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Notes	For additional information please contact, Zillah Holford at Zillah.holford@magistrates-association.org.uk

About the Magistrates Association

The Magistrates Association is an independent charity and the membership body for the magistracy. We work to promote the sound administration of the law, including by providing guidance, training and support for our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the development and delivery of reforms to the courts and the broader justice system. With over 14,000 members across England and Wales, we are a unique source of information and insight and the only independent voice of the magistracy.

MA views

The MA's initial response to the Justice Select Committee's 2019 consultation on Children and Young People in Custody can be found [here](#).

Oral evidence was given by Linda Logan on 16 June 2020. This written evidence is submitted as follow-up to this oral evidence, covering the most relevant issues raised during that evidence session.

Positive changes in the youth justice system over the last 15 years

- There has been much success in reducing the numbers of Children and Young People (CYP) entering the youth justice system over the past 10-15 years, largely through the utilisation of diversionary measures. While we welcome this progress, it means that the cohort of CYP who now come through court tend to be those with more complex needs and offending behaviour. Sufficient resources must therefore be available in order for youth offending teams and other support services to deal with these cases appropriately and fairly.
- It is vital that youth courts follow a distinct approach which considers the welfare of CYP as a primary aim throughout, and which adapts to the individual CYP and any specific needs they may have to achieve fair and effective participation. CYP must perceive the process as fair themselves, and interventions must always be focused on the welfare of the CYP, and supporting them in reducing reoffending.
- The cohort of CYP seen by the courts is acknowledged as having more complex needs than those who have not entered the youth justice system – recent government data on the

assessed needs of sentenced children¹ showed that professionals noted concerns for these CYP's welfare in a number of areas:

- 56% were assessed as being a current or previous Child in Need
- Over 70% had a concern present in at least five concern categories:
 - 88% presented with concerns for their safety and wellbeing
 - 75% presented with concerns around substance misuse
 - 71% presented with concerns around speech, language and communication
 - 71% presented with concerns around mental health
- Owing to these more complex needs, specific consideration is needed around how to support CYPs' communication and participation.
- The MA developed a Youth Court Protocol, which can be found appended to the Youth Court Bench Book. It is important that all youth courts follow this protocol for guidance on best practice.
- Specific measures that can ensure a fairer process include:
 - a) The court should consider a ground rules hearing before a trial, to agree ground rules for any questioning
 - b) CYP should sit with their parents/guardians, along with their legal representative
 - c) A more informal process is followed
 - d) The bench should make sure they explain to the CYP who everyone is in the court, and what their role is – before going on to explain the process
 - e) Regular breaks should be taken
 - f) Special measures may be necessary
 - g) If there are specific communication needs, an intermediary can be used (either to support a CYP giving evidence or for the whole hearing)

MA concerns regarding the current situation

Out of court disposals and the need for scrutiny

- There has been very successful diversion of CYP from court as early intervention, which the MA has supported. However, it is important that out of court disposals for CYP are scrutinised, and that more serious or complex cases come to court, where the bench can fully assess the situation and ensure the right support is put in place for the CYP. This includes those CYP who are repeatedly caught up in offending behaviour, where diversion has not been successful, and where court intervention is needed.
- We are particularly concerned about the use of OCDs in relation to violent offences, such as knife crime, and would argue that crimes of this nature are more appropriately dealt with by a court.
- We believe all police areas should have scrutiny panels that provide oversight of how OCDs are being used. Youth cases should be considered separately from other cases, and scrutiny panels should include specialised individuals with awareness and understanding about CYP.
- Youth magistrates should have involvement in OCD scrutiny panels, and any expenses incurred by magistrates involved in scrutiny panels should be covered, so that they are not out of pocket when taking on this role.
- We are aware of recent analysis of data² released by the National Police Chiefs' Council (NPCC) showing the disproportionate distribution of fixed penalty notices to Black, Asian and Minority Ethnic (BAME) people in England and Wales under the Health Protection (Coronavirus, Restrictions) Regulations. This analysis found that BAME people are around 54% more likely than white people to be issued with a fixed penalty notice.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887644/assessing-needs-of-sentenced-children-youth-justice-system.pdf

² <https://libertyinvestigates.org.uk/articles/bame-people-disproportionately-targeted-by-coronavirus-fines/>

- Given the wider context of a high level of distrust amongst BAME communities in respect of the use of police powers, it is vital that the new powers provided to police to prevent the spread of coronavirus are not disproportionately used against minority communities. It is also important to consider how to gain public trust and confidence in the new powers, as this is the best way to ensure public compliance with the restrictions placed on their movement. Specific consideration must be given to gaining the trust of those communities who have historic reasons to mistrust the police.
- The MA proposes that one solution to both minimise disproportionate use of powers, and increase confidence in them, is to ensure there are processes in place to scrutinise police actions, with outcomes of any scrutiny made publically available. We have long called for all police areas to have scrutiny panels considering a random selection of police out-of-court disposals and identifying learning where needed. Obviously, it would be challenging for panels to meet in person during this pandemic, but scrutiny could still be offered either through virtual meetings or the use of electronic communication.
- We therefore recommend that the Ministry of Justice, the Home Office and Police and Crime Commissioners ensure that alternative ways are found for existing panels (including youth scrutiny panels) to work, and for panels to be established in areas where they do not exist, so there can be scrutiny of the use of powers introduced through [the Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#).

Disproportionality

- The Lammy Review (2017) contains 35 different recommendations about how the justice system can decrease disproportionality and ensure that the system is transparent. David Lammy found the most concerning evidence related to the youth justice system which showed that as diversion from the justice system has increased, the proportion of BAME CYP in the system has gone up.
- Since the Lammy Review, disproportionality in youth justice has either stayed the same or increased. For example, on average, 49% of children in custody were from a Black, Asian and minority ethnic background in 2018/19, compared to 45% in the year ending March 2018.
- We remain alarmed at the disproportionate outcomes for BAME CYP: it is especially worrying that as diversion increases, disproportionality has also increased.
- We also note the impact this has had on the confidence and trust that CYP from BAME backgrounds have in the justice system.
- More disaggregated data is needed to fully understand the problem at different stages of the process – it is likely that any disproportionality that occurs before the court process may affect decisions being made in court. However, it is vital that all those working in the youth justice system take responsibility for working to reduce disproportionality.
- The data on disproportionality in relation to remand are very worrying, and we would support the collection and publication of disaggregated data in this regard, too. We would note the importance of courts having access to all the necessary information to make decisions – and the need for robust bail packages to be in place to reduce the use of custodial remand.
- This is a policy priority for the MA – we have worked with other stakeholders to produce steps we can take as a charity, and to support our members to reduce disproportionality.
- We organised a roundtable in the summer of 2019, focusing on the court process and what could be done to reduce disproportionality. A number of themes were identified including:
 - a) Raising awareness amongst youth magistrates about the problem
 - b) Raising awareness amongst youth magistrates on factors that might link to disproportionality – for example the use of the gang matrix.
 - c) Highlighting the useful training resources on unconscious bias, fair decision-making and ensuring fair participation
 - d) Supporting the recruitment of a more diverse magistracy – including through our Magistrates in the Community programme

- We note that valuable work has been done in recent years regarding the unnecessary criminalisation of looked-after children (LAC), in recognition of their over-representation in the criminal justice system. There may be value in looking at strategic and operational approaches which have been taken to reduce this, to see whether useful lessons can be learned which could appropriately be applied when considering the issue in relation to BAME CYP's over-representation. For example, the 10-point checklist which was developed for prosecutors considering offences in children's homes emphasises the importance of considering the context in which offences have been committed, and of ensuring all other informal measures and diversions have been considered prior to imposing an out of court disposal or prosecuting. It may be useful to look at whether similar tools can be developed in order to proactively address the disproportionate representation of BAME CYP within the youth justice system, including a step-back process where the impact of disproportionality is assessed at different stages of the CJS.

Remand:

- We would note that the disproportionate representation of BAME CYP on remand is particularly concerning, with government data showing that 57% of CYP currently being held on remand are identified as BAME.³
- We are aware that there are cases in which a custodial sentence is not ultimately handed down, but where a CYP has been remanded prior to sentencing. We would emphasise that in such cases, this does not necessarily mean the decision to remand was wrong at the time it was made – magistrates must follow specific guidelines about when a CYP must be remanded and consider the severity of the offence in front of them. In cases where a CYP is ultimately sentenced for a lesser offence which would attract a non-custodial sentence, it is important to acknowledge that this cannot be pre-empted. Magistrates must consider the facts as presented to them at the given time. We [responded](#) in 2019 to a [report](#) published by Transform Justice which highlighted statistics suggesting that up to two thirds of remanded children do not go on to receive a custodial sentence, with 29% being acquitted and 35% receiving a non-custodial sentence. That report also noted figures suggesting this is a more acute problem in magistrates' courts, where those not receiving a custodial sentence following remand make up three-quarters of cases. We would emphasise that there are valid reasons why a non-custodial sentence could follow a decision to remand a youth defendant, and that these statistics do not necessarily point to an over-use or reliance on remand. When sentencing, youth magistrates must take account of any time that the defendant has already spent on remand. It is also particularly important to note that the minimum term for a DTO is four months. As such, a CYP can be remanded in light of having a real prospect of custody, but due to the time spent on remand a DTO is not an option at point of sentence. The report often refers to the courts making use of remand "instead" of a short custodial sentence, but this is misleading in this context.
- We also have concerns about cases involving CYP where a bench of Adult Magistrates are making remand decisions. Youth cases must have the involvement of youth specialists, so if a CYP is remanded when a youth court is not sitting, it is crucial to ensure that the YOT is in attendance so that any concerns can be raised at the appropriate time and taken into account by the bench.

Impact of delays on CYP during Covid-19

- We are aware that it has not been possible during Covid-19 for youth courts to continue operating in all areas across England and Wales; youth cases have been being dealt with in adult courts chaired by District Judges. It is important that youth cases are dealt with by those who have specialist training, as the youth court follows specific processes and adheres to a distinct set of principles to ensure the welfare of children is a primary aim, as far as is possible.

³ <https://www.gov.uk/government/statistics/youth-justice-statistics-2018-to-2019>

- Attending court can be a difficult and intimidating experience, especially for CYP. It is crucial that they are able to have support at court, and social distancing measures will have a significant impact, in particular for CYP who are not living in the same household as the person supporting them – for example, their social worker. Being required to physically distance from a supportive person could affect their overall presentation in court, making the process more difficult.

Turning 18:

- We remain particularly concerned about the implications of delays for defendants approaching the age of 18, which is exacerbated while the pandemic is ongoing. We are aware of a significant number of cases where delays between the time of the alleged offence and charging decisions mean that a CYP turns 18 before charging decisions are made, meaning they are dealt with in the adult jurisdiction by the time the cases reaches court.
- We strongly believe that cases involving a CYP who is 17 years of age should be identified and prioritised so that these cases are charged and prosecuted before the CYP turns 18. This would ensure the CYP has the opportunity to appear before the youth court.

Impact of delays on CYP - remand and sentencing:

- We believe that cases where a CYP has been remanded in custody must be similarly prioritised; defendants on remand are likely to now spend longer periods in custody than pre-Covid-19, and in some cases the time spent on remand may exceed the average sentence length for the offence they have been charged with, as trials are not able to continue as normal. Sentencers will need to consider this while making decisions.
- The Youth Court Bench Book sets out the relevant time limits for remanding CYP, and the Sentencing Guidelines for sentencing CYP make clear that custody should be a last resort. Given this, alongside the heightened health risks at present, any decisions to remand CYP should consider the impact of delays in terms of the length of time it will take for a matter to return to court.
- We would suggest that busy remand courts which are dealing with CYP defendants should ensure the bench has sufficient youth expertise, either with a specialist DJs or at least one of the magistrates being a youth magistrate. In addition, legal advisers should have the requisite knowledge and experience for dealing with youth cases. Efforts should be made to ensure that court professionals involved in hearings for CYP are familiar with youth-specific issues and processes.
- It may also be more challenging than in normal circumstances to put in place an effective bail package as relevant services (including tagging) may be unavailable. Flexibility may be required as to when a tag is fitted if location monitoring is considered necessary (e.g. if the CYP or a member of their household is having to self-isolate), and YOTs may require more time in which to organise a remand to local authority accommodation.
- In terms of sentencing decisions, most elements of community orders (such as unpaid work, programme requirements and attendance centres) are likely to be unavailable, while tags may not be able to be fitted.
- Sentencers take into account the impact of any court order on the individual. Given the inherent risk of transmission of coronavirus in custodial institutions, along with reduced staffing levels limiting the regime that can be provided, the impact of remanding, sentencing or recalling someone to custody may be more serious than it would have been pre-Covid and could constitute a more severe punishment in reality, because of safety restrictions around association as well as the increased risk of catching the virus in a custodial environment. The impact of fines on households which are already struggling financially in the current economic climate must also be considered by the judiciary.
- We are also concerned about what impact Covid may be having on the National Referral Mechanism (NRM) process. In our earlier evidence, we highlighted how this process was relevant

to cases in the youth court, as the Section 45 defence of being a victim of modern slavery can be linked to country lines activity. Therefore delays in the NRM process can impact on youth court proceedings, and if Covid has meant it is more challenging to process cases through the NRM promptly, this will affect court proceedings.

Remote hearings for CYP

- We are concerned that emergency measures should not become the ‘new normal’ – especially where remote hearings have been permitted for under 18s. Youth justice is a unique jurisdiction, which follows distinct processes, frameworks and principles, and video link technology often presents challenges for this.
- The cohort of CYP dealt with in youth court often have very complex, interrelating needs which mean it will be inappropriate for them to be required to attend remotely, as it will restrict their right to participate fairly and effectively. We would highlight in particular the prevalence of speech, language and communication needs (SLCN) among sentenced CYP in the youth justice system: recent government figures⁴ showed that for 80% of 10-14 year olds and 69% of 15-17 years olds assessed, professionals had concerns about their SLCN. It is crucial that professionals across the youth justice system consider this and any need for reasonable adjustments, when making decisions about whether a remote hearing is appropriate for a CYP defendant.
- Attending remotely means a CYP may struggle to understand the process, as well as limiting their opportunity to intervene, and therefore influence the outcome. Any restriction to a right to participate not only infringes the right to a fair trial, but also on procedural fairness – which ultimately reduces the confidence a CYP will have in the outcome.
- For those cases where CYP have to access hearings remotely, it is important they are co-located with their legal representatives and parent/carer with parental responsibility, so they can be supported appropriately. Arrangements should be made to ensure that video link locations provide adequate room for physical distancing, so that CYP can access specialist legal advice in a confidential space which is safe for all parties.
- CYP appearing before the youth court must be able to access necessary support such as those of an intermediary or an interpreter satisfactorily. Again, it is more difficult for these specialists to support communication, if they are not co-located with the CYP.
- In order for courts to make appropriate decisions, they need to have detailed, up to date information about the CYP, which requires Youth Offending Teams (YOTs) to engage directly with the CYP. We are aware of YOTs working incredibly hard to retain the service they provide and using remote technology where possible, but we are conscious that face to face contact is key to building positive relationships with CYP and this is likely to be more difficult in practice for some time.