose the contents of the order but not all sentencers felt confident enough to alter or challenge any proposals, or even to know whether it would be appropriate to do so.

It is important to note that there was no suggestion that the requirements proposed by the YOT may not be the most appropriate; sentencers agreed that the YOT are the best placed to make these recommendations, having completed assessments and spent time with the offender. However, some sentencers felt that although the proposals would likely be correct, it would still be beneficial to have enough information to know this for certain.

The Council has therefore included more information on the available requirements of the YRO and the various levels of order. This is intended to ensure that sentencers are better informed about the recommendations the YOT has made and feel confident that they are correct or to propose changes, if appropriate.

The additional information added for this purpose includes a breakdown of all the possible requirements in a YRO, as well as a table indicating the various levels of a YRO and what each may entail.

Youth Rehabilitation Orders (YROs)

- 5.23 A YRO is a community sentence within which a court may include one or more requirements designed to provide for punishment, protection of the public, reducing re-offending and reparation.
- 5.24 When imposing a YRO, the court must fix a period within which the requirements of the order are to be completed; this must not be more than three years from the date on which the order comes into effect.
- 5.25 The offence must be ‘serious enough’ in order to impose a YRO, but it does not need to be an imprisonable offence. Even if an offence is deemed ‘serious enough’ the court is not obliged to make a YRO.
- 5.26 The requirements included within the order (and the subsequent restriction on liberty) and the length of the order must be proportionate to the seriousness of the offence and suitable for the offender.
- 5.27 The available requirements within a YRO are:
- activity requirement;
 - supervision requirement;
 - unpaid work requirement;*
 - programme requirement;
 - attendance centre requirement;
 - prohibited activity requirement;
 - curfew requirement;
 - exclusion requirement;
 - electronic monitoring requirement;
 - residence requirement;*
 - local authority accommodation requirement;
 - fostering requirement;**
 - mental health requirement;
 - drug treatment requirement (with or without drug testing);
 - intoxicating substance requirement;
 - education requirement; and
 - intensive supervision and surveillance requirement.**

* These requirements are only available for offenders aged 16 or 17 years old on the date of conviction

** These requirements can only be imposed if the offence is an imprisonable one and for offenders aged under 15 they must be deemed a ‘persistent offender’

5.28 When determining the nature and extent of the requirements the court should primarily consider the likelihood of the young person re-offending and the risk of the young person causing serious harm.

5.29 The Youth Offending Team will assess this as part of their report and recommend an intervention level to the court for consideration.

	Offender profile	Requirements of order
Standard	Low likelihood of re-offending and a low risk of serious harm	Primarily seek to repair harm caused through, for example: <ul style="list-style-type: none"> • reparation; • unpaid work; • supervision; and/or • attendance centre.
Enhanced	Medium likelihood of re-offending or a medium risk of serious harm	Seek to repair harm caused and to enable help or change through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • requirement to address behaviour e.g. drug treatment, offending behaviour programme, education programme; and/or • a combination of the above.
Intensive	High likelihood of re-offending or a very high risk of serious harm	Seek to ensure the control of the young person through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • requirement to address behaviour; • requirement to monitor or restrict movement, e.g. prohibited activity, curfew, exclusion or electronic monitoring; and/or • a combination of the above.

5.30 If a young person is assessed as presenting a high risk of re-offending or of causing serious harm but the offence that was committed is of relatively low seriousness then the appropriate requirements are likely to be primarily rehabilitative or for the protection of the public.

5.31 Likewise if a young person is assessed as presenting a low risk of re-offending or of causing serious harm but the offence was of relatively high seriousness then the appropriate requirements are likely to be primarily punitive.

Orders with intensive supervision and surveillance or with fostering

5.32 An intensive supervision and surveillance requirement and a fostering requirement are both intended to be a community alternative to custody.

5.33 The offence must be punishable by imprisonment, cross the custody threshold and a custodial sentence must be merited before one of these requirements can be imposed.

5.34 An order of this nature may only be imposed on an offender aged below 15 (at the time of conviction) if they are a 'persistent offender'.

When intensive supervision and surveillance is ordered:

5.35 An order of this nature must include an extended activity requirement of between 90 to 180 days, a supervision requirement and a curfew requirement. Where appropriate, a YRO with intensive supervision and surveillance may also include additional requirements (other than a fostering requirement), although the order as a whole must comply with the obligation that

the requirements must be those most suitable for the offender and that any restrictions on liberty are commensurate with the seriousness of the offence.

5.36 When imposing such an order, a court must ensure that the requirements are not so onerous as to make the likelihood of breach almost inevitable.

When fostering is ordered:

5.37 Where a fostering requirement is included within a YRO, it will require the offender to reside with a local authority foster parent for a specified period that must not exceed 12 months.

5.38 In order to impose this requirement the court must be satisfied that a significant factor in the offence was the circumstances in which the young person was living and that the imposition of a fostering requirement would assist in the rehabilitation of the young person. It is likely that other rights will be engaged (such as those under Article 8 of the European Convention on Human Rights) and any interference with such rights must be proportionate.

5.39 The court must consult the young person's parent or guardian (unless impracticable) and the local authority before including this requirement. It can only be included if the young person was legally represented in court when consideration was being given to imposing such a requirement unless the offender, having had the opportunity to do so, did not apply for representation or that right was withdrawn because of the offender's conduct.

This requirement may be included only where the court has been notified that arrangements are available in the area of the relevant authority.

5.40 A YRO with a fostering requirement must include a supervision requirement and can include other requirements when appropriate (except an intensive supervision and surveillance requirement). The order as a whole must comply with the obligation that the requirements must be those most suitable for the offender and that any restrictions on liberty are commensurate with the seriousness of that offence.

5.41 It is unlikely that the statutory criteria will be met in many cases; where they are met and the court is considering making an order, care should be taken to ensure that there is a well developed plan for the care and support of the young person throughout the period of the order. A court will need to be provided with sufficient information, including proposals for education and training during the order and plans for the offender on completion of the order.

Q13

Is the additional detail regarding the requirements of a YRO helpful? If you are a sentencer do you feel that this will make you better informed when considering the requirements proposed in youth sentencing reports?

Custodial sentences

It has been long established in legislation and in practice that custody should be the last resort for young offenders.⁶ At paragraph 5.44 sentencers are reminded that the principal aim of any sentence for young offenders should be to prevent re-offending; above all other considerations the court should be satisfied that this disposal has the best prospect of preventing future offending. This is especially important when considering that young offenders may be more susceptible to the influences they might be exposed to in a custodial setting, as detailed at paragraph 5.49.

Through its social research, the Council is aware that, due to a lack of offence-specific youth guidelines, sentencers often refer to adult guidelines. This was an approach set out in the current *Overarching Principles – Sentencing Youths* and a starting point for the sentence of between a half and three quarters of the appropriate adult sentence is suggested as a starting point for offenders aged 15 – 17.

Analysis of current sentencing practice indicates that across various offences, the average reduction compared to the adult sentence is actually slightly greater than that proposed in the guideline; generally the starting point is within the range of half to two-thirds of the appropriate adult sentence.⁷ Accordingly, the Council proposes this as a provisional starting point. The guidance seeks to make it very clear that consulting the adult guideline is a preliminary consideration and the starting point should only be used as a rough guide (paragraphs 5.45 and 5.46).

Custodial Sentences

A custodial sentence should always be used as a last resort. If youth offence-specific guidelines are available then the court should consult them in the first instance to assess whether custody is the most appropriate disposal.

The available custodial sentences for a youth are:

Youth Court	Crown Court
<ul style="list-style-type: none"> • Detention and training order for the following periods: <ul style="list-style-type: none"> • 4 months; • 6 months; • 8 months; • 10 months; • 12 months; • 18 months; or • 24 months. 	<ul style="list-style-type: none"> • Detention and training order (the same periods are available as in the youth court) • Long-term detention (under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000) • Extended sentence of detention or detention for life (if dangerousness criteria are met) • Detention at Her Majesty's pleasure (for offences of murder)

⁶ The United Nations Convention on the Rights of the Child, Article 37 & s.152(2) Criminal Justice Act 2003

⁷ Analysis was undertaken on the following offences; robbery, rape, domestic burglary, ABH and non-domestic burglary. Source: Court Proceedings Database, Ministry of Justice.

- 5.42 Under both domestic law and international convention, a custodial sentence must only be imposed as a **'measure of last resort'**; statute provides that such a sentence may be imposed only where an offence is "so serious that neither a fine alone nor a community sentence can be justified". If a custodial sentence is imposed, a court must state its reasons for being satisfied that the offence is so serious that no other sanction would be appropriate and, in particular, why a YRO with intensive supervision and surveillance could not be justified.
- 5.43 The term of a custodial sentence must be the shortest commensurate with the seriousness of the offence; any case that warrants a detention and training order of less than four months must result in a non-custodial sentence. The court should take account of the circumstances, age and maturity of the offender.
- 5.44 In determining whether an offence has crossed the custody threshold a court will need to assess the seriousness of the offence, in particular the level of harm that was caused, or was likely to have been caused, by the offence. If youth offence-specific guidelines are available then the court should consult them in the first instance. The risk of serious harm in the future must also be assessed. The pre-sentence report will assess this criterion and must be considered before a custodial sentence is imposed. A custodial sentence is most likely to be unavoidable where it is necessary to protect the public from serious harm.

The court must always bear in mind that the principal aim of any sentence is **to prevent re-offending**.

- 5.45 If the court is satisfied that the offence crosses the custodial threshold, and that no other sentence is appropriate, the court may as a preliminary consideration consult the equivalent adult guideline in order to decide upon the appropriate length of the sentence.
- 5.46 When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of **half to two thirds** of the adult sentence **for those aged 15 – 17 and allow a greater reduction for those aged under 15**. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the offender are of the greatest importance and may justify a sentence outside of this range.
- 5.47 The closer the young offender is to 18 the closer the sentence will be to that which would have been imposed for an adult. In most cases when making this assessment the emotional age and maturity of the offender is of at least equal importance as their chronological age.
- 5.48 There is an expectation that custodial sentences will be particularly rare for an offender aged 14 or under. If custody is imposed, it should be for a shorter length of time than that which a young offender aged 15 – 17 would receive if convicted of the same offence. For an offender aged 14 or under the sentence should normally be imposed in a youth court (except in cases of homicide or when the dangerous offender criteria are met).

5.49 The welfare of the offender must be considered when imposing any sentence but is especially important when a custodial sentence is being considered. A custodial sentence could have a significant effect on the prospects and opportunities of the young person and a young person is likely to be more susceptible than an adult to the contaminating influences that can be expected within a custodial setting. There is a high reconviction rate for young people that have had custodial sentences and there have been many studies profiling the effect on vulnerable young people, particularly the risk of self harm and suicide.

Q14 Do you agree that, in light of current sentencing practice, the provisional starting point for 15 – 17 year olds compared to the appropriate adult sentence should be changed, to between one half and two thirds?

The available custodial sentences have been broken down into categories: detention and training orders; long-term detention; those which can be imposed when the dangerousness criteria have been met; and detention at Her Majesty's pleasure. The Council is not seeking any specific comments regarding these sections but please do share any observations or comments you may have.

Detention and training order

- 5.50 A court can only impose a detention and training order if the offender is legally represented unless they have refused to apply for legal aid or it has been withdrawn as a result of their conduct.
- 5.51 If it is determined that the offence is of such seriousness that a custodial sentence is unavoidable then the length of this sentence must be considered on an individual basis. The court must take into account the chronological age of the offender, as well as their maturity and other relevant factors, such as their mental health or learning disabilities.
- 5.52 A detention and training order cannot be imposed on any offender under the age of 12 at the time of conviction and is only applicable to offenders aged 12 – 14 if they are deemed to be a 'persistent offender' (see section on persistent offenders on page 24).
- 5.53 A detention and training order can be made only for the periods prescribed – 4, 6, 8, 10, 12, 18 or 24 months. Any time spent on remand in custody or on bail subject to a qualifying curfew condition should be taken into account when calculating the length of the order. The accepted approach is to double the time spent on remand before deciding the appropriate period of detention, in order to ensure that the regime is in line with that applied to adult offenders. After doubling the time spent on remand the court should then adopt the nearest prescribed period available for a detention and training order.

Long-term detention

- 5.54 A young person may be sentenced by the Crown Court to long-term detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 if convicted of a 'grave crime' and neither a community order nor a detention and training order is suitable.
- 5.55 These cases may be sent for trial to the Crown Court or committed for sentence only (see section two for further information).
- 5.56 It is possible that, following a guilty plea a two year detention order may be appropriate, as opposed to a sentence of section 91 detention, to account for the reduction.

Dangerous offenders

- 5.57 If a young person is found to be a dangerous offender they can be sentenced to **extended detention** or **detention for life**.
- 5.58 A sentence of extended detention may be imposed only where the appropriate custodial term would be 4 years or more. The extension period must not exceed 5 years in the case of a specified violent offence and 8 years in the case of a specified sexual offence. The term of the extended sentence of detention must not exceed the maximum term of imprisonment for an adult offender convicted of that offence.
- 5.59 A sentence of detention for life should be used as a last resort when an extended sentence is not able to provide the level of public protection that is necessary. In order to determine this the court should consider the following factors in the order given:
- the seriousness of the offence;
 - the offender's previous findings of guilt;
 - the level of danger posed to the public and whether there is a reliable estimate of the length of time the defendant will remain a danger; and
 - the alternative sentences available.

The court is required to set a minimum term which must be served in custody before parole can be considered.

Detention at Her Majesty's pleasure

- 5.60 This is the mandatory sentence for anyone convicted of committing a murder whilst aged below 18 years old. The starting point for the minimum term is 12 years.

Appendix one (paragraphs 6.1 – 6.22 in Annex C) deals with breaches of various orders. The existing guideline currently only offers guidance on breach of a YRO and so there were obvious gaps in the information offered. The Council was keen to offer comprehensive advice but was also aware that the guideline includes a lot of information and is fairly dense. Therefore the information on breaches has been included as an appendix, so it should not hinder users when looking for information in the main body of the guideline, but it is available as a reference tool that sentencers can easily turn to when necessary.

Q15

Is it helpful to have guidance on breach of all orders, rather than just guidance on breach of a YRO?

Q17

Reviewing the draft Overarching Principles guideline as a whole (Annex C) do you have any observations or comments about any parts of the guideline?

Q16

Do you agree that this information is best placed as an appendix, rather than incorporated into the main body of the text?

Part three: Developing the offence-specific guidelines

Assessing seriousness

The guideline sets out a step-by-step decision-making process for the court to use when sentencing each type of offence. This means that all sentencers are adopting a consistent approach to sentencing across England and Wales.

The particular circumstances of each offence covered by the draft guideline will be different. The draft guideline aims to help the court to decide how serious an offence is by reference to a series of factors.

The first two steps that the court follows are about assessing the seriousness of an individual offence. These two steps are described below.

STEP ONE

Offence Seriousness – Nature of the offence

The first step is to consider the principal factors of the offence. The guideline sets out examples of harm and culpability factors that the Council considers are the most important in deciding the seriousness of the offence.

The guideline directs the court to consider the **offence-specific** factors relating to the culpability of the offender in committing the offence and the harm that has been caused. In considering these factors the court will be able to assess whether a sentencing threshold has been crossed. This is simply a starting point, and the guideline directs that **the fact that a sentence threshold is crossed does not necessarily mean that is the sentence that should be imposed**. This is an important message as sentencing youths is much more focussed on the individual offender, and a court must ensure that all factors, including offender-specific factors, are carefully considered before determining the most appropriate sentence in the case.

STEP TWO**Offence Seriousness – Aggravating and mitigating factors**

In order to complete the assessment of seriousness the court must consider the **offence-specific** factors that may aggravate or mitigate the seriousness of the offence.

STEP THREE**Offender mitigation**

Step three requires the court to focus upon the offender to consider the personal factors that may have played a part in the commission of the offence. The court is reminded that these factors may be sufficient to reduce the sentence from one of custody to a non-custodial sentence or from a community sentence to a different means of disposal.

STEP FOUR**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE**Review the sentence**

Finally the court must review the sentence to ensure it is appropriate. The court is required to consider whether the sentence addresses the likelihood of an offender re-offending and the risk of that offender causing serious harm.

Part four: Sexual offences guideline

(Draft guideline on page 83)

This guideline is to be used for sentencing youths for all sexual offences. The guideline is to be read in conjunction with the *Overarching Principles* guideline which provides much greater detail on procedure and comprehensive information on the different sentences available to the court when sentencing youths.

The guideline begins with a short narrative about why sentencing youths for the commission of sexual offending behaviour requires a different approach to sentencing adults. It also describes a number of background factors that may have played a part in the offending behaviour.

Sentencing youths for sexual offences involves a number of different considerations from adults. The primary difference is the age and immaturity of the offender. Young people are less emotionally developed than adults; offending can arise through inappropriate sexual experimentation; confusion about sexual identity or orientation; gang or peer group pressure to engage in sexual activity; or a lack of understanding regarding consent, exploitation and coercion.

Background factors may also play a part.

- Offender is or has been the victim of abuse (sexual, physical or emotional).
- Exposure to pornography or materials which are unsuitable for a person of the age of the offender.
- Involvement in gangs associated with child sexual exploitation.
- Unstable living or educational arrangements.
- A trigger event such as the death of a close relative or a family breakdown.

This guideline should be read alongside the *Overarching Principles – Sentencing Youths* definitive guideline which provides comprehensive guidance on the full range of sentences that are available by age. The guideline also includes details on issues such as grave crime determination and dangerousness.

Q18

Do you find the short narrative on sentencing youths for sexual offences helpful? If not please specify what you would add or remove and why.

STEP ONE: OFFENCE SERIOUSNESS – Nature of the offence

The first step of the guideline is to consider the nature of the offence. With the assistance of examples, the court is required to consider the culpability and harm factors specific to the offence that may indicate that the threshold for a certain type of sentence has been crossed. Whilst a certain sentence threshold will be indicated by this step, this is only the starting point and it is to be expected that sentencers may move away from this starting point on the basis of aggravating or mitigating factors relevant to the offence or the offender.

A non-custodial sentence may be the most suitable disposal where one or more of the following factors apply:

There are three factors that indicate that a non-custodial sentence may be the most appropriate starting point:

- any form of non-penetrative sexual activity;
- sexual activity without coercion, exploitation or pressure; and
- no psychological or physical harm caused to the victim.

The Council is of the view that the starting point for offending involving non-penetrative sexual activity should not ordinarily be a custodial sentence. This is a similar position to that for adult offenders charged with sexual assault where, in the absence of additional culpability, harm or aggravating factors, the starting point sentence would be a non-custodial one.

The second factor concerns the nature of the relationship between the offender and the victim, and seeks to ensure that those offences which are committed as part of non-exploitative sexual experimentation between two young people would not ordinarily warrant a custodial sentence.

The third factor provides that where the victim has not been harmed by the offending, either psychologically or physically, then the starting point should again be non-custodial. The Council is aware that individuals will have differing psychological responses and that assumptions should not be made about the severity of an offence based solely on the resilience of a victim. For this reason the guideline ensures that the court will have sufficient opportunity to move away from the starting point if there are other factors that aggravate or mitigate the offence seriousness.

Q19

Do you agree with the harm and culpability factors proposed at step one which indicate a non-custodial sentence? If not, please specify which you would add or remove and why.

A custodial sentence or Youth Rehabilitation Order with Intensive Supervision and Surveillance or Fostering may be justified where one or more of the following factors apply:

- any penetrative activity involving coercion, exploitation or pressure;
- use or threats of violence;
- sustained offence; and
- significant psychological or physical harm caused to the victim.

Where the custodial threshold has been passed, the court can impose a custodial sentence or a YRO with ISS or fostering.

The Council is of the view that the starting point for offending involving penetrative sexual activity, which would include offences of rape or assault by penetration, should be a custodial sentence.

The second factor is ‘use or threats of violence’. Following the extensive work and research that the Council engaged in to produce the adult sexual offences guideline, and the research carried out for the production of this guideline, it has approached this factor with a degree of caution. The Council is aware that force is not an essential element of sexual offending, and so does not wish to convey the impression that a lack of physical harm makes a sexual offence less serious. For that reason the factor focuses on the use of violence, rather than on physical injury or on how far the victim has fought back. When harm to the victim is considered in the fourth bullet point, this incorporates both physical and psychological harm.

The third factor is ‘sustained offence’. The inclusion of this factor reflects the fact that a sustained incident may increase the psychological harm to the victim who has to endure a longer period where there is the fear of escalation and possibly greater psychological trauma.

The final factor is ‘significant psychological or physical harm caused to the victim’. As discussed above, the Council is aware that force, violence and harm are not essential elements of sexual offending, but consider that where significant injuries, either physical or psychological, do result this is a harm factor that should impact on the assessment of seriousness.

Q20

Do you agree with the harm and culpability factors proposed at step one which indicate that the starting point should be a custodial sentence? If not, please specify which you would add or remove and why.

STEP TWO: OFFENCE SERIOUSNESS – Aggravating and mitigating factors

To complete the assessment of seriousness the court is asked to identify whether there are any additional factors related to the offence that have not already been considered at step one, which might either aggravate or mitigate. These aggravating and mitigating factors allow the court to consider the wider context of the offence.

The lists at this step are not exhaustive and any factors not considered at step one, but which the court considers relevant either to the harm caused or the culpability of the offender, can be taken into account. A factor being present does not mean that the court must take it into account; it has discretion to decide whether factors are relevant in the case before it and, if so, will make an assessment of the weight to be given to them.

Although the list of factors is not exhaustive the Council's intention is to highlight factors that are likely to be relatively common to the offence, in order to ensure that they are considered by all sentencers.

The table below sets out the proposed aggravating factors.

Aggravating factors (non-exhaustive)
Previous findings of guilt, having regard to a) the nature of the offence to which the finding of guilt relates and its relevance to the current offence; and b) the time that has elapsed since the finding of guilt
Significant degree of planning
Offender acts together with others to commit the offence
Use of alcohol/drugs on victim to facilitate the offence
Abuse of trust (e.g. where the offender is babysitting the victim)
Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intent of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups
Grooming
Significant disparity of age between offender and victim
Specific targeting of particularly vulnerable victim
Any steps taken to prevent reporting the incident/seeking assistance
Pregnancy or STI as a consequence of offence
Blackmail

- 'Significant degree of planning' is a factor that is considered by the Council to increase the culpability of the offender, indicating a higher level of culpability than an opportunistic or impulsive offence.
- 'Offender acts together to commit the offence' reflects the enhanced fear and intimidation created by the presence of more than one offender.
- 'Use of alcohol/drugs on the victim to facilitate the offence' is included as the Council wishes to reflect the increased culpability of someone who, in a common scenario, deliberately gets a victim drunk or administers some form of drug in order to render them incapable of consenting to sexual activity.

- ‘Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intent of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups’. The Council is aware that through the use of social media, the recording and sharing of photographs and video footage has become increasingly common. This sort of behaviour is often used to embarrass or humiliate the victim, and in some cases may be used as some form of blackmail. The Council therefore considers this to be a serious aggravating feature.
- ‘Grooming’. This includes all aspects of grooming, including online. The Council considers this to be a significant aggravating feature of any sexual offence. A recent report from Barnardo’s⁸ highlights the impact that technology has had on the sexual abuse and exploitation of children and young people:

“In the past year, referrals solely concerning internet abuse have ranged from 20% of a worker’s caseload through 45% to 70% and with one project worker stating “for 75% of the 30 cases I worked on last year, the initial referral was internet abuse. We wouldn’t have received referrals like we do now, four years ago such as picture sending, sexting, sexualised conversations with peers and adults, meeting a groomer following online conversations...””

- ‘Significant disparity of age’ has been included as a factor that increases seriousness on the grounds that a greater disparity in age is likely to reveal a greater degree of exploitation or abuse of power.
- ‘Specific targeting of particularly vulnerable victim’. This factor is intended to cover vulnerability over and above the fact that the victim is likely to be young. Barnardo’s in their report *Puppet on a String* have said:

“...some groups of young people are more vulnerable to targeting by the perpetrators of sexual exploitation. These include children living in care, particularly residential care, those who are excluded from mainstream school and those who misuse drugs and alcohol. Barnardo’s is concerned that these children are increasingly being targeted by abusers who are developing more sophisticated grooming techniques.”⁹

- ‘Any steps taken to prevent reporting the incident/seeking assistance’ is a factor which has been included in previous guidelines and is intended to reflect the serious aggravation created where offenders attempt to intimidate their victims into remaining silent. Steps taken to prevent reporting cover a wide range of scenarios and could include instances of threats that physical harm will be done, or photographs taken during the offence will be circulated, if a report is made.
- ‘Pregnancy or STI as a consequence of offence’. The Council considers that these factors may exacerbate still further the long-term harm experienced by the victim. The phrase ‘pregnancy’ is also intended to cover instances where the victim has undergone an abortion.
- ‘Blackmail’ will increase the seriousness of the offending behaviour. The offender may use the threat of telling others about the activity as a way of controlling the victim.

⁸ *Digital dangers: The impact of technology on the sexual abuse and exploitation of children and young people* (2015)

⁹ *Puppet on a String: The urgent need to cut children free from sexual exploitation*, Barnardo’s (2011)

Q21

Do you agree with the aggravating factors for this offence? Please state which, if any, should be removed or added.

Q22

Should any of the factors be considered at step one? If so, why?

The mitigating factors that may apply are set out below.

Mitigating factors (non-exhaustive)

No findings of guilt **or** no relevant/recent findings of guilt

Good character and/or exemplary conduct

Participated in offence due to peer pressure/bullying

Genuine belief that activity was lawful

- ‘Participated in offence due to peer pressure/bullying’. Young people may be more inclined to engage in sexual experimentation as a result of pressure from their peers. The Council recognises this and considers that it may be relevant when considering the seriousness of the offending behaviour.
- ‘Genuine belief that activity was lawful’. Some young people may be genuinely unaware that their behaviour is unlawful, for example sexual activity with another young person who is under the age of 16, or sending indecent images to friends.

Q23

Are there any offence-specific mitigating factors that should be added?

STEP THREE: OFFENDER MITIGATION

The court is then required to focus upon the offender and consider the personal factors that may have played a part in the commission of the offence. The offender-specific mitigating factors that may apply are set out below:

Offender mitigating factors (non-exhaustive)

Particularly young or immature offender

Mental disorder or learning disability, particularly where linked to the commission of the offence

Unstable upbringing including but not limited to time spent ‘looked after’, exposure to drug and alcohol abuse, lack of attendance at school, lack of familial presence or support, victim of neglect and/or abuse, exposure to familial criminal behaviour

Determination and/or demonstration of steps taken to address offending behaviour

Strong prospect of rehabilitation

Q24

Are there any offender-specific mitigating factors that should be added?

STEP FOUR: REDUCTION FOR GUILTY PLEAS

This section ensures that the court takes account of any potential reduction for a guilty plea.

STEP FIVE: REVIEW THE SENTENCE

This final step gives the court the opportunity to stand back and review the sentence, to ensure that it is appropriate and will address the likelihood of an offender reoffending and the risk of that offender causing serious harm.

Q25

Do you agree with the inclusion of this step? Please state what, if anything, should be removed or added?

Case Studies

Case Study A

V, a 16 year old female, is in the park drinking with college friends. D, a fellow student aged 17 years old, is there too. The group are drinking alcohol and, later, most of the group move on, leaving D and V together. D tells V how much he likes her. V is surprised and, before she says anything, D starts to touch her thighs. V tells D to remove his hand. D ignores her and tells V he knows she likes it and moves his hand higher and starts to touch V's genital area over her jeans. V pushes D away and shouts at him to get off. D holds his hands up and says he didn't do anything, although shortly after tells V that he's sorry, pleading with her not to tell anyone.

D has no previous findings of guilt and is generally of good character. D pleads guilty at the first hearing to an offence of sexual assault. He is apologetic, and says he got carried away because of the alcohol. V says that she was shocked and embarrassed by the incident.

Step one – The offence committed involved non-penetrative sexual activity. There were no threats of violence, and the incident was not sustained. V was shocked and embarrassed by the incident but not caused significant psychological or physical harm. On balance the offence is most likely to fall within the 'non-custodial' sentence bracket.

Step two – There are no aggravating factors that apply, but in mitigation D has no previous findings of guilt.

Step three – There are no relevant offender mitigating factors.

D has pleaded guilty and has no previous findings of guilt, which means that in the youth court the sentences available are discharge, referral order or DTO. The most appropriate sentence in this case would be a period of referral order.

Q26

Do you consider that the sentence passed in case study A is proportionate? If you do not agree, please tell us what sentence should be passed and why.

Case Study B

The male offender, D was 15 at the time of the offences, and the two male victims were both aged 7. D and the two victims were at a public event on a Saturday evening. D forced his penis into both the victims' mouths in turn, in the presence of four other boys aged 12 – 16. D had told the victims that he would give them alcohol if they did what he told them to.

D pleaded guilty to rape of a child under 13. D had previous findings of guilt for theft and common assault, where he had been made subject to a referral order for 12 months.

Step one – The offence committed involved penetrative sexual activity and involved two victims. A custodial sentence would be justified.

Step two – The offence is aggravated by the fact that it was committed before a group of peers, by the fact that D promised the boys alcohol if they carried out the act, and because there was a significant disparity of age between D and the victims. There were no relevant mitigating factors.

In the absence of any further information a custodial sentence is the most appropriate disposal. However the court should request a report from the YOT in such a case. The court will need to hear more about the offender in order to ensure an appropriate sentence is imposed.

In the above case a YOT report revealed that D has been diagnosed with Attention Deficit Disorder, and has the level of maturity of an 11 – 12 year old. D has been attending a special educational needs school since the age of 11. In addition the YOT ascertained that D had been exposed to pornography by an older brother at home, and that he had recognised he had a problem, and had spoken to a teacher about how to get help. The YOT can offer a requirement under a YRO which would address D's offending behaviour.

Step three – The YOT report has revealed that D is a particularly immature offender with learning disabilities; he has been exposed to pornography in the home; and he has taken steps to address his offending behaviour, indicating a strong prospect of rehabilitation. For these reasons the court should now consider the possibility of a community order.

The court will come on to review the sentence. Given the serious nature of the offence an intensive YRO would be appropriate.

Q27

Do you consider that the sentence passed in case study B is proportionate? If you do not agree, please tell us what sentence should be passed and why.

Part five: Robbery guideline

(Draft guideline on page 87)

This guideline is to be used for sentencing youths for robbery. The guideline is to be read in conjunction with the *Overarching Principles* guideline which provides much greater detail on procedure and comprehensive information on the different sentences available to the court when sentencing youths.

STEP ONE: OFFENCE SERIOUSNESS – Nature of the offence

The first step of the guideline is to consider the nature of the offence. With the assistance of examples the court is required to consider the culpability and harm factors specific to the offence that may indicate that the threshold for a certain type of sentence has been crossed. Whilst a certain sentence threshold will be indicated by this step, this is only the starting point and it is to be expected that sentencers may move away from this starting point on the basis of aggravating or mitigating factors relevant to the offender or the offence.

A non-custodial sentence may be the most suitable disposal where one or more of the following factors apply:

There are two factors that indicate that a non-custodial sentence may be the most appropriate starting point.

- Threat or use of minimal force.
- Little or no physical or psychological harm caused to the victim.

The Council is of the view that a robbery involving the threat or use of minimal force, which causes little or no harm to the victim, should result in a non-custodial sentence for a young person.

Q28

Do you agree with the harm and culpability factors proposed at step one which indicate a non-custodial sentence? If not, please specify which you would add or remove and why.

A custodial sentence or Youth Rehabilitation Order with Intensive Supervision and Surveillance or Fostering may be justified where one or more of the following factors apply:

There are three factors that indicate that the custodial threshold has been passed.

- Use of very significant force.
- Threat or use of a bladed article, firearm or imitation firearm.
- Significant physical or psychological harm caused to the victim.

The possession of a bladed article or firearm or imitation firearm indicates a level of planning to commit an offence that puts the offender at the highest level of culpability. Possession of this type of weapon is considered by the Council to be extremely serious. The risk of a situation escalating and the gravity of an offence increasing is considerably higher when weapons are carried. The use of significant force, whether with or without a weapon, is also considered to be a factor that would put the offence at the highest level of seriousness.

The third factor is ‘significant physical or psychological harm caused to the victim’. There are two elements to robbery: the acquisition of property and the threat of or use of violence immediately before or during the theft. While robbery is an offence that is committed for gain, the Council’s view is that the effect the use or threat of force has on the victim should be the main measure of harm.

The Council recently published an adult guideline on robbery which included these factors in the highest levels of culpability. When the Council consulted on the guideline, consultees were broadly supportive of this approach.

Q29

Do you agree with the harm and culpability factors proposed at step one which indicate a custodial sentence? If not, please specify which you would add or remove and why.

STEP TWO: OFFENCE SERIOUSNESS – Aggravating and mitigating factors

To complete the assessment of seriousness, the court is asked to identify whether there are any additional factors related to the offence that have not already been considered at step one which might either aggravate or mitigate. These aggravating and mitigating factors allow the court to consider the wider context of the offence.

The lists at this step are not exhaustive and any factors not considered at step one, but which the court considers relevant either to the harm caused or the culpability of the offender, can be taken into account. A factor being present does not mean that the court must take it into account; it has discretion to decide whether factors are relevant in the case before it and, if so, will make an assessment of the weight to be given to them.

Although the list of factors is not exhaustive the Council’s intention is to highlight factors that are likely to be relatively common to the offence, in order to ensure that they are considered by all sentencers.

The table below sets out the proposed aggravating factors.

Aggravating factors (non-exhaustive)
Previous findings of guilt, having regard to a) the nature of the offence to which the finding of guilt relates and its relevance to the current offence; and b) the time that has elapsed since the finding of guilt
Significant degree of planning
Threat or use of a weapon other than a bladed article, firearm or imitation firearm (whether produced or not)
Victim is targeted due to vulnerability (or a perceived vulnerability)
A leading role where offending is part of a group
Attempt to conceal identity (for example, wearing a balaclava or hood)
Any steps taken to prevent the reporting the incident/seeking assistance
High value goods or sums targeted or obtained (includes economic, personal or sentimental)
Restraint, detention or additional degradation of the victim

- ‘Significant degree of planning’ is a factor that is considered by the Council to increase the seriousness of the offence, reflecting a higher degree of responsibility than an opportunistic or impulsive offence.
- Whilst the Council considers that the use or threat to use a knife or a firearm indicates a particularly high degree of culpability, the Council does consider that the involvement of any weapon in the commission of the offence of robbery ought to aggravate the offence.
- ‘Victim is targeted due to vulnerability (or a perceived vulnerability)’. The Council has a strong focus on the impact an offence has on the victim. Where a victim was targeted due to inherent factors (for example, age or disability) the Council believes that this should increase the seriousness of the offence.
- ‘A leading role where offending is part of a group’ will increase the seriousness of the offence as it indicates that the offender was pivotal in the commission of the offence.
- ‘Attempt to conceal identity (for example, wearing a balaclava or hood)’ may make the offence more distressing for the victim as well as indicating planning by the offender.
- ‘Any steps taken to prevent reporting the incident/seeking assistance’ is a standard aggravating factor that has been included in other definitive guidelines and is self explanatory.
- ‘High value goods or sums targeted or obtained (includes economic, personal or sentimental)’. Whilst the Council considers that the psychological and physical harm caused to the victim of a robbery is the most significant factor in assessing seriousness, if a high value item has been taken this should clearly affect the sentence.
- ‘Restraint, detention or additional degradation of the victim’ is a factor that clearly indicates a higher degree of harm to the victim, and should aggravate the offence.

Q30

Do you agree with the aggravating factors for this offence? Please state which, if any, should be removed or added.

Q31

Should any of the factors be considered at step one? If so, why?

The mitigating factors that may apply to the offence are set out below.

Mitigating factors (non-exhaustive)
No findings of guilt or no relevant/recent findings of guilt
Good character and/or exemplary conduct
Participated in offence due to peer pressure/bullying
Remorse, particularly where evidenced
Little or no planning

- ‘Participated in offence due to peer pressure/bullying’. Young people may be more inclined to engage in offending behaviour as a result of pressure from their peers. The Council recognises this and considers that it may be a relevant mitigating factor.
- ‘Remorse, particularly where evidenced by voluntary reparation to the victim and ‘Little or no planning’ are both factors used in other guidelines, and are self explanatory.

Q32

Are there any mitigating factors that should be added?

Steps 3 – 5 of this guideline replicate the sexual offences guideline.

Case Studies

Case Study C

The offence took place at 6 pm on a Saturday night in May. The victim, a male aged 15, was walking along a residential street using his mobile phone. The offender, D, a male aged 15, approached him and tried to take the phone from him. The victim resisted and the offender shoved him and made off with the phone. The victim gave chase and the offender was caught and detained.

The offender entered a guilty plea to robbery. He has a previous finding of guilt for theft from a shop for which he was made the subject of a referral order. The YOT provide a report which informs the court that D’s father has been in and out of prison his whole life, and is currently serving a lengthy custodial sentence. He lives with his mother and five other siblings, and money is very tight. D claims to have taken the phone to try to get some money for his mother.

Step one – The offence committed involved the use of minimal force, and no physical harm was caused to the victim.

Step two – The offence is aggravated by D’s previous offence of theft. There is no offence mitigation.

Step three – In personal mitigation D has been exposed to familial criminal behaviour.

D has pleaded guilty. The most appropriate sentence in this case would be a standard length YRO.

Q33

Do you consider that the sentence passed in case study C is proportionate? If you do not agree, please tell us what sentence should be passed and why.

Case Study D

The victims were brother and sister, aged 14 and 12. At about 8pm they were walking home through the park and were approached by four young people, including the offender D, a female aged 17. The group threatened the pair with a knife and demanded their money and mobile phones. The brother resisted so D and another pulled him to the ground and kicked him repeatedly until he handed his mobile over to them. The remaining two from the group held onto the sister preventing her from assisting her brother.

The brother suffered black eyes, swelling to the face and a chipped tooth. Both victims were very frightened by the incident and since that evening have been afraid to leave home without an adult.

D entered a guilty plea to robbery. She has previous findings of guilt for public order offences, theft offences and for a burglary which she committed when she was 15 years old. For the burglary she was sentenced to a YRO with ISS. She breached that order twice but has recently completed it.

The pre-sentence report revealed that D resides in a care home. She has been in the care system for 6 years and during that time has had several foster placements which have broken down.

Step one – The offence committed involved threats with a knife, the use of very significant force, and resulted in significant harm to the victim. A custodial sentence or YRO with ISS would be justified.

Step two – The offence is aggravated by the fact that D has a previous finding of guilt relating to robbery. In addition D targeted her victims due to their young age which made them particularly vulnerable. Finally D played a leading role in the group attack. There is no offence mitigation.

Step three – In personal mitigation D has had an unstable upbringing.

D has pleaded guilty to the offence which will go in her favour; in addition the court will reflect on her difficult upbringing and consider carefully any structure or support that could be offered to her in the community. However due to the high starting point, and the numerous additional aggravating factors, and due to her reluctance to comply with previous orders the most appropriate sentence would be a DTO.

Q34

Do you consider that the sentence passed in case study D is proportionate? If you do not agree, please tell us what sentence should be passed and why.

Annex A:

List of consultation questions

- Q1 Do you agree with the general principles for sentencing youths? Are there any additional principles that should be included?
- Q2 Do you agree with the factors that should be taken into account when considering the welfare of a young person? Are there any additional factors that should be included?
- Q3 Are you content that the guidance on grave crimes clearly and accurately reflects the relevant legislation and case law? If you disagree please state why.
- Q4 Does the allocation section include all the necessary considerations? Do you have any general observations on this section?
- Q5
- a) Do the flowcharts include all the necessary considerations for allocation?
 - b) Do you think you would refer to these flowcharts on a regular basis when considering sentence levels (legal practitioners/sentencers)?
 - c) Do you have any general observations about these flowcharts?
- Q6 Do you agree with the approach taken to the assessment of seriousness? Is the approach useful and does it provide you with greater structure when assessing seriousness?
- Q7 Do you agree with the aggravating and mitigating factors included? Please state which, if any, should be removed or added.
- Q8 Do you agree with the Council's approach to 'persistent offenders'? If you disagree, please give your reasons why.
- Q9 Should there be any other considerations taken into account when assessing whether a young offender should be categorised as a 'persistent offender'?
- Q10 Is the table helpful? Are you likely to use it as a quick reference tool?
- Q11 Do you agree that the varying long-term effects of different sentences should be taken into consideration when determining the sentence?
- Q12 Is there sufficient guidance offered on the suitability of discretionary referral orders, in particular when they may no longer be the most suitable disposal for preventing re-offending?

- Q13 Is the additional detail regarding the requirements of a YRO helpful? If you are a sentencer do you feel that this will make you better informed when considering the requirements proposed in youth sentencing reports?
- Q14 Do you agree that, in light of current sentencing practice, the provisional starting point for 15 – 17 years old compared to the appropriate adult sentence should be changed, to between one half and two thirds?
- Q15 Is it helpful to have guidance on breach of all orders, rather than just guidance on breach of a YRO?
- Q16 Do you agree that this information is best placed as an appendix, rather than incorporated into the main body of the text?
- Q17 Reviewing the draft Overarching Principles guideline as a whole (Annex C) do you have any observations or comments about any parts of the guideline?
- Q18 Do you find the short narrative on sentencing youths for sexual offences is helpful? If not please specify what you would add or remove and why.
- Q19 Do you agree with the harm and culpability factors proposed at step one which indicate a non-custodial sentence? If not, please specify which you would add or remove and why.
- Q20 Do you agree with the harm and culpability factors proposed at step one which indicate that the starting point should be a custodial sentence? If not, please specify which you would add or remove and why.
- Q21 Do you agree with the aggravating factors for this offence? Please state which, if any, should be removed or added.
- Q22 Should any of the factors be considered at step one? If so, why?
- Q23 Are there any offence-specific mitigating factors that should be added?
- Q24 Are there any offender-specific mitigating factors that should be added?
- Q25 Do you agree with the inclusion of this step? Please state what, if anything, should be removed or added?
- Q26 Do you consider that the sentence passed in case study A is proportionate? If you do not agree, please tell us what sentence should be passed and why.
- Q27 Do you consider that the sentence passed in case study B is proportionate? If you do not agree, please tell us what sentence should be passed and why.

- Q28 Do you agree with the harm and culpability factors proposed at step one which indicate a non-custodial sentence? If not, please specify which you would add or remove and why.
- Q29 Do you agree with the harm and culpability factors proposed at step one which indicate a custodial sentence? If not, please specify which you would add or remove and why.
- Q30 Do you agree with the aggravating factors for this offence? Please state which, if any, should be removed or added.
- Q31 Should any of the factors be considered at step one? If so, why?
- Q32 Are there any mitigating factors that should be added?
- Q33 Do you consider that the sentence passed in case study C is proportionate? If you do not agree, please tell us what sentence should be passed and why.
- Q34 Do you consider that the sentence passed in case study D is proportionate? If you do not agree, please tell us what sentence should be passed and why.

Annex B:

Background to guidelines

STATUTORY REQUIREMENTS

In producing these draft guidelines, the Council has had regard to a number of statutory requirements.

The purposes of sentencing are stated in section 142 of the Criminal Justice Act 2003:

- the punishment of offenders;
- the reduction of crime (including its reduction by deterrence);
- the reform and rehabilitation of offenders;
- the protection of the public; and,
- the making of reparation by offenders to persons affected by their offences.

In addition, when sentencing an offender aged under 18 a court must have regard to section 37(1) Crime and Disorder Act 1998, and section 44(1) Children and Young Person Act 1933:

- It shall be the principal aim of the youth justice system to prevent offending by children and young persons.¹⁰
- Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.¹¹

The Sentencing Council has also had regard to the statutory duties in the Coroners and Justice Act 2009 which set out requirements for sentencing guidelines as follows:

- guidelines may be general in nature or limited to a particular offence;
- the Council must publish them as draft guidelines;
- the Council must consult the following persons about draft guidelines: the Lord Chancellor, such persons as the Lord Chancellor may direct, the Justice Select Committee of the House of Commons, such other persons as the Council considers appropriate;
- after making appropriate amendments, the Council must issue definitive guidelines;
- the Council may review the guidelines and may revise them;¹²
- the Council must publish a resource assessment in respect of the guidelines;¹³ and
- the Council must monitor the operation and effect of its sentencing guidelines.¹⁴

¹⁰ s.37(1) Crime & Disorder Act 1998

¹¹ s.44(1) Children & Young Person Act 1933

¹² s.120 Coroners and Justice Act 2009

¹³ s.127(2) *ibid*

¹⁴ s.128(1) *ibid*

Under the previous bodies (the Sentencing Guidelines Council and the Sentencing Advisory Panel), courts had to ‘*have regard to any guidelines which are relevant to the offender’s case*’¹⁵ and give reasons if a sentence fell outside of the range.¹⁶ Section 125(a) of the Coroners and Justice Act 2009 states that, ‘*every court must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender’s case*’. Therefore, courts are required to impose a sentence consistent with the guidelines, unless contrary to the interests of justice to do so. Therefore, the Sentencing Council is keen to ensure that the guidelines are as accessible as possible for sentencers.

When preparing sentencing guidelines, the Council must have regard to the following matters:

- the sentences imposed by courts in England and Wales for offences;
- the need to promote consistency in sentencing;
- the impact of sentencing decisions on victims of offences;
- the need to promote public confidence in the criminal justice system;
- the cost of different sentences and their relative effectiveness in preventing re-offending; and,
- the results of monitoring the operation and effect of its sentencing guidelines.¹⁷

When publishing any draft guidelines, the Council must publish a resource assessment of the likely effect of the guidelines on:

- the resources required for the provision of prison places;
- the resources required for probation provision; and
- the resources required for the provision of youth justice services.¹⁸

In order to achieve these requirements, the Council has considered case law on the offences included within the guidelines, where it is available, evidence on current sentencing practice and drawn on members’ own experience of sentencing practice. The intention is for the decision-making process in the proposed guideline to provide a clear structure, not only for sentencers, but also to provide more clarity on sentencing for the victims and the public, so that they too can have a better understanding of how a sentence has been reached.

The Council has had regard to these duties throughout the preparation of this draft guideline. In developing an understanding of the cost and effectiveness of different sentences, the Council has considered the available information and evidence and these are contained in the resource assessment which accompanies this consultation paper.

15 s.172(1) Criminal Justice Act 2003

16 s.174(2) *ibid*

17 s.120(11) Coroners and Justice Act 2009

18 s.127(3) *ibid*

Annex C:

Draft guidelines

Overarching Principles –

Sentencing Youths

Section one: General approach

Sentencing principles

- 1.1 When sentencing an offender aged under 18 at the date of conviction, a court must¹⁹ have regard to:
 - the principal aim of the youth justice system (to prevent offending by children and young people);²⁰ and
 - the welfare of the offender.²¹
- 1.2 While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and offender focused, as opposed to offence focused. For an offender under 18 the sentence should focus on the rehabilitation of the offender where possible. A court should also consider the effect the sentence is likely to have on the young person as well as any underlying factors contributing to the offending behaviour.
- 1.3 It is important to avoid ‘criminalising’ young people unnecessarily; the primary purpose of the youth justice system is to foster a sense of responsibility for others and promote re-integration into society rather than to punish.
- 1.4 It is important to bear in mind any factors that may diminish the culpability of a young offender. Young people have not attained full maturity and as such may not fully appreciate the effect their actions can have on other people. They may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Young people are also likely to be susceptible to peer pressure and other external influences. It is important to consider the extent to which the offender has been acting impulsively and the offender’s conduct has been affected by inexperience, emotional volatility or negative influences.
- 1.5 For these reasons young people are likely to benefit from being given an opportunity to address their behaviour and may be receptive to changing their conduct. They should, if possible, be given the opportunity to learn from their mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the young person and hinder their re-integration into society.

¹⁹ This section does not apply when imposing a mandatory life sentence, when imposing a statutory minimum custodial sentence, when imposing detention for life under the dangerous offender provisions or when making certain orders under the Mental Health Act 1983

²⁰ s.37(1) Crime and Disorder Act 1998

²¹ s.44(1) Children and Young Persons Act 1933

- 1.6 Offending by a young person is often a phase which passes fairly rapidly and so the sentence should not result in the alienation of the young person from society if that can be avoided.
- 1.7 The impact of punishment is likely to be felt more heavily by a young person in comparison to an adult as any sentence will seem longer due to their young age. In addition penal interventions may interfere with a young person's education and this should be considered by a court at sentencing.
- 1.8 Any restriction on liberty must be commensurate with the seriousness of the offence. In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.²²
- 1.9 Section 142 of the Criminal Justice Act 2003 sets out the purposes of sentencing for offenders who are over 18 on the date of conviction. That Act was amended in 2008 to add section 142A which sets out the purposes of sentencing for offenders under 18, subject to a commencement order being made. The difference between the purposes of sentencing for those under and over 18 is that section 142A does not include as a purpose of sentencing 'the reduction of crime (including its reduction by deterrence)'. Section 142A has not been brought into effect. Unless and until that happens, deterrence can be a factor in sentencing young offenders although normally it should be restricted to serious offences and can, and often will, be outweighed by considerations of the offender's welfare.²³

For more information on assessing the seriousness of the offence see section four.

Welfare

- 1.10 The statutory obligation to have regard to the welfare of a young person includes the obligation to secure proper provision for education and training,²⁴ to remove the young person from undesirable surroundings where appropriate²⁵ and the need to choose the best option for the young person taking account of the circumstances of the offence.
- 1.11 **In having regard to the welfare of the young person, a court should ensure that it is alert to:**
- **the high incidence of mental health problems amongst young people in the criminal justice system;**
 - **the high incidence of those with learning difficulties or learning disabilities amongst young people in the criminal justice system;**
 - **the effect that speech and language difficulties might have on the ability of the young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction;**
 - **the reasons why a young person may conduct themselves inappropriately in court, e.g. due to nerves, a lack of understanding of the system, a belief that they will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity, etc;**

²² s.143(1) Criminal Justice Act 2003

²³ *R v DS and others* [2012] EWCA Crim 1470 [2013] 1 Cr. App. R. (S.) 64

²⁴ s.44 Children and Young Persons Act 1933

²⁵ *ibid*

- **the vulnerability of young people to self harm, particularly within a custodial environment;**
- **the extent to which changes taking place during adolescence can lead to experimentation; and**
- **the effect on young people of experiences of loss and neglect and/or abuse.**

- 1.12 Additional factors regularly present in the background of young offenders include deprived homes, poor employment records, low educational attainment, early experience of offending by other family members, experience of abuse and/or neglect, negative influences from peer associates and the misuse of drugs and/or alcohol.
- 1.13 Evidence shows that ‘looked after’ children are over-represented in the criminal justice system.²⁶ When dealing with a young person who is ‘looked after’ the court should also bear in mind the additional complex vulnerabilities that are likely to be present in their background. For example, looked after children may have no or little contact with their family and/or friends, they are relatively likely to have special educational needs and/or emotional and behavioural problems, they may be heavily exposed to peers who have committed crime and they are likely to have accessed the care system as a result of abuse, neglect or parental absence due to bereavement, imprisonment or desertion. The court should also bear in mind that the level of parental-type support that a looked after child receives throughout the criminal justice process may vary, and may be limited.
- 1.14 The court should always seek to ensure that it has access to information about how best to identify and respond to these factors and, where necessary, that a proper assessment has taken place in order to enable the most appropriate sentence to be imposed.
- 1.15 The requirement to have regard to the welfare of a young person is subject to the obligation to impose only those restrictions on liberty that are commensurate with the seriousness of the offence; accordingly, a court should not impose greater restrictions because of other factors in the young person’s life.
- 1.16 When considering a young offender who may be particularly vulnerable, sentencers should consider which available disposal is best able to support the young offender and which disposals could potentially exacerbate any underlying issues. This is particularly important when considering custodial sentences as there are concerns about the effect on vulnerable young offenders of being in closed conditions, with significant risks of self harm, including suicide.
- 1.17 The vulnerability factors that are often present in the background of young offenders should also be considered in light of the offending behaviour itself. Although they do not alone cause offending behaviour – there are many young people who have experienced these circumstances but do not commit crime – there is a correlation and any response to criminal activity amongst young people will need to recognise the presence of such factors in order to be effective.

²⁶ Department for Education (2014) Outcomes for Children Looked After by Local Authorities in England, as at 31 March 2014. Statistical First Release 49/2014. [accessed via: <https://www.gov.uk/government/statistics/outcomes-for-children-looked-after-by-local-authorities>]

These principles do not undermine the fact that the sentence should have regard to the seriousness of the offence. Further guidance on assessing the seriousness of an offence can be found at section four.

Section two: Allocation

(See also the allocation charts at pages 64 – 66 when reading this section.)

- 2.1 **Cases involving young people** and in particular those under 15 years of age should, wherever possible, be tried in the youth court. It is the court which is best designed to meet their specific needs. A trial in the Crown Court with the inevitably greater formality and greatly increased number of people involved (including a jury and the public) should be reserved for the most serious cases.²⁷

This section covers the exceptions to this requirement.²⁸

- 2.2 A youth must always appear in the Crown Court for trial if:
- charged with homicide;
 - charged with a firearms offence subject to a mandatory minimum sentence of three years (and is over 16 years of age at the time of the offence); or
 - notice has been given to the court (under section 51B or 51C of the Crime and Disorder Act 1998) in a serious or complex fraud or child case.

Dangerousness

- 2.3 A case should be sent to the Crown Court for trial if the offence charged is a specified offence²⁹ **and** it seems to the court that if convicted the young person would meet the criteria for a sentence under the dangerous offender provisions.
- 2.4 A sentence under the dangerous offender provisions can only be imposed if
- the young person is convicted of a specified violent or sexual offence **and**
 - the court is of the opinion that there is a significant risk to the public of serious harm caused by the young person committing further specified offences **and**
 - a custodial term of at least four years would be imposed for the offence.
- 2.5 A ‘significant risk’ is more than a mere possibility of occurrence. The assessment of dangerousness should take into account all the available information relating to the circumstances of the offence and **may** also take into account any information regarding previous patterns of behaviour related to this offence and any other relevant information relating to the offender. In making this assessment it will normally be necessary to obtain a pre-sentence report.
- 2.6 Young offenders may change and develop within a shorter time than adults and this factor, along with their level of maturity, may be highly relevant when assessing probable future conduct and whether it may cause a significant risk of serious harm.³⁰

²⁷ *R on the application of H, A and O v Southampton Youth Court* [2004] EWHC 2912 Admin

²⁸ s.24 Magistrates’ Courts Act 1980

²⁹ As listed in the Criminal Justice Act, 2003 Sch.15

³⁰ *R v Lang* [2005] EWCA Crim 2864, [2006] 1 WLR 2509

2.7 In anything but the most serious cases it may be impossible for the court to form a view as to whether the defendant would meet the criteria of the dangerous offender provisions without greater knowledge of the circumstances of the offence and the offender. In those circumstances jurisdiction for the case should be retained in the youth court. If, following conviction, the dangerousness criteria are met then the defendant should be committed **for sentence**.

Grave crimes

2.8 Where a young person is before the court for an offence mentioned in section 91(1) of the Powers of Criminal Courts (Sentencing) Act 2000 and the court considers that it ought to be possible to sentence him to more than two years' detention if found guilty of the offence, then he should be sent to the Crown Court. The test to be applied by the court is whether there is a **real prospect** that a sentence in excess of two years' detention will be imposed.

2.9 Before deciding whether to send the case to the Crown Court or retain jurisdiction in the youth court, the Court should hear submissions from the prosecution and defence. As there is now a power to commit for sentence³¹ the Court should no longer take the prosecution case at its highest when deciding whether to retain jurisdiction.³² In most cases it is likely to be impossible to decide whether there is a real prospect that a sentence in excess of two years' detention will be imposed without knowing more about the facts of the case and the offender. In those circumstances the youth court should retain jurisdiction and commit for sentence if it is of the view, having heard more about the facts and the offender, that its powers of sentence are insufficient.

2.10 An offence comes within section 91 where:

- it is punishable with 14 years imprisonment or more for an adult (but is not a sentence fixed by law);
- it is an offence of sexual assault, child sex offences committed by a child or young person, sexual activity with a child family member or inciting a child family member to engage in sexual activity; or
- it is one of a number of specified offences in relation to firearms, ammunition and weapons which are subject to a minimum term but in respect of which a court has found exceptional circumstances justifying a lesser sentence.

Where the court decides that the case is suitable to be dealt with in the youth court it must warn the young person that all available sentencing options remain open and, if convicted, the young offender may be committed to the Crown Court for sentence.

A young person aged 10 or 11 should only be sent for trial or committed for sentence to the Crown Court when charged with or convicted of an offence of such gravity that, despite the normal prohibition on a custodial sentence for a person of that age, a sentence exceeding two years is a realistic possibility.

A young person aged 12 – 17 (for which a detention and training order could be imposed) should be sent for trial or committed for sentence to the Crown Court only when charged with or convicted of an offence of such gravity that a sentence substantially beyond the two year maximum for a detention and training order is a realistic possibility.

³¹ s.3(b) Powers of Criminal Courts (Sentencing) Act 2000, (as amended)

³² *R (DPP) v South Tyneside Youth Court* [2015] EWHC 1455 (Admin)

Charged alongside an adult

2.11 The proper venue for the trial of any youth is normally the youth court. Subject to statutory restrictions, that remains the case where a youth is jointly charged with an adult.

If the adult is sent for trial to the Crown Court, the court should conclude that the youth must be tried separately in the youth court unless it is in the interests of justice for the youth and the adult to be tried jointly.

2.12 Examples of factors that should be considered when deciding whether to send the youth to the Crown Court (rather than having a trial in the youth court) include:

- whether separate trials will cause injustice to witnesses or to the case as a whole (consideration should be given to the provisions of sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999);
- the age of the youth; the younger the youth, the greater the desirability that the youth be tried in the youth court;
- the age gap between the youth and the adult; a substantial gap in age militates in favour of the youth being tried in the youth court;
- the lack of maturity of the youth;
- the relative culpability of the youth compared with the adult and whether the alleged role played by the youth was minor; and/or,
- the lack of previous findings of guilt on the part of the youth.

2.13 The court should bear in mind that the youth court now has a general power to commit for sentence (as discussed at paragraph 2.9); in appropriate cases this will permit a sentence to be imposed by the same court on adults and youths who have been tried separately.

2.14 The court should follow the plea before venue procedure (see flowcharts on pages 64 – 66) prior to considering whether it is in the interest of justice for the youth and the adult to be tried jointly.

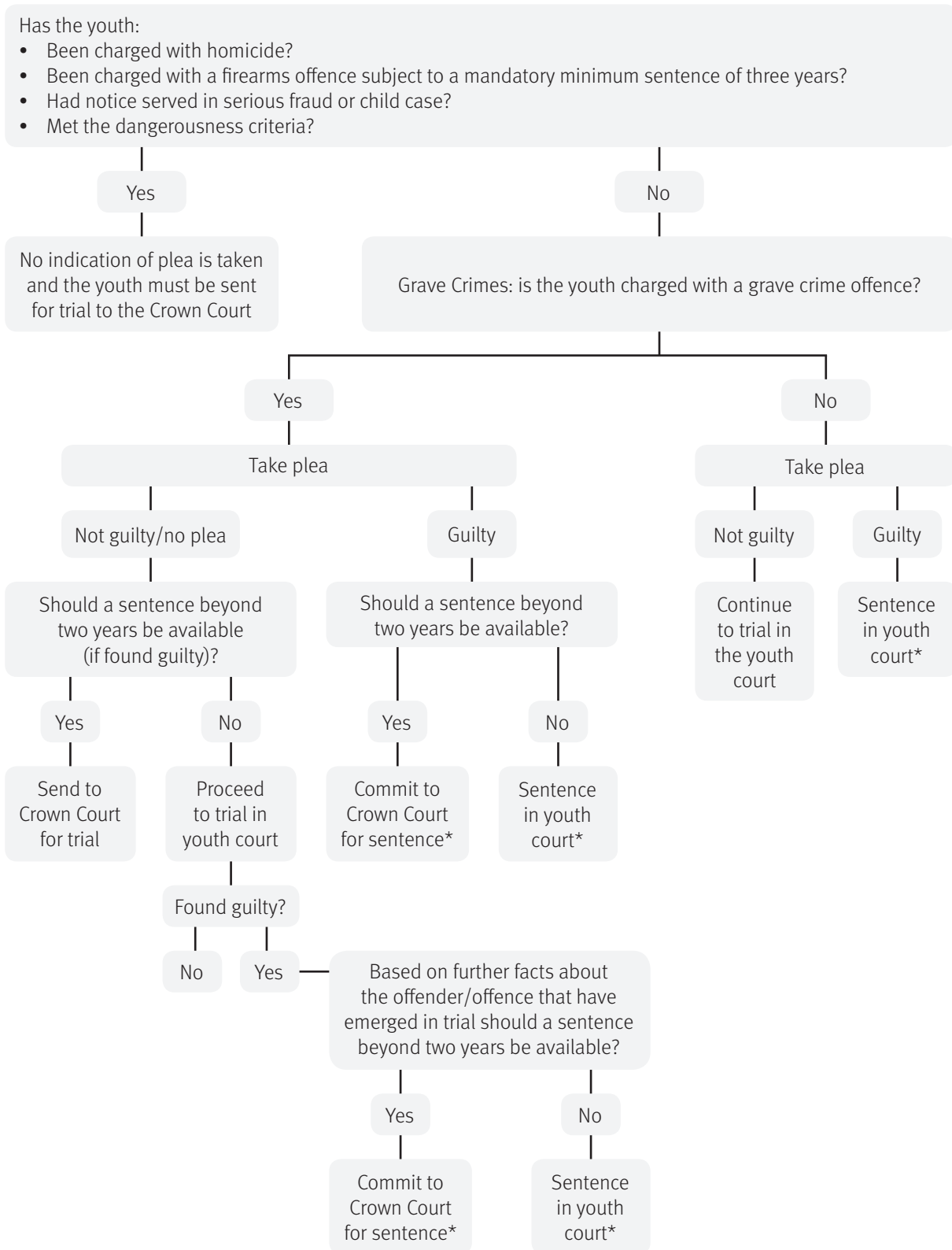
Remittal from the Crown Court

2.15 If a young person is convicted before the Crown Court of an offence other than homicide the court must remit the case to the youth court, unless it would be undesirable to do so.³³ In considering whether remittal is undesirable a court should balance the need for expertise in the sentencing of young offenders with the benefits of the sentence being imposed by the court which determined guilt.

2.16 Particular attention should be given to young offenders who are appearing before the Crown Court only because they have been charged with an adult offender; referral orders are generally not available in the Crown Court but may be the most appropriate sentence.

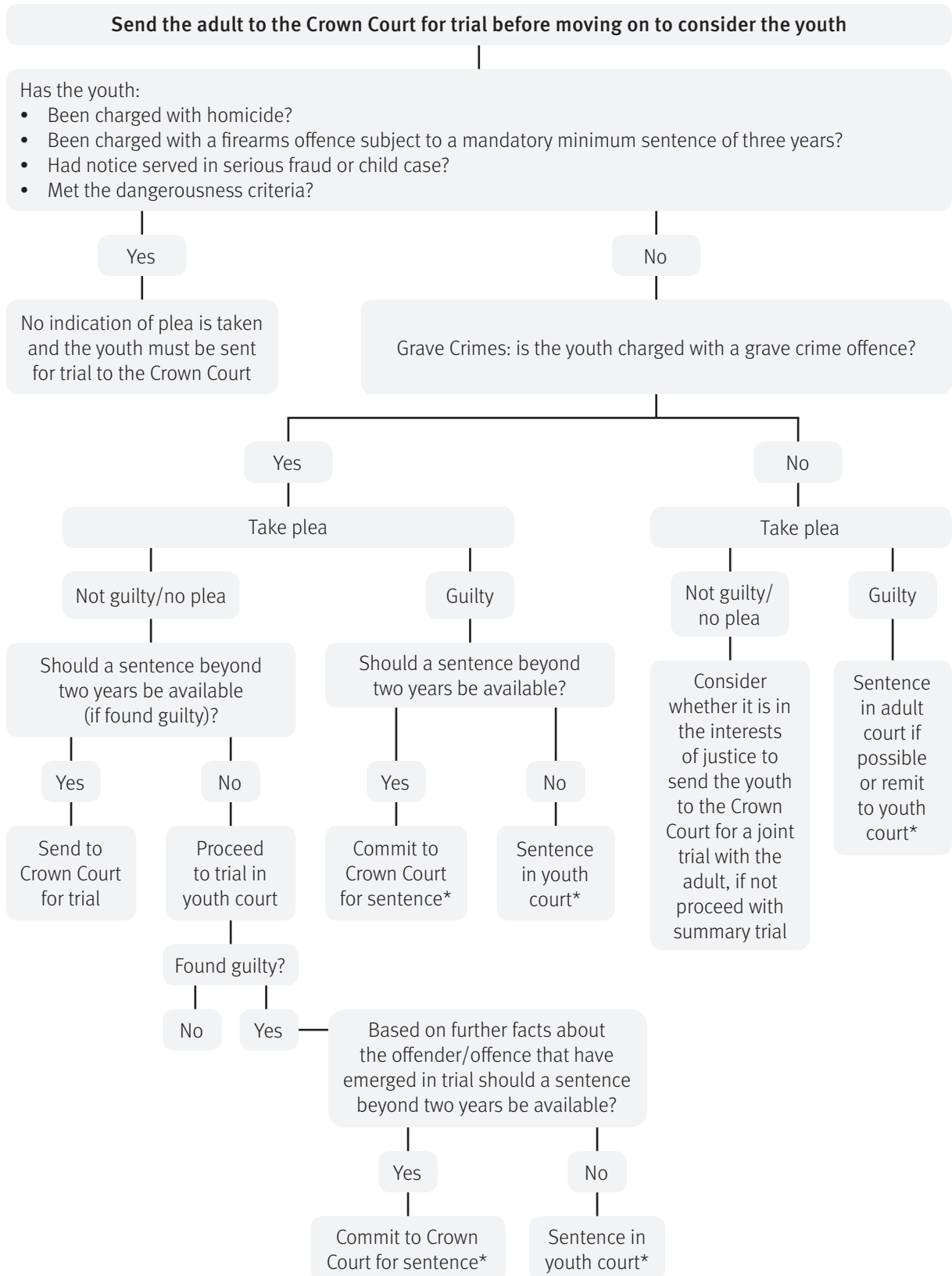
33 s.8 Powers of Criminal Courts (Sentencing) Act 2008

Youth charged alone or with other youths



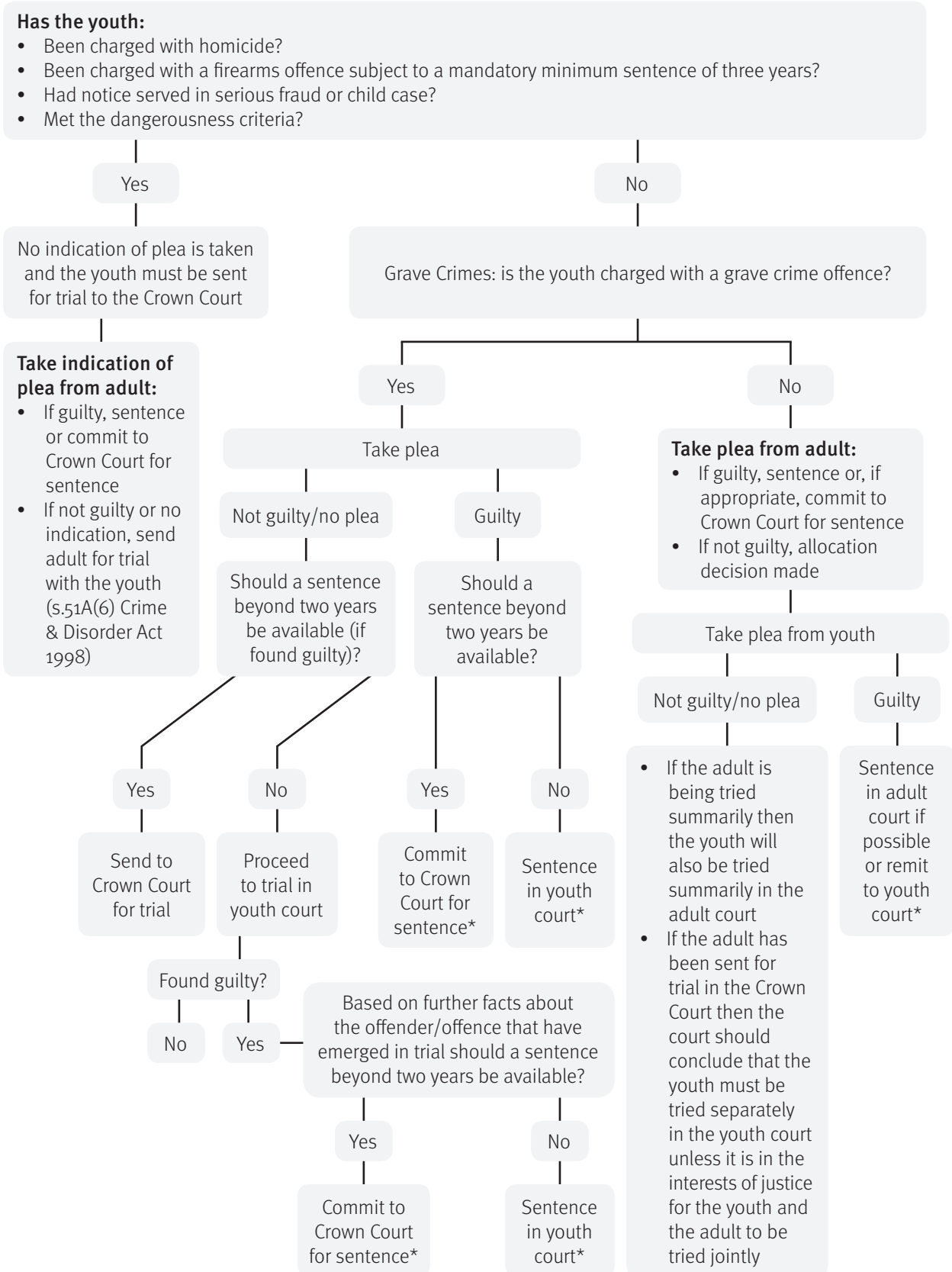
* If the dangerousness provisions are satisfied the court must commit for sentence

Youth and adult charged as co-defendants where the adult is charged with an indictable only offence (or an offence where notice is given to the court under s.51B or s.51C Crime & Disorder Act 1998)



* If the dangerousness provisions are satisfied the court must commit for sentence

Youth and adult charged as co-defendants where the adult is charged with either way offence



* If the dangerousness provisions are satisfied the court must commit for sentence

Section three: Parental responsibilities

- 3.1 For any young person aged under 16 appearing before court there is a statutory requirement that parents/guardians attend during all stages of proceedings, unless the court is satisfied that this would be unreasonable having regard to the circumstances of the case.³⁴ The court may also enforce this requirement for a young person aged 16 and above if they deem it desirable to do so.
- 3.2 Although this requirement can cause a delay in the case before the court it is important it is adhered to. If a court does find exception to proceed in the absence of a responsible adult then extra care must be taken to ensure the outcomes are clearly communicated to and understood by the young person.
- 3.3 In addition to this responsibility there are also orders that can be imposed on parents. If the young offender is aged under 16 then the court has a duty to make a **parental bind over** or impose a **parenting order**, if it would be desirable in the interest of preventing the commission of further offences.³⁵ There is a discretionary power to make these orders where the offender is aged 16 or 17. If the court chooses not to impose a parental bind over or parenting order they must state their reasons for not doing so in open court. In most circumstances a parenting order is likely to be more appropriate than a parental bind over.

A court cannot make a bind over alongside a referral order.

Section four: Determining the sentence

- 4.1 In determining the sentence, the key elements to consider are:
 - the seriousness of the offence;
 - the age of the offender (chronological and emotional);
 - the likelihood of further offences being committed;
 - the extent of harm likely to result from those further offences; and
 - the principal aims of the youth justice system.

The seriousness of the offence

- 4.2 The seriousness of the offence is the starting point for determining the appropriate sentence; the sentence imposed and any restriction on liberty must be commensurate with the seriousness of the offence.
- 4.3 The approach to sentencing young offenders should always be individualistic and the court should always have in mind the principal aims of the youth justice system.
- 4.4 There is an expectation that in general a young person will be dealt with less severely than an adult offender although this distinction diminishes as the offender approaches age 18, subject to an assessment of maturity and criminal sophistication. In part, this is because young people are unlikely to have the same experience and capacity as an adult to understand the effect

³⁴ s.34A Children and Young Persons Act 1933

³⁵ s.8(6) Powers of Criminal Courts (Sentencing Act) 2000 & s.150 Crime and Disorder Act 1998

of their actions on other people or to appreciate the pain and distress caused and because a young person may be less able to resist temptation, especially where peer pressure is exerted.

- 4.5 In order to determine the seriousness of the offence the court should assess the culpability of the offender and the harm that was caused, intended to be caused or could foreseeably have been caused.
- 4.6 In assessing **culpability** the court will wish to consider the extent to which the offence was planned, the role of the offender (if committed as part of a group), the level of force that was used in the commission of the offence and the awareness that the offender had of their actions and its possible consequences.
- 4.7 In assessing **harm** the court should consider the level of physical and psychological harm caused to the victim, the degree of any loss caused to the victim and the extent of any damage caused to property. (This assessment should also include a consideration of any harm that was intended to be caused or could foreseeably have been caused in the committal of the offence.)
- 4.8 The Court should also consider any aggravating or mitigating factors that may increase or reduce the overall seriousness of the offence. **If any of these factors are included in the definition of the committed offence they should not be taken into account when considering the relative seriousness of the offence before the court.**

Factors increasing seriousness

Statutory aggravating factors:

Previous findings of guilt, having regard to a) the **nature** of the offence to which the finding of guilt relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the finding of guilt

Offence committed whilst on bail

Other aggravating factors:

Steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution

Victim is particularly vulnerable due to factors including but not limited to age, mental or physical disability

Restraint, detention or additional degradation of the victim

Prolonged nature of attack

Attempts to conceal/dispose of evidence

Established evidence of community/wider impact

Failure to comply with current court orders

Attempt to conceal identity

Involvement of others through peer pressure or bullying

Commission of offence whilst under the influence of alcohol or drugs

History of antagonising or bullying the victim

Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intent of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups

Factors reducing seriousness or reflecting personal mitigation

No previous findings of guilt **or** no relevant/recent findings of guilt

Remorse, particularly where evidenced by voluntary reparation to the victim

Good character and/or exemplary conduct

Unstable upbringing including but not limited to time spent 'looked after', exposure to drug and alcohol abuse, lack of attendance at school, lack of familial presence or support, victim of neglect and/or abuse, exposure to familial criminal behaviour

Involved through bullying or peer pressure

Limited understanding of effect on victim

Serious medical conditions requiring urgent, intensive or long-term treatment

Mental disorder or learning disability

Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

Reduction for guilty pleas

The Court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

Age of the offender

- 4.9 There is a statutory presumption that no young person under the age of 10 can be guilty of an offence.³⁶
- 4.10 With a young offender, the consideration of age requires a different approach to that which would be adopted in relation to the age of an adult. Even within the category of 'youth', the response of a court to an offence is likely to be very different depending on whether the offender is at the lower end of the age bracket, in the middle or towards the top end.
- 4.11 It is important to consider whether the young offender lacks the necessary maturity to appreciate fully the consequences of their conduct, the extent to which the offender has been acting on an impulsive basis and whether their conduct has been affected by inexperience, emotional volatility or negative influences.

Section five: Available sentences**Crossing a significant age threshold between commission of offence and sentence**

- 5.1 There will be occasions when an increase in the age of an offender will result in the maximum sentence on the date of *conviction* being greater than that available on the date on which the offence was *committed* (primarily turning 12, 15 or 18 years old).

³⁶ s.50 Children and Young Persons Act 1933

- 5.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes offenders who attain the age of 18 between the *commission* and the *conviction* of the offence³⁷ but when this occurs the purpose of sentencing adult offenders³⁸ has to be taken into account, which is:
- the punishment of offenders;
 - the reduction of crime (including its reduction by deterrence);
 - the reform and rehabilitation of offenders;
 - the protection of the public; and
 - the making of reparation by offenders to persons affected by their offences.
- 5.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate.

Persistent offenders

- 5.4 Some sentences can only be imposed on young offenders if they are deemed a ‘persistent offender’. A youth **must** be classed as such for one of the following to be imposed:
- a YRO with intensive supervision and surveillance when aged under 15;
 - a youth rehabilitation order with fostering when aged under 15; and
 - a detention and training order when aged 12 – 14.
- 5.5 The term ‘persistent offender’ is not defined in statute but has been considered by the Court of Appeal. In general it is expected that the young offender would have had previous contact with authority as a result of criminal behaviour. This includes previous findings of guilt as well as admissions of guilt such as reprimands, final warnings and conditional cautions.
- 5.6 A young offender who has committed one previous offence cannot reasonably be classed as a ‘persistent offender’, and a young offender who has committed two or more previous offences should not necessarily be assumed to be one. To determine if the behaviour is persistent the nature of the previous offences and the lapse of time between the offences would need to be considered.³⁹
- 5.7 Courts may also wish to consider any evidence of a reduction in the level of offending when taking into account previous offending behaviour. Young offenders may be unlikely to desist from committing crime in a clear cut manner but there may be changes in patterns of criminal behaviour (e.g. less frequent offending or longer lengths of time between offences) that indicate the offender is attempting to desist from crime.
- 5.8 If there have been three findings of guilt in the past 12 months for imprisonable offences of a comparable nature (or the youth has been made the subject of orders as detailed above in relation to an imprisonable offence) then the court could certainly justify classing the youth as a ‘persistent offender’.

37 *R v Ghafoor* [2002] EWCA Crim 1857, [2003] 1 Cr App R (S) 428

38 s.142 Criminal Justice Act 2003

39 *R v M* [2008] EWCA Crim 3329

- 5.9 When a young offender is being sentenced in a single appearance for a series of separate, comparable offences committed over a short space of time then the court could justifiably consider the offender to be a ‘persistent offender’, despite the fact that there may be no previous findings of guilt.⁴⁰
- 5.10 Even where a young person is found to be a persistent offender, a court is not obliged to impose one of the optional sentences. The approach should still be individualistic and all other considerations still apply. Custodial sentences must be a last resort for all young offenders and there is an expectation that they will be particularly rare for offenders aged 14 or under.

Sentences available by age:

Sentence	Age of youth		
	10 – 12	12 – 14	15 – 17
Absolute or conditional discharge or reparation order	✓	✓	✓
Financial order	✓	✓	✓
Referral order	✓	✓	✓
Youth Rehabilitation Order (YRO)	✓	✓	✓
Detention and training order	✗	✓ For ‘persistent offenders’ only	✓
s.91 PCC(S) Act detention (grave crime)	✓	✓	✓
Extended sentence of detention*	✓	✓	✓

* If convicted of a specified violent or sexual offence and the court is of the opinion that there is a significant risk to the public of serious harm caused by the child or young person committing further specified offences.

- 5.11 Some sentences have longer rehabilitation periods than others, for example referral orders are spent on the last day on which the order is to have effect⁴¹ and other sentences could have a longer term impact on the future of young offenders than others; for example absolute or conditional discharges are not deemed to be treated as convictions other than for the purposes of criminal proceedings.⁴² This should be taken into account when considering if the sentence is commensurate to the seriousness of the offence.

Breaches and the commission of further offences during the period of an order

- 5.12 If a young offender is found guilty of breaching an order, or commits a further offence during the period of an order, the court will have various options available depending upon the nature of the order (**see Appendix One at page 79**). The primary aim of the court should be to encourage compliance and seek to support the rehabilitation of the offender.

⁴⁰ *R v S* [2000] 1 Cr App R (S)18

⁴¹ s.139 Legal Aid, Sentencing and Punishment of Offenders Act 2012

⁴² s.14 (1) Powers of Criminal Courts (Sentencing) Act 2000

Absolute or conditional discharge and reparation orders

- 5.13 An absolute discharge is appropriate when, despite a finding of guilt, the offence is not serious enough to warrant punishment.
- 5.14 A conditional discharge is appropriate when, despite a finding of guilt, the offence is not serious enough to warrant an immediate punishment. The fixed period of conditional discharge must not exceed three years. Unless exceptional circumstances are found a conditional discharge cannot be imposed if the young offender has received one of the following in the previous 24 months: a final warning; two or more cautions; or a conditional caution followed by a caution.
- 5.15 A reparation order can require a young offender to make reparation to the victim of the offence, where a victim wishes it, or to the community as a whole. Before making an order the court must consider a written report from a relevant authority, e.g. a youth offending team, and the order must be commensurate with the seriousness of the offence.
- 5.16 If the court has the power to make a reparation order but chooses not to do so, they must give their reasons.

Financial order

- 5.17 A court may impose a fine for any offence (unless the criteria for a mandatory referral order are met). In accordance with statutory requirements, where financial orders are being considered, priority must be given to compensation orders and, when an order for costs is to be made alongside a fine, the amount of the cost must not exceed the amount of the fine. If the offender is under 16 then the court has a duty to order parents or guardians to pay the fine; if the offender is 16 or over this duty is discretionary.
- 5.18 It is important that travel costs to school, college or apprenticeships and lunch expenses are taken into account when assessing the income of a young offender.

Referral orders

- 5.19 A referral order is the mandatory sentence in a youth court or magistrates' court for most first time offenders who have pleaded guilty to an imprisonable offence. Exceptions are for offences where a sentence is fixed by law or if the court deems a custodial sentence, an absolute or conditional discharge or a hospital order to be more appropriate.
- 5.20 A discretionary referral order can also be given if the above conditions are not met but the offender has pleaded guilty to at least one connected offence. If the offender does not plead guilty to any offence then a referral order is not available to the court.
- 5.21 There is no restriction to the number of times a young offender can be sentenced to a referral order, or the number of referral orders that can be imposed, or the number of previous findings of guilt a young offender receiving a referral order can have. However before a court imposes a further referral order it must be satisfied that the sentence is commensurate with the seriousness of the offence and that the imposition of such a sentence has a reasonable prospect of preventing re-offending.

5.22 The court determines the length of the order but a Referral Order Panel determines the requirements of the order.

Offence seriousness	Suggested length of referral order
Low	• 3 – 5 months
Medium	• 5 – 7 months
High	• 7 – 9 months • 10 – 12 months

A court should be prepared to use the whole range of periods; orders of 10 – 12 months should be made only for the most serious offences.

Youth Rehabilitation Orders (YRO)

5.23 A YRO is a community sentence within which a court may include one or more requirements designed to provide for punishment, protection of the public, reducing re-offending and reparation.

5.24 When imposing a YRO, the court must fix a period within which the requirements of the order are to be completed; this must not be more than three years from the date on which the order comes into effect.

5.25 The offence must be ‘serious enough’ in order to impose a YRO, but it does not need to be an imprisonable offence. Even if an offence is deemed ‘serious enough’ the court is not obliged to make a YRO.

5.26 The requirements included within the order (and the subsequent restriction on liberty) and the length of the order must be proportionate to the seriousness of the offence and suitable for the offender.

5.27 The available requirements within a YRO are:

- activity requirement;
- supervision requirement;
- unpaid work requirement;*
- programme requirement;
- attendance centre requirement;
- prohibited activity requirement;
- curfew requirement;
- exclusion requirement;
- electronic monitoring requirement;
- residence requirement;*
- local authority accommodation requirement;
- fostering requirement;**
- mental health requirement;
- drug treatment requirement (with or without drug testing);
- intoxicating substance requirement;
- education requirement; and
- intensive supervision and surveillance requirement.**

- * These requirements are only available for offenders aged 16 or 17 years old on the date of conviction
- ** These requirements can only be imposed if the offence is an imprisonable one and for offenders aged under 15 they must be deemed a 'persistent offender'

5.28 When determining the nature and extent of the requirements the court should primarily consider the likelihood of the young person re-offending and the risk of the young person causing serious harm.

5.29 The Youth Offending Team will assess this as part of their report and recommend an intervention level to the court for consideration.

	Offender profile	Requirements of order⁴³
Standard	Low likelihood of re-offending and a low risk of serious harm	Primarily seek to repair harm caused through, for example: <ul style="list-style-type: none"> • reparation; • unpaid work; • supervision; and/or • attendance centre.
Enhanced	Medium likelihood of re-offending or a medium risk of serious harm	Seek to repair harm caused and to enable help or change through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • requirement to address behaviour e.g. drug treatment, offending behaviour programme, education programme; and/or • a combination of the above.
Intensive	High likelihood of re-offending or a very high risk of serious harm	Seek to ensure the control of the young person through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • requirement to address behaviour; • requirement to monitor or restrict movement, e.g. prohibited activity, curfew, exclusion or electronic monitoring; and/or • a combination of the above.

5.30 If a young person is assessed as presenting a high risk of re-offending or of causing serious harm but the offence that was committed is of relatively low seriousness then the appropriate requirements are likely to be primarily rehabilitative or for the protection of the public.

5.31 Likewise if a young person is assessed as presenting a low risk of re-offending or of causing serious harm but the offence was of relatively high seriousness then the appropriate requirements are likely to be primarily punitive.

Orders with intensive supervision and surveillance or with fostering

5.32 An intensive supervision and surveillance requirement and a fostering requirement are both intended to be a community alternative to custody.

5.33 The offence must be punishable by imprisonment, cross the custody threshold and a custodial sentence must be merited before one of these requirements can be imposed.

⁴³ The examples provided here are not exclusive; the Youth Offending Team will make recommendations based upon their assessment of the young offender which may vary from some of the examples given.

5.34 An order of this nature may only be imposed on an offender aged below 15 (at the time of conviction) if they are a ‘persistent offender’.

When intensive supervision and surveillance is ordered:

5.35 An order of this nature must include an extended activity requirement of between 90 to 180 days, a supervision requirement and a curfew requirement. Where appropriate, a YRO with intensive supervision and surveillance may also include additional requirements (other than a fostering requirement), although the order as a whole must comply with the obligation that the requirements must be those most suitable for the offender and that any restrictions on liberty are commensurate with the seriousness of the offence.

5.36 When imposing such an order, a court must ensure that the requirements are not so onerous as to make the likelihood of breach almost inevitable.

When fostering is ordered:

5.37 Where a fostering requirement is included within a YRO, it will require the offender to reside with a local authority foster parent for a specified period that must not exceed 12 months.

5.38 In order to impose this requirement the court must be satisfied that a significant factor in the offence was the circumstances in which the young person was living and that the imposition of a fostering requirement would assist in the rehabilitation of the young person. It is likely that other rights will be engaged (such as those under Article 8 of the European Convention on Human Rights⁴⁴) and any interference with such rights must be proportionate.

5.39 The court must consult the young person’s parent or guardian (unless impracticable) and the local authority before including this requirement. It can only be included if the young person was legally represented in court when consideration was being given to imposing such a requirement unless the offender, having had the opportunity to do so, did not apply for representation or that right was withdrawn because of the offender’s conduct. **This requirement may be included only where the court has been notified that arrangements are available in the area of the relevant authority.**

5.40 A YRO with a fostering requirement must include a supervision requirement and can include other requirements when appropriate (except an intensive supervision and surveillance requirement). The order as a whole must comply with the obligation that the requirements must be those most suitable for the offender and that any restrictions on liberty are commensurate with the seriousness of that offence.

5.41 It is unlikely that the statutory criteria⁴⁵ will be met in many cases; where they are met and the court is considering making an order, care should be taken to ensure that there is a well developed plan for the care and support of the young person throughout the period of the order and following conclusion of the order. A court will need to be provided with sufficient information, including proposals for education and training during the order and plans for the offender on completion of the order.

⁴⁴ Right to respect for family and private life

⁴⁵ See paragraphs 5.28 – 30

Custodial Sentences

A custodial sentence should always be used as a last resort. If youth offence-specific guidelines are available then the court should consult them in the first instance to assess whether custody is the most appropriate disposal.

The available custodial sentences for a youth are:

Youth Court	Crown Court
<ul style="list-style-type: none"> • Detention and training order for the following periods: <ul style="list-style-type: none"> • 4 months; • 6 months; • 8 months; • 10 months; • 12 months; • 18 months; or • 24 months. 	<ul style="list-style-type: none"> • Detention and training order (the same periods are available as in the youth court) • Long-term detention (under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000) • Extended sentence of detention or detention for life (if dangerousness criteria are met) • Detention at Her Majesty's pleasure (for offences of murder)

5.42 Under both domestic law and international convention, a custodial sentence must only be imposed as a **'measure of last resort'**; statute provides that such a sentence may be imposed only where an offence is "so serious that neither a fine alone nor a community sentence can be justified".⁴⁶ If a custodial sentence is imposed, a court must state its reasons for being satisfied that the offence is so serious that no other sanction would be appropriate and, in particular, why a YRO with intensive supervision and surveillance could not be justified.

5.43 The term of a custodial sentence must be the shortest commensurate with the seriousness of the offence; any case that warrants a detention and training order of less than four months must result in a non-custodial sentence. The court should take account of the circumstances, age and maturity of the offender.

5.44 In determining whether an offence has crossed the custody threshold a court will need to assess the seriousness of the offence, in particular the level of harm that was caused, or was likely to have been caused, by the offence. The risk of serious harm in the future must also be assessed. The pre-sentence report will assess this criterion and must be considered before a custodial sentence is imposed. A custodial sentence is most likely to be unavoidable where it is necessary to protect the public from serious harm.

The court must always bear in mind that the principal aim of any sentence is **to prevent re-offending**.⁴⁷

5.45 If the court is satisfied that the offence crosses the custodial threshold, and that no other sentence is appropriate, the court may as a preliminary consideration consult the equivalent adult guideline in order to decide upon the appropriate length of the sentence.

⁴⁶ s.152(2) Criminal Justice Act 2003

⁴⁷ s.37 Crime and Disorder Act 1998

- 5.46 When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of **half to two thirds** of the adult sentence **for those aged 15 – 17 and allow a greater reduction for those aged under 15**. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the offender are of the greatest importance and may justify a sentence outside of this range.
- 5.47 The closer the young offender is to 18 the closer the sentence will be to that which would have been imposed for an adult. In most cases when making this assessment the emotional age and maturity of the offender is of at least equal importance as their chronological age.
- 5.48 There is an expectation that custodial sentences will be particularly rare for an offender aged 14 or under. If custody is imposed, it should be for a shorter length of time than that which a young offender aged 15 – 17 would receive if convicted of the same offence. For an offender aged 14 or under the sentence should normally be imposed in a youth court (except in cases of homicide or when the dangerous offender criteria are met).
- 5.49 The welfare of the offender must be considered when imposing any sentence but is especially important when a custodial sentence is being considered. A custodial sentence could have a significant effect on the prospects and opportunities of the young person and a young person is likely to be more susceptible than an adult to the contaminating influences that can be expected within a custodial setting. There is a high reconviction rate for young people that have had custodial sentences and there have been many studies profiling the effect on vulnerable young people, particularly the risk of self harm and suicide.

Detention and training order

- 5.50 A court can only impose a detention and training order if the offender is legally represented unless they have refused to apply for legal aid or it has been withdrawn as a result of their conduct.
- 5.51 If it is determined that the offence is of such seriousness that a custodial sentence is unavoidable then the length of this sentence must be considered on an individual basis. The court must take into account the chronological age of the offender, as well as their maturity and other relevant factors, such as their mental health or learning disabilities.
- 5.52 A detention and training order cannot be imposed on any offender under the age of 12 at the time of conviction and is only applicable to offenders aged 12 – 14 if they are deemed to be a ‘persistent offender’ (see section on persistent offenders on page 70).
- 5.53 A detention and training order can be made only for the periods prescribed – 4, 6, 8, 10, 12, 18 or 24 months. Any time spent on remand in custody or on bail subject to a qualifying curfew condition should be taken into account when calculating the length of the order. The accepted approach is to double the time spent on remand before deciding the appropriate period of detention, in order to ensure that the regime is in line with that applied to adult offenders.⁴⁸ After doubling the time spent on remand the court should then adopt the nearest prescribed period available for a detention and training order.

⁴⁸ *R v Eagles* [2006] EWCA Crim 2368

Long-term detention

5.54 A young person may be sentenced by the Crown Court to long-term detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 if convicted of a ‘grave crime’ and neither a community order nor a detention and training order is suitable.

5.55 These cases may be sent for trial to the Crown Court or committed for sentence only⁴⁹ (see section two for further information).

5.56 It is possible that, following a guilty plea a two year detention order may be appropriate, as opposed to a sentence of section 91 detention, to account for the reduction.⁵⁰

Dangerous offenders

5.57 If a young person is found to be a dangerous offender they can be sentenced to **extended detention** or **detention for life**.

5.58 A sentence of extended detention may be imposed only where the appropriate custodial term would be 4 years or more. The extension period must not exceed 5 years in the case of a specified violent offence and 8 years in the case of a specified sexual offence. The term of the extended sentence of detention must not exceed the maximum term of imprisonment for an adult offender convicted of that offence.

5.59 A sentence of detention for life should be used as a last resort when an extended sentence is not able to provide the level of public protection that is necessary.⁵¹ In order to determine this the court should consider the following factors in the order given:

- the seriousness of the offence;
- the offender’s previous findings of guilt;
- the level of danger posed to the public and whether there is a reliable estimate of the length of time the defendant will remain a danger, and;
- the alternative sentences available.⁵²

The court is required to set a minimum term which must be served in custody before parole can be considered.

Detention at Her Majesty’s pleasure

5.60 This is the mandatory sentence for anyone convicted of committing a murder whilst aged below 18 years old. The starting point for the minimum term is 12 years.

⁴⁹ s.3(b) Powers of Criminal Courts (Sentencing) Act 2000, (as amended)

⁵⁰ *Fieldhouse and Watts* [2001] 1 Cr App R (S) 104

⁵¹ *R v Saunders; R v G; R v Edwards* [2014] 1 Cr App. R (S) 45, CA

⁵² *Attorney-General’s Reference (No. 27 of 2013)*

Appendix 1

Breach of a conditional discharge

- 6.1 If the young offender commits an offence during the period of conditional discharge then the court has the power to re-sentence the original offence. The offender should be dealt with on the basis of their current age and not the age at the time of conviction and the court can deal with the original offence(s) in any way which it could have if the offender had just been convicted.
- 6.2 There is no requirement to re-sentence; if a court deems it appropriate to do so they can sentence the offender for the new offence and leave the conditional discharge in place.

If the order was made by the Crown Court then the youth can be committed to that court for re-sentence.

If the young offender is convicted of committing a new offence after attaining the age of 18 but during the period of a conditional discharge made by a youth court then they may be re-sentenced for the original offence by the convicting adult magistrates' court. If the adult magistrates' court decides to take no action then the youth court that imposed the conditional discharge may summon the offender for the breach to be dealt with.

Breach of a reparation order

- 6.3 If it is proved to the appropriate court that the offender has failed to comply with any requirement of a reparation order that is currently in force then the court can:
- Order the young offender to pay a fine not exceeding £1,000; or
 - Revoke the order and re-sentence the offender in any way which they could have been dealt with for that offence

If re-sentencing the offender the court must take into account the extent to which the offender has complied with the requirements of this order.

- 6.4 If the order was made by the Crown Court then the youth court can commit the offender in custody or release them on bail until they can be brought or appear before the Crown Court.
- 6.5 The young offender or a Youth Offending Team officer can also apply for the order to be revoked or amended but any new provisions must be ones that the court would have been able to include when the original reparation order was given. There is no power to re-sentence in this situation as the offender has not been found to be in breach of requirements.

Even when an offender has attained the age of 18 breach of a reparation order must be dealt with in the youth court.

Breach of a referral order (Referral back to court)

- 6.6 If a young offender is found to have breached the conditions of their referral order the Court can revoke the referral order and re-sentence the young offender using the range of sentencing options (other than a referral order) that would have been available to the court that originally sentenced them. If the court chooses not to revoke the referral order then it is possible to:
- allow the referral order to continue with the existing contract;
 - extend the referral order up to a maximum of 12 months; or
 - impose a fine up to a maximum of £2,500.

If an offender has attained the age of 18 by the first court hearing then breach proceedings must be dealt with by the adult magistrates' court. If the court chooses to revoke the order then its powers are limited to those available to the court at the time of the original sentence.

Commission of further offences whilst on a referral order

- 6.7 The court has the power to extend a referral order in respect of additional or further offences. This applies to not only a first referral order but also to any subsequent referral orders. Any period of extension must not exceed the total 12 month limit for a referral order.
- 6.8 If the court chooses not to extend the existing referral order they have the power to impose a new referral order. The court may direct that the contract under the new order is not to take effect until the earlier order is revoked or discharged.
- 6.9 If the court sentences in any other way they have a discretionary power to revoke the referral order. Where an order is revoked, if it appears to be in the interests of justice, the court may deal with the original offence(s) in any way that the original court could have done, but may not make a new referral order. Where the referral contract has taken effect, the court shall have regard to the extent of the offender's compliance with the terms of the contract.

Breach of a YRO

- 6.10 Where a young person fails to comply with a YRO, the responsible officer must consider whether there was a reasonable excuse. If the officer considers that there was no reasonable excuse then a warning must be issued.
- 6.11 A warning must describe the circumstances of the failure to comply and include a statement that the failure is not acceptable and that further failure to comply may lead to the order being referred back to the court. In most circumstances, two warnings will be permitted within a 12 month period before the matter is referred back to court but there is a discretionary power to do so on the second failure.
- 6.12 The following options are available to the court:
- allow the order to continue in its original form;
 - impose a fine (and allow the order to continue in its original form);
 - amend the terms of the order; or
 - revoke the order and re-sentence the offender.

- 6.13 If the terms of the order are amended the new requirements must be capable of being complied with before the expiry of the overall period. The court may impose any requirement that it could have imposed when making the order and this may be in addition to, or in substitution for, any requirements contained in the order. If the YRO did not contain an unpaid work requirement and the court includes such a requirement using this power, the minimum period of unpaid work is 20 hours; this will give greater flexibility when responding to less serious breaches or where there are significant other requirements to be complied with.
- 6.14 A court may not amend the terms of a YRO that did not include an extended activity requirement or a fostering requirement by inserting them at this stage; should these requirements be considered appropriate following breach, the offender must be re-sentenced and the original YRO revoked.
- 6.15 A court must ensure that it has sufficient information to enable it to understand why the order has been breached and should be satisfied that the Youth Offending Team and other local authority services have taken all steps necessary to ensure that the young person has been given appropriate opportunity and the support necessary for compliance. This is particularly important if the court is considering imposing a custodial sentence as a result of the breach.
- 6.16 Where the failure arises primarily from non-compliance with reporting or other similar obligations and a sanction is necessary, the most appropriate response is likely to be the inclusion of (or increase in) a primarily punitive requirement such as the curfew requirement, unpaid work, the exclusion requirement and the prohibited activity requirement or the imposition of a fine. However, continuing failure to comply with the order is likely to lead to revocation of the order and re-sentencing for the original offence.
- 6.17 Where the offender has ‘wilfully and persistently’ failed to comply with the order, and the court proposes to sentence again for the offence(s) in respect of which the order was made, additional powers are available.

A young person will almost certainly be considered to have ‘wilfully and persistently’ breached a YRO where there have been three breaches that have demonstrated a lack of willingness to comply with the order that have resulted in an appearance before court.

- 6.18 The additional powers available to the court when re-sentencing an offender who has ‘wilfully and persistently’ breached their order are:
- the making of a YRO with intensive supervision and surveillance even though the offence is non-imprisonable;
 - a custodial sentence if the YRO that is breached is one with an intensive supervision and surveillance requirement, which was imposed for an offence that was imprisonable; and
 - the imposition of a detention and training order for four months for breach of a YRO with intensive supervision and surveillance which was imposed following wilful and persistent breach of an order made for a non-imprisonable offence.

The primary objective when sentencing for breach of a YRO is to ensure that the young person completes the requirements imposed by the court.

If an offender has attained the age of 18 by the first court hearing then breach proceedings must be dealt with by the adult magistrates' court. If the court chooses to revoke the order then its powers are limited to those available to the court at the time of the original sentence.

Commission of further offences during a YRO

6.19 If a young offender commits an offence whilst subject to a YRO the court can impose any sentence for the new matter, but can only impose a new YRO if they revoke the existing order. Where the court revokes the original order they may re-sentence that matter at the same time as sentencing the new offence.

Breach of a detention and training order

6.20 If a young offender is found to have breached a supervision requirement after release from custody then the court may:

- impose a further period of custody of up to three months or the length of time from the date the breach was committed until the end of the order, **whichever is shortest**;
- impose a further period of supervision of up to three months or the length of time from the date the breach was committed until the end of the order, **whichever is shortest**;
- impose a fine of up to £1,000; or
- take no action.

Even if the offender has attained the age of 18 proceedings for breach of the supervision requirements must be dealt with in the youth court.

Commission of further offences during a detention and training order

6.21 If a young offender is found guilty of a further imprisonable offence during the currency of the order then the court has the power to impose a further period of detention, whether or not it chooses to pass any other sentence. This period cannot exceed the period between the date of the new offence and the date of when the original order would have expired.

6.22 This period can be served consecutively or concurrently with any sentence imposed for the new offence and this period should not be taken into account when determining the appropriate length of the sentence for the new offence.

Sexual Offences Guideline

Sentencing youths for sexual offences involves a number of different considerations from adults. The primary difference is the age and immaturity of the offender. Young people are less emotionally developed than adults; offending can arise through inappropriate sexual experimentation; confusion about sexual identity or orientation; gang or peer group pressure to engage in sexual activity; or a lack of understanding regarding consent, exploitation and coercion.

Background factors may also play a part.

- Offender is or has been the victim of abuse (sexual, physical or emotional).
- Exposure to pornography or materials which are unsuitable for a person of the age of the offender.
- Involvement in gangs associated with child sexual exploitation.
- Unstable living or educational arrangements.
- A trigger event such as the death of a close relative or a family breakdown.

This guideline should be read alongside the *Overarching Principles – Sentencing Youths* definitive guideline which provides comprehensive guidance on the full range of sentences that are available by age. The guideline also includes details on issues such as grave crime determination and dangerousness.

The first step in determining the sentence is to assess the seriousness of the offence. This assessment is made by considering the nature of the offence and any aggravating and mitigating factors relating to the offence itself. **The fact that a sentence threshold is crossed does not necessarily mean that that sentence should be imposed.**

STEP ONE

Offence Seriousness – Nature of the offence

The boxes below give **examples** of the type of culpability and harm factors that may indicate that a particular threshold of sentence has been crossed.

A non-custodial sentence* may be the most suitable disposal where one or more of the following factors apply:

Any form of non-penetrative sexual activity

Sexual activity without coercion, exploitation or pressure

No psychological or physical harm caused to the victim

A custodial sentence or Youth Rehabilitation Order with Intensive Supervision and Surveillance* or Fostering* may be justified where one or more of the following factors apply:

Any penetrative activity involving coercion, exploitation or pressure

Use or threats of violence

Sustained offence

Significant psychological or physical harm caused to the victim

* Where the young offender appears in the magistrates' court, and the conditions for a compulsory referral order apply, a referral order must be imposed unless the court is considering imposing a discharge, hospital order or custody.

STEP TWO**Offence Seriousness – Aggravating and mitigating factors**

To complete the assessment of seriousness the court should consider the aggravating and mitigating factors relevant to the offence.

Aggravating factors (non-exhaustive)

Previous findings of guilt, having regard to a) the nature of the offence to which the finding of guilt relates and its relevance to the current offence; and b) the time that has elapsed since the finding of guilt

Significant degree of planning

Offender acts together with others to commit the offence

Use of alcohol/drugs on victim to facilitate the offence

Abuse of trust (e.g. where the offender is babysitting the victim)

Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intent of causing additional distress or circulating details/photos/videos etc of the offence on social media or within peer groups

Grooming

Significant disparity of age between offender and victim

Specific targeting of particularly vulnerable victim

Any steps taken to prevent reporting the incident/seeking assistance

Pregnancy or STI as a consequence of offence

Blackmail

Mitigating factors (non-exhaustive)

No findings of guilt **or** no relevant/recent findings of guilt

Good character and/or exemplary conduct

Participated in offence due to peer pressure/bullying

Genuine belief that activity was lawful

STEP THREE

Offender mitigation

Having assessed the offence seriousness the court should then consider the mitigation personal to the offender to determine whether a custodial sentence or a community sentence is necessary. The effect of personal mitigation may reduce what would otherwise be a custodial sentence to a non-custodial one or a community sentence to a different means of disposal.

Offender mitigating factors (non-exhaustive)

Particularly young or immature offender

Mental disorder or learning disability, particularly where linked to the commission of the offence

Unstable upbringing including but not limited to time spent 'looked after', exposure to drug and alcohol abuse, lack of attendance at school, lack of familial presence or support, victim of neglect and/or abuse, exposure to familial criminal behaviour

Determination and/or demonstration of steps taken to address offending behaviour

Strong prospect of rehabilitation

STEP FOUR

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

The reduction in sentence for a guilty plea can be taken into account by imposing one type of sentence rather than another; for example:

- by reducing a custodial sentence to a community sentence; or
- by reducing a community sentence to a different means of disposal.

See the *Overarching Principles – Sentencing Youths* definitive guideline for details of other available sentences including Referral Orders and Reparation Orders.

STEP FIVE**Review the sentence**

The court must now review the sentence to ensure it is the most appropriate one for the young offender. This will include an assessment of the likelihood of reoffending and the risk of causing serious harm. A report from the Youth Offending Team may assist.

Youth Rehabilitation Order

The following non-custodial sentences are available under a Youth Rehabilitation Order:

	Offender profile	Requirements of order
Standard	Low likelihood of re-offending and a low risk of serious harm	Primarily seek to repair harm caused through, for example: <ul style="list-style-type: none"> • reparation; • unpaid work; • supervision; and/or • attendance centre.
Enhanced	Medium likelihood of re-offending or a medium risk of serious harm	Seek to repair harm caused and to enable help or change through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • requirement to address behaviour e.g. drug treatment, offending behaviour programme, education programme; and/or • a combination of the above.
Intensive	High likelihood of re-offending or a very high risk of serious harm	Seek to ensure the control of the young person through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • requirement to address behaviour; • requirement to monitor or restrict movement, e.g. prohibited activity, curfew, exclusion or electronic monitoring; and/or • a combination of the above.

YRO with Intensive Supervision and Surveillance (ISS) or YRO with fostering

A YRO with an ISS or fostering requirement can only be imposed where the court is of the opinion that the offence has crossed the custody threshold.

The YRO with ISS includes an extended activity requirement, a supervision requirement and curfew. The YRO with fostering requires the offender to reside with a local authority foster parent for a specified period of up to 12 months.

Custodial Sentences

Where a custodial sentence is **unavoidable** the length of custody imposed must be commensurate with the seriousness of the offence. The court may want to consider the equivalent adult guideline in order to determine the appropriate length of the sentence.

If considering the adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the appropriate adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the offender are of the greatest importance and may present good reason to impose a sentence outside of this range.

Robbery Guideline

This guideline should be read alongside the *Overarching Principles – Sentencing Youths* definitive guideline which provides comprehensive guidance on the full range of sentences that are available by age. The guideline also includes details on issues such as grave crime determination and dangerousness.

The first step in determining the sentence is to assess the seriousness of the offence. This assessment is made by considering the nature of the offence and any aggravating and mitigating factors relating to the offence itself. **The fact that a sentence threshold is crossed does not necessarily mean that that sentence should be imposed.**

STEP ONE

Offence Seriousness – Nature of the offence

The boxes below give **examples** of the type of culpability and harm factors that may indicate that a particular threshold of sentence has been crossed.

A non-custodial sentence* may be the most suitable disposal where one or more of the following factors apply:

Threat or use of minimal force

Little or no physical or psychological harm caused to the victim

A custodial sentence or Youth Rehabilitation Order with Intensive Supervision and Surveillance* or Fostering* may be justified where one or more of the following factors apply:

Use of very significant force

Threat or use of a bladed article, firearm or imitation firearm

Significant physical or psychological harm caused to the victim

* Where the young offender appears in the magistrates' court, and the conditions for a compulsory referral order apply, a referral order must be imposed unless the court is considering imposing a discharge, hospital order or custody.

STEP TWO**Offence Seriousness – Aggravating and mitigating factors**

To complete the assessment of seriousness the court should consider the aggravating and mitigating factors relevant to the offence.

Aggravating factors (non-exhaustive)

Previous findings of guilt, having regard to a) the nature of the offence to which the finding of guilt relates and its relevance to the current offence; and b) the time that has elapsed since the finding of guilt

Significant degree of planning

Threat or use of a weapon other than a bladed article, firearm or imitation firearm (whether produced or not)

Victim is targeted due to vulnerability (or a perceived vulnerability)

A leading role where offending is part of a group

Attempt to conceal identity (for example, wearing a balaclava or hood)

Any steps taken to prevent the reporting the incident/seeking assistance

High value goods or sums targeted or obtained (includes economic, personal or sentimental)

Restraint, detention or additional degradation of the victim

Mitigating factors (non-exhaustive)

No findings of guilt **or** no relevant/findings of guilt

Good character and/or exemplary conduct

Participated in offence due to peer pressure/bullying

Remorse, particularly where evidenced by voluntary reparation to the victim

Little or no planning

STEP THREE**Offender mitigation**

Having assessed the offence seriousness the court should then consider the mitigation personal to the offender to determine whether a custodial sentence or a community sentence is necessary. The effect of personal mitigation may reduce what would otherwise be a custodial sentence to a non-custodial one or a community sentence to a different means of disposal.

Offender mitigating factors (non-exhaustive)

Particularly young or immature offender

Mental disorder or learning disability, particularly where linked to the commission of the offence

Unstable upbringing including but not limited to time spent 'looked after', exposure to drug and alcohol abuse, lack of attendance at school, lack of familial presence or support, victim of neglect and/or abuse, exposure to familial criminal behaviour

Determination and/or demonstration of steps taken to address offending behaviour

STEP FOUR

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

The reduction in sentence for a guilty plea can be taken into account by imposing one type of sentence rather than another; for example:

- by reducing a custodial sentence to a community sentence; or
- by reducing a community sentence to a different means of disposal.

See the *Overarching Principles – Sentencing Youths* definitive guideline for details of other available sentences including Referral Orders and Reparation Orders.

STEP FIVE

Review the sentence

The court must now review the sentence to ensure it is the most appropriate one for the young offender. This will include an assessment of the likelihood of reoffending and the risk of causing serious harm. A report from the Youth Offending Team may assist.

Youth Rehabilitation Order

The following non-custodial sentences are available under a Youth Rehabilitation Order:

	Offender profile	Requirements of order
Standard	Low likelihood of re-offending and a low risk of serious harm	Primarily seek to repair harm caused through, for example: <ul style="list-style-type: none"> • reparation; • unpaid work; • supervision; and/or • attendance centre.
Enhanced	Medium likelihood of re-offending or a medium risk of serious harm	Seek to repair harm caused and to enable help or change through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • requirement to address behaviour e.g. drug treatment, offending behaviour programme, education programme; and/or • a combination of the above.
Intensive	High likelihood of re-offending or a very high risk of serious harm	Seek to ensure the control of the young person through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • requirement to address behaviour; • requirement to monitor or restrict movement, e.g. prohibited activity, curfew, exclusion or electronic monitoring; and/or • a combination of the above.

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Custodial Sentences

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