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Children's Rights and the Law in a Time of Coronavirus - Part 3

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CHILDREN'S RIGHTS AND COVID-19

COVID-19 Emergency Police Powers

Kirsty Brimelow QC

Health Protection (Coronavirus Restrictions) (England) Regulations 2020/350

- Secondary legislation pursuant to the Public Health (Control of Disease) Act 1984 (emergency procedure section 45R)
- In force 26 March 2020 and can last 6 months (Regulation 12)
- Must be reviewed every 21 days (Reg. 3(2))
- Amendments made 22 April 2020, 13 May 2020 and 1 June 2020
- {Coronavirus Act 2020 –powers for restrictions on “potentially infectious persons”(Sched 21). Expires 24 March 2022; must be renewed every 6 months)

Statutory Purpose of Regulations

- “Preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination” (section 45C(1) Public Health Act 1984)
- “As soon as the Secretary of State considers that any restrictions or requirements set out in these Regulations are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England with the coronavirus, the Secretary of State must publish a direction terminating that restriction or requirement. (Reg 3(3))
- Not public order powers

Restrictions on Movement

Regulation 6

- Law up to 1 June (11.30 am)- completely changed thereafter
- During the emergency period no person may leave or be outside of the place where they are living without reasonable excuse (Reg 6(1))
- A non-exhaustive list of 13 “reasonable excuses” were at Reg. 6(2) (“a reasonable excuse includes the need....”)

*(in red added on 22 April and applied to conduct from 11am 22 April)

Reasonable excuse included the need to:

(a) to **obtain basic necessities**, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies **for the essential upkeep, maintenance and functioning of the household**, or the household of a vulnerable person, or to obtain money, including from any business listed in Part 3 of Schedule 2;

Amended: to replace “or to obtain money” with “to obtain money from or deposit money with any business listed in paragraphs 33 or 34 of Schedule 2”

(b) to **take exercise** either alone or with other members of their household;

(c) to **seek medical assistance**, including to access any of the services referred to in

(d) to **provide care or assistance**, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding of Vulnerable Groups Act 2006(1), to a vulnerable person, or to provide emergency assistance;

(e) to **donate blood**;

(f) to **travel for the purposes of work** or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living;

(g) to **attend a funeral** of—

(i) a member of the person’s household,

(ii) a close family member, or

(iii) if no-one within sub-paragraphs (i) or (ii) are attending, a friend;

(ga) to visit a burial ground or garden of remembrance, to pay respects to a member of the person’s household, a family member or friend;

- **Reasonable excuses include the need to:**
 - (h)to **fulfil a legal obligation**, including attending court or satisfying
- (i)to **access critical public services**, including—
- (i)childcare or educational facilities (where these are still available to a child in relation to whom that person is the parent, or has parental responsibility for, or care of the child);
- (ii)social services;
- (iii)services provided by the Department of Work and Pensions; (iv)services provided to victims (such as victims of crime);
- (j)in relation to children who do not live in the same household as their parents, or one of their parents, **to continue existing arrangements for access to, and contact between, parents and children**, and for the purposes of this paragraph, “parent” includes a person who is not a parent of the child, but who has parental responsibility for, or who has care of, the child;
- (k)**in the case of a minister of religion or worship leader, to go to their place of worship;**
- (l)to **move house** where reasonably necessary;
- (m)to **avoid injury or illness or to escape a risk of harm.**

Major Amends 1 June (from 11.30 am)

- Prohibition relates to staying **overnight** at any place other than the place where they are living (Reg. 6). A person can now be outside for any reason.
- A new list of “reasonable excuses” for staying away overnight include:
- It is reasonably necessary to stay elsewhere to obtain medical assistance (Reg 6(2)(d)(v))
- P is unable to return to the place where P lives because-
- (iii) the place where P is living is not available to P for any other reason

Regulation 7

Substitution of this Regulation from 1 June

- No person may participate in a gathering which takes place in a public or private place-
- (a) outdoors and consists of more than six persons, or
- (b) Indoors and consists of two or more persons
- There is an exhaustive list of exceptions set out at Reg 7(2) e.g. funeral, for work purposes, care, at an educational facility and is reasonably necessary for the purposes of education etc
- Gathering is defined as “two or more people present together in the same place in order to engage in any form of social interaction with each other or to undertake any other activity with each other (Reg 7(3)(a).
- NB previous to 1 June there was no restriction upon gathering in private

Children - enforcement

Reg 8 Amends 1 June: “outside” changed “staying overnight”

Children outside without reasonable excuse “Outside” now reads “staying overnight at a place other than”

Where the person without reasonable excuse is a child, relevant person can direct an individual accompanying them with responsibility for the child to take the child to the place they are living and “so far as reasonably practicable, ensure that the child complies with any direction or instruction given by the relevant person to the child” (Reg 8(5))

Where a relevant person has reasonable grounds to believe that a child is repeatedly failing to comply with the restriction in regulation 6(1), the relevant person may direct any individual who has responsibility for the child to secure, so far as reasonably practicable, that the child complies with that restriction (Reg 8 (6))

Must be necessary and proportionate enforcement (Reg 8(8))

Children

Reg 8

Children participating in a gathering in contravention of Regulation 7 (amends 22 April 2020) Amends 1 June “gathering in a public place”

Powers include:

8. Where a person who is in a gathering in contravention of regulation 7 is a child accompanied by an individual who has responsibility for the child—
9. (a) the relevant person may direct that individual to take the child to the place where the child is living, and
10. (b) that individual must, so far as reasonably practicable, ensure that the child complies with any direction or instruction given by the relevant person to the child. (new Regulation 8 (10A))
11. Where a relevant person has reasonable grounds to believe that a child is repeatedly failing to comply with the restriction in regulation 7, the relevant person may direct any individual who has responsibility for the child to secure, so far as reasonably practicable, that the child complies with that restriction (new Regulation 8 (10B))

Offences and penalties Regulation 9

- Police or “relevant person” (includes person delegated by LA) have to have “reasonable belief” that an offence has been committed.
- A person who without reasonable excuse contravenes Regs 4, 5, 6, 7 or 8 commits an offence (Reg 9(1))
- A person who obstructs without reasonable excuse a person carrying out a function under these Regs commits an offence (Reg 9(2))
- A person who without reasonable excuse contravenes a direction given under Reg 8 or fails to comply with a reasonable instruction or prohibition notice commits an offence (Reg 9(3))

- **Offences and penalties Regulation 9 and 10**
- Offences punishable on summary conviction by a fine (Reg 9(4))
- Also applies to bodies corporate (Reg 9(5))
- **Power to issue fixed penalty notices (on/after 13 May 2020 £100 or £50 if paid in 14 days. Doubles for each FPN up to max of £3200)**
- S.24 PACE (power of arrest without warrant) applies if (a) to maintain public health and (b) to maintain public order (Reg 9(7))



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Representing children in the criminal courts

Practical tips to overcoming barriers during COVID-19

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Preparation

- **Locations**

- Which courts are open?
 - HMCTS Court tracker: <https://www.gov.uk/guidance/courts-and-tribunals-tracker-list-during-coronavirus-outbreak>
- Where is the child
 - Overnight custody? Produced or remote? [/](#)
- Where are the Papers (Mags)?
 - London.IDPCRequests@cps.gov.uk.cjsm.net and london.magistrates@cps.gsi.gov.uk.cjsm.net email for papers (the earlier the better)

- **Before the hearing:**

- Call/email the court: CVP.Thames@justice.gov.uk
- Call the police station directly first thing, tell them your name and number, ask to introduce yourself to your client <https://www.met.police.uk/contact/find-a-police-station>
- Mags only: “BCM form” <http://www.justice.gov.uk/courts/procedure-rules/criminal/forms> complete and send to prosecutor and court clerk ahead of the hearing

Communication: Conference/advising

- Remote advice via telephone/ VL
 - Reassurance reassurance reassurance:
 - Icebreaker
 - family contact
 - Check secure/safe to speak
 - Explain remote procedure – flag mid hearing barriers.
 - Advise/take instructions: beware of overloading
 - Double check bail details

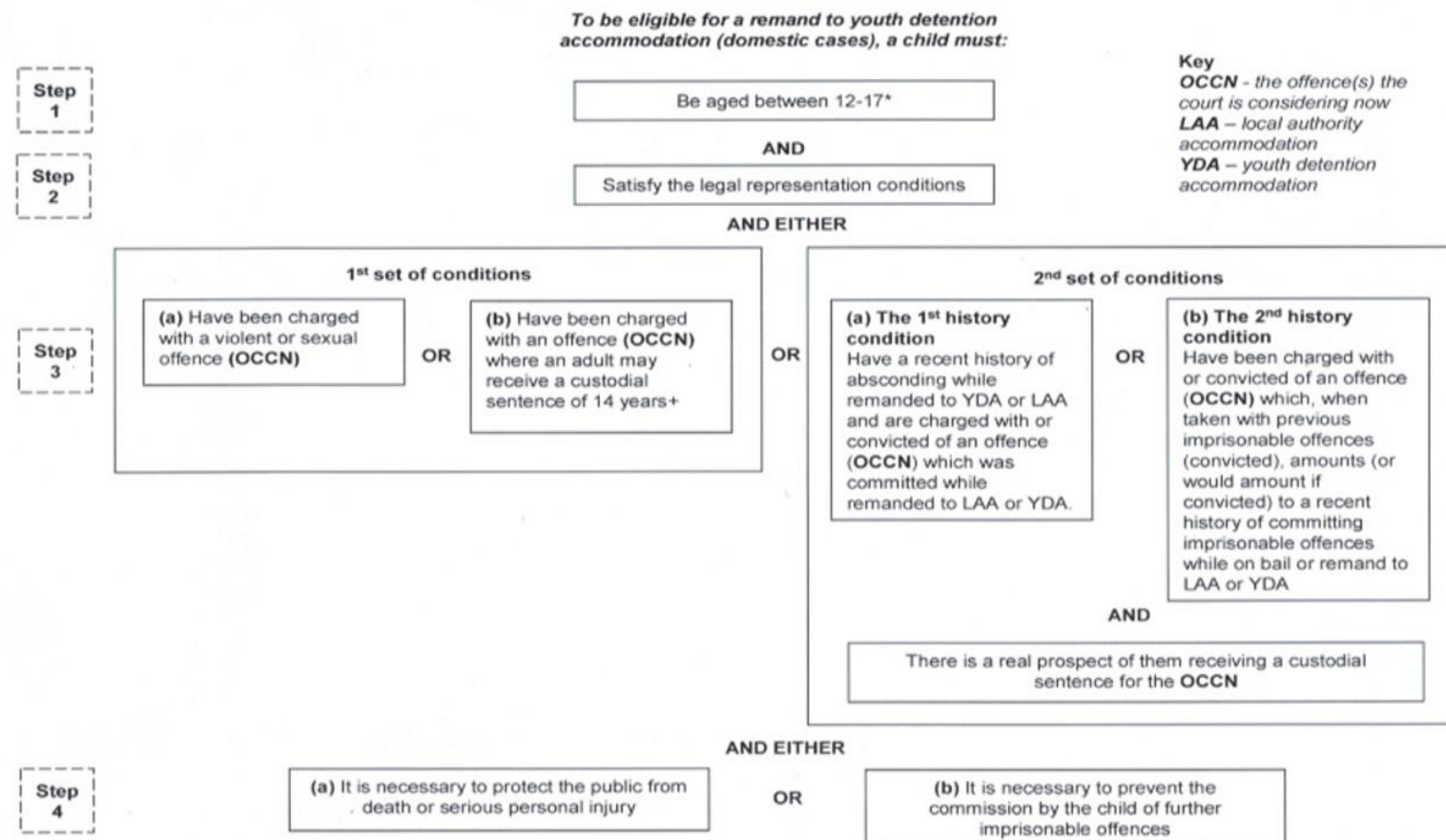
Bail

- Bail applications for children are different from adults for three reasons:
 - The youth offending team (YOT) have a duty to provide information, bail support and supervision packages created for the individual child. Local authority like to have assigned a case worker.
 - If bail is refused the child must be remanded to local authority accommodation unless the specific conditions are met to remand the child to youth detention accommodation (see flow chart). At the police station, children should be transferred to 'section 38 beds'.
 - Duty of the court: Section 44 Children and Young Person's Act 1933:
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.
- Address checks (PLO)
- Sureties at court where possible
- Social services & YOS support
- LASPO and the "necessity" test: *use the flowchart- if bail likely to be refused, push for remand to local authority rather than custody*

Bail Flowchart

Annex A

[Sections 91-104, Legal Aid, Sentencing and Punishment of Offenders Act 2012](#)



A word on sentencing

- Sentencing during COVID-19 – What can be done?
- ***A-G Ref (Manning) [2020] EWCA Crim 592***
- “The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.” (para 41) “Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended. Moreover, sentencers can and should also bear in mind the Reduction in Sentence Guideline. That makes clear that a guilty plea may result in a different type of sentence or enable a Magistrates' Court to retain jurisdiction, rather than committing for sentence.” (para 42)



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COVID-19 AND CHILDREN IN CUSTODY





Dr Laura Janes, Legal Director

The Howard League for Penal Reform

Howard League for Penal Reform

Howard League for Penal Reform

- England and Wales, since 1866
- Less crime, safer communities, fewer people in prison
- Policy, research, direct legal work for young people (confidential helpline – still running during lockdown)
- Membership organisation: no government funding; lawyers' network
- www.howardleague.org

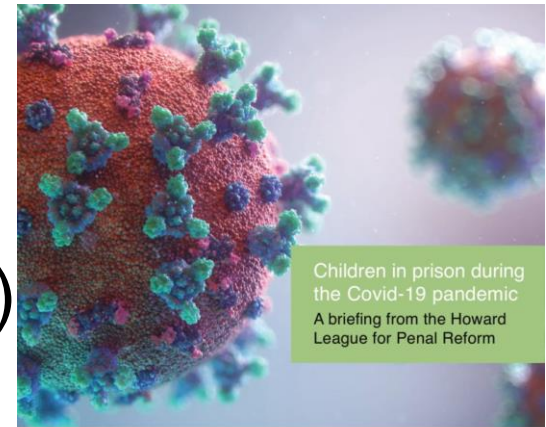
 <p>Briefings and submissions</p> <p>We are often consulted when policy-makers need expert advice. Read our briefings and submissions.</p>	 <p>Crime, Justice and Social Harms</p> <p>Howard League International Conference 2020 - Call for papers</p>
 <p>Children in residential care</p> <p>Children in children's homes are more likely to be criminalised than other children. Our programme looks into the reasons why, and explores how change could be achieved.</p>	 <p>Legal advice</p> <p>Our lawyers provide expert legal advice to anyone aged under 21 in prison.</p>

Life inside for children during COVID-19

- *“Stressful – behind my door all day – getting to my head. Not allowed to go gym or nothing”.*
- *“Worried because I got grandparents – worried about what will happen and could happen to them.”*
- *“Just waiting”*
- *“Always hungry – I sleep to forget”*

Life inside for children during COVID-19

- The regime in prisons has been severely restricted since 24 March 2020
- Most children are in prolonged solitary confinement (15+ days of confinement to cell for 22-24 hours a day)
- No face to face visits
- No face to face education in most establishments
- No therapy
- No gym
- Difficulties in planning for release
- Safeguards reduced



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Key points

- The Howard League's legal work with children in custody provides an insight into the difficulties they face. The team operates a unique front-line legal service for young people aged 21 and under in custody.
- Evidence from a host of independent sources shows that custody can be harmful and difficult for children in ordinary times. Many children in prison report that they do not feel safe. Around half of all children in prison come from black, Asian and minority ethnic (BAME) backgrounds. Between a third and half of children in custody report having been in the care of their local authority.
- The Howard League's legal work and contact with children during the Covid-19 pandemic shows that this is a particularly difficult time for children in custody.
- In response to Covid-19, the regime in prisons has been severely restricted, with most children being placed in prolonged solitary confinement. There are no face to face visits, virtually no face to face education and no therapy. Children are experiencing particular difficulties in accessing the support they need to plan for release.

Life inside for children before COVID-19:

A low starting point

- In 2019, Chief Inspector of Prisons reported that between April 2017 and March 2018, 40% of boys in YOIs and 34% of children in STCs did not feel safe at some point
- In January 2020, Chief Inspector of Prisons found that *“many children separated from their peers in ...YOIs... are effectively held in harmful solitary confinement, with little human contact and in conditions which risk damaging their mental health.”*
- 1,000 incidents of alleged sexual abuse reported from 2009 to 2017 (IICSA 2019).

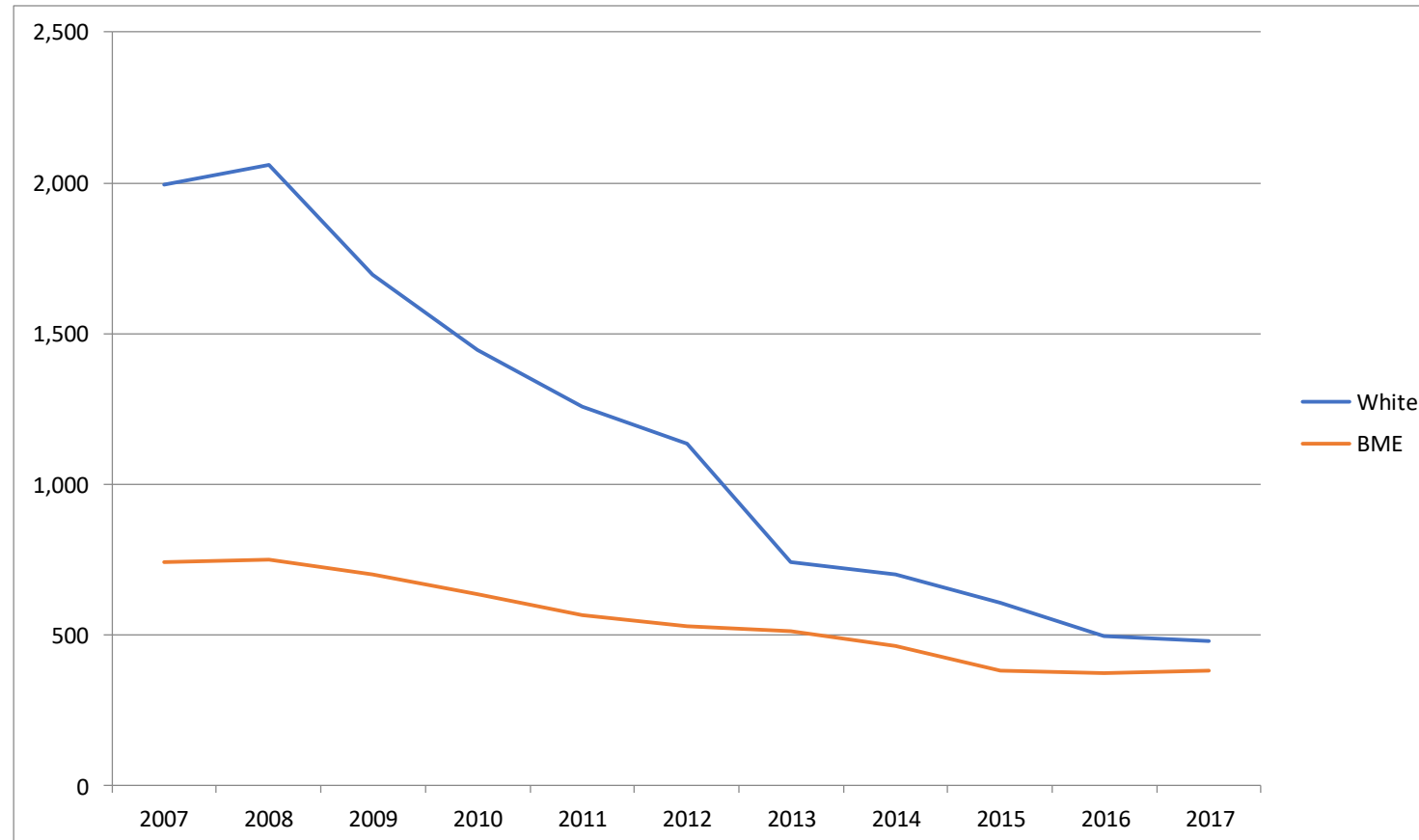
Use of force and self harm at an all time high

The number of Restrictive Physical Interventions (RPI) and self harm incidents in youth custody have increased



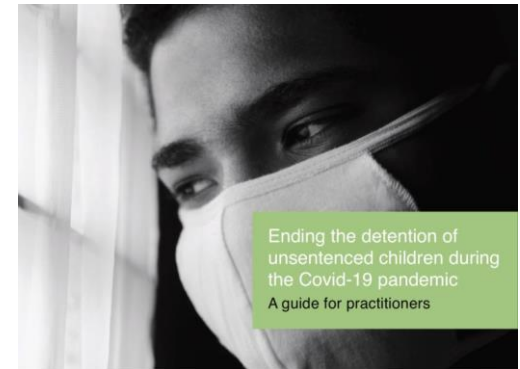
The number of RPIs increased by 16% in the last year, to around 6,300 incidents. The number of self harm incidents has increased by 3%, to around 1,800. For both measures, this is the highest number of incidents in the last five years.

Reduction in the number of children in prison



Remands

- One third of all children in prison are on remand
- Two thirds will not get a prison sentence
- In the South two thirds of children on remand are BAME
- Most cases have been postponed
- Guidance in R v Manning has not been replicated for remand decisions
- Call to practitioners to end the indefinite detention of children...



Key points

- Custody is a damaging environment for children in normal times but it has become even worse since the start of the Covid-19 pandemic. Severely restricted prison regimes have led to the majority of children being held in prolonged solitary confinement; no face-to-face visits; virtually no education or therapy; and difficulties in contacting families and professionals making planning for court hearings especially problematic.
- The proportion of unsentenced children is at an all-time high at one third of all children in the youth secure estate. Over two thirds of children remanded to prisons in the South of England are from black, Asian and minority ethnic backgrounds.
- In the year ending March 2019, over two thirds of children remanded to youth detention accommodation did not subsequently receive a custodial sentence.
- Courts are required to subject decisions to remand children to custody to anxious scrutiny because all decisions about children should take account of their welfare and their best interests. Depriving a child of liberty should always be a last resort and for the shortest period of time. During the pandemic it is not possible to guarantee any of these things.
- This guide provides legal and practical guidance for defence lawyers to resist applications to remand children to custody and assist them in making effective bail applications for children during the pandemic.

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No excuses

- **Three years on** from the Lammy Review, why has the proportion of BAME children in prison increased?
- **Over 15 years on from** the tragic deaths of Adam Rickwood and Gareth Myatt in 2004, why are children still being restrained and at an increased rate?
- **Over 100 years on** from the 1908 Children's Charter, designed to "*to shut the prison door and open the door of hope*" and ensure "*special treatment*" for children, why are we still locking children up when all hope of welfare, education and training for children in custody have disappeared?



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Questions?