Written evidence from the Alliance for Youth Justice (PCS0392)

About the AYJ

The Alliance for Youth Justice (AYJ) brings together over 70 non-profit organisations, advocating for and with children to drive positive change in youth justice in England and Wales. Our members range from large national charities and advocacy organisations, to numerous smaller grassroots and community organisations. We bring together the expertise of our members and provide ways for them to shape decision-making. We work to influence policy, legislation and practice to address issues affecting children caught up in crime.

Please note the contents of this briefing do not necessarily reflect the views of all AYJ member organisations.

As the Committee recognises, the Bill is extremely wide-ranging. While we have numerous concerns across many different aspects of the Bill – set out in detail in our submission to the Public Bill Committee[1] – we have narrowed these down to three principal concerns regarding the impact on children's rights. These are the ways in which the Bill: fails to treat children as children, will increase the incarceration of children, and will exacerbate racial disparities.

Treating children as children

As set out by the UN Committee on the Rights of the Child (CRC) in its General Comment No. 24 on children's rights in the child justice system, there is a clear need to treat children differently to adults in contact with the law, and minimise contact with the criminal justice system:

> *"Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults."*

We are therefore concerned to see multiple measures in the Bill which treat older children as adults, fail to ensure all those who commit crimes under the age of 18 are treated as children, and fail to pay due regard to the distinct needs and best interests of children.

Lack of separate consideration of needs

Child Rights Impact Assessments

The CRC in its Concluding Observations on the fifth periodic report of the UK recommended that the UK:

> *(a) Introduce a statutory obligation at national and devolved levels to systematically conduct a child rights impact assessment when developing laws and policies affecting children, including in international development cooperation;*
> *(b) Publish the results of such assessments and demonstrate how they have been taken into consideration in the proposed laws and policies.*

Despite the extensive measures contained in the Bill, no Child Rights Impact Assessment has been produced to examine the impact on children. This is characteristic of the overall lack of separate consideration of the distinct needs of children in the Bill.

Best interests of the child

Article 3, UNCRC states that:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"*

The CRC in its Concluding Observations raised concerns that: *"the right of the child to have his or her best interests taken as a primary consideration is still not reflected in all legislative and policy matters and judicial decisions affecting children,"* especially children in youth justice system.

The CRC recommended that the UK:

> "*...ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions as well as in all policies, programmes and projects that are relevant to and have an impact on children".*

As such, we welcome the addition to legislation around custodial remand in clause 131 reminding courts that before deciding whether to remand a child to custody, "*the court must consider the interests and welfare of the child."*

However, this could go further to ensure the primacy, rather than consideration of, the interests and welfare of the child. Furthermore, the Bill misses opportunities to legally embed the primacy of the best interests of the child, in the raft of both new laws and amendments to numerous other pieces of existing legislation impacting children. For example, the Serious Violence Duty (clauses 7-21) neglects to mention children or set out how they should be treated differently, does not set out authorities' safeguarding and welfare duties and the need to avoid criminal justice contact, and does not state that the primary function of the Duty should be to promote the best interests of the child. The Duty must be amended as such, in particular to ensure the welfare and best interests of a child is the paramount consideration in any disclosure or information sharing regarding a child.

The Bill also permanently embeds a massive expansion of the use of live links in court proceedings. Available evidence raises concerns that live links impact the effective participation of children in their court proceedings and therefore risk their right to a fair trial. The measures pay no consideration to the distinct needs of children. Measures should be introduced to ensure a presumption against the use of live links with child defendants, stating in legislation that live links should only be used where it is in the best interests of the child, with appropriate adjustments.

Promoting reintegration

Article 40 of the UNCRC stipulates that:

> *"States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."*

Reforms to criminal records in clause 163 are very welcome. But although the changes make improvements, the childhood criminal record system remains closely tied to the system for adults. Reforms should create clear distinctions between the treatment of childhood and adult records. Regarding article 40 above, it is wholly inappropriate that any child should face lifelong repercussions for their childhood behaviour. Children should be removed from the exclusion of sexual, violent and terrorism offences for rehabilitation periods for custodial sentences of four or more years.

Treating older children like adults

Article 1 of the UN Convention on the Rights of the Child (UNCRC) defines a child as any human being below the age of 18 years. The CRC in its General Comment No. 24 highlights that "the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years", and urges:

> *"States parties that limit the applicability of their child justice system to children under the age of 16 years (or lower), or that allow by way of exception that certain children are treated as adult offenders (for example, because of the offence category), change their laws to ensure a non-discriminatory full application of their child justice system to all persons below the age of 18 years at the time of the offence"*

The General Comment also states: *"The period to be served before consideration of parole should be substantially shorter than that for adults."*

We are very concerned that measures in the Bill perpetuate a trend under recent Governments to include older children in measures designed for adults. Clause 103 amends the starting point for minimum custodial terms for murder for 17-year-olds to 90 per cent of the starting point for adults, and 66 per cent of adult starting points for 15-16-year-olds. Clause 100 (2) and (5) are aimed at increasing the use of mandatory minimum custodial sentences for 16- and 17-year-olds. Clause 36 around the extraction of information from electronic devices, defines "adult" as "a person aged 16 or over" and "child" as "a person aged under 16". These measures are inappropriate and out of line with the CRC, who urge governments to take the opposite approach – rather than treating older children more harshly, taking a more nuanced approach to young adults:

> *"The Committee commends States parties that allow the application of the child justice system to persons aged 18 and older whether as a general rule or by way of exception. This approach is in keeping with the developmental and neuroscience evidence that shows that brain development continues into the early twenties." (General Comment N.24)*

Children who turn 18 before their hearing or conviction

The CRC's Concluding Observations to the UK urged that:

> *"The child justice system should apply to all children above the minimum age of criminal responsibility but below the age of 18 years at the time of the commission of the offence."*
>
> *"Child justice systems should also extend protection to children who were below the age of 18 at the time of the commission of the offence but who turn 18 during the trial or sentencing process."*

This Bill misses a key opportunity to fix the injustice of 'cliff-edge sentencing' in the criminal justice system that sees those who allegedly committed an offence as a child but turn 18 before their trial being treated as adults by the criminal justice system. This is a significant and growing issue given court delays have been exacerbated greatly by COVID-19. Measures should be introduced to ensure all those who commit offences as children but turn 18 before their hearing are heard and sentenced as children. Clause 163 makes other amendments to the Rehabilitation of Offenders Act but does not amend it to ensure the 'relevant date' for criminal record rehabilitation periods is the date of the commission of an offence rather than the date of conviction. This inequity is also seen in Clause 104 which restricts the possibility for minimum term reviews for children sentenced to Detention at Her Majesty's Pleasure to those under 18 when *convicted.*

Ensuring custody is a last resort, and for the shortest possible time

The 2018 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* stated:

> *"The scale and magnitude of children's suffering in detention and confinement call for a global commitment to the abolition of child prisons and large care institutions alongside scaled up investment in community-based services*."

Article 37 of the UNCRC sets out that the arrest, detention or imprisonment of children shall be used only as a measure of last resort and for the shortest appropriate period of time. In the CRC's Concluding Observations to the UK it urged the government to:

> *"Establish the statutory principle that detention should be used as a measure of last resort and for the shortest possible period of time and ensure that detention is not used discriminatorily against certain groups of children."*

Custody is not currently used as a last resort for children, or for the shortest possible period of time,[2] and over half of children in custody are Black, Asian and Minority Ethnic.[3] Measures in this Bill will only exacerbate the UK's failing to meet this standard. Article 3 of the UNCRC regarding the primacy of the best interests of the child, and Article 40 regarding promoting reintegration and assuming a constructive role in society, will also be impeded by these measures.

Changes to Detention and Training Orders (Clauses 132-34) are predicted to reverse the downward trend of the numbers of children in custody, with a projected increase of up to 50 children by 2023/24.[4] These changes are concerning particularly given the CRC's General Comment on child justice states:

> *"The Committee recommends that no child be deprived of liberty, unless there are genuine public safety or public health concerns, and encourages State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age."*

Mandatory custodial sentences are by definition against the principle of custody as a last resort for children. Clause 100 (2) and (5) aim to increase their use for 16- and 17-year-olds and should be removed. Clause 103 increases the length of mandatory life imprisonment in the form of 'Detention at Her Majesty's Pleasure' for 7 of the 9 new categories. This is entirely in contrast to the CRC's Concluding Observations to the UK which urged the government to abolish these sentences, with the CRC's General Comment highlighting how "*life imprisonment makes it very difficult, if not impossible, to achieve the aims of reintegration.",* and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment finding that: *"Life imprisonment and lengthy sentences… are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child.*"[5]

The increase in length of these sentences, particularly for older children, and the restriction on reviews of minimum terms for Detention at Her Majesty's Pleasure are not justified. As set out by the CRC in its General Comment on child justice, regarding life imprisonment:

> *"The period to be served before consideration of parole should be substantially shorter than that for adults and should be realistic, and the possibility of parole should be regularly reconsidered…This also requires a regular review of the child's development and progress in order to decide on his or her possible release."*

Similarly, clauses 105 and 106 which move the custody release point, or 'minimum term', from halfway to two-thirds of certain custodial sentences are entirely inappropriate for children, particularly considering they go against the need to ensure custody is for the shortest possible time.

Reform of the custodial remand threshold

The CRC General Comment N.24 states that:

> *"…children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of the Convention. Pretrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered."*
>
> *"The law should clearly state the criteria for the use of pretrial detention, which should be primarily for ensuring appearance at the court proceedings and if the child poses an immediate danger to others. If the child is considered a danger (to himself or herself or others) child protection measures should be applied."*

The AYJ has set out proposals for a custodial remand threshold that we believe would ensure pre-trial detention was used as the General Comment above states.[6] We welcome the reforms to remand set out in clause 131 which go some way to achieving this, however they must go further to ensure the use of remand is in line with the UNCRC. The reforms to the custodial

remand threshold also present an opportunity for this Bill to bring forward corresponding changes to the custodial sentencing threshold,[7] as well as the threshold for police remand.

Electronic Whereabouts Monitoring Requirements on Youth Rehabilitation Orders

The reported intention of "toughening" youth community sentences including with electronic whereabouts monitoring requirements is to reduce the number of children sentenced to custody. While any reduction in custody numbers would be welcome, the Bill's Impact Assessments cannot confirm any degree to which these 'high-end' community sentences will be used instead of custody. The imposition of electronic monitoring is in itself a form of deprivation of liberty for children and anxious scrutiny should be applied to its use, particularly due to the potential for many more children to be drawn into custody due to breach of these restrictive requirements.

Challenging discrimination and reducing racial and ethnic inequalities

The various Equalities Statements and Equality Impact Assessments that accompany the Bill set out that many of the measures proposed will exacerbate existing racial inequalities in the criminal justice system. The government justifies this as 'a proportionate means of achieving the legitimate aim of protecting the public.' However, the government admits there is 'limited evidence that the combined set of measures will deter offenders long term or reduce overall crime.'[8]

Article 2 of the UNCRC and Article 14 of the European Convention on Human Rights protect citizens from discrimination, and the government must pay due regard to its Public Sector Equality Duty under section 149 of the Equality Act 2010. The AYJ is part of a coalition[9] of organisations calling for clauses to be withdrawn from the Bill which fail the meet these standards. We refer the Committee to the submission to its call for evidence by AYJ member EQUAL, which provides detail on this issue, as well as to the forthcoming joint briefing on the Bill by the coalition, available here[10] shortly.

AYJ's own briefing also sets out more detail on racial disparity, and discrimination faced by those in the youth justice system, and how clauses 2, 100 (2) and (5), 103, 104, 105, and 106 will exacerbate inequalities.[11] As well as the clauses around sentencing, we set out our concerns that the Serious Violence Duty (7-21) will increase racialised profiling, labelling and targeting of children, risking creating new discriminatory profiling systems like the Gang Matrix or the Prevent Duty. We are concerned that clauses 61-63 regarding 'unauthorised encampments' and the criminalisation of trespass will exacerbate ethnic inequality in the UK and increase the risk of Gypsy, Roma and Traveller children entering the youth justice system. Finally, we are concerned that provisions around restricting protests (clauses 54-60) will disproportionately impact BAME children, given the over-policing and disproportionately punitive criminal justice response to BAME communities.

17/05/2021

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