

## Written evidence submitted by Just for Kids Law

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued. This evidence is informed by our work monitoring implementation of the UN Convention on the Rights of the Child (UNCRC) in England through our hosting of the Children's Rights Alliance for England and our direct advocacy and legal case work with children and young people who are in conflict with the law.

Below we have set out our two key concerns around the growing backlog in the criminal courts, which has been exacerbated by the COVID-19 pandemic, for children in the criminal justice system as follows:

- **The impact of turning 18 between the commission of an offence and prosecution**
- **Increased use of video link hearings involving child defendants**

### Key messages:

- Young adults who have committed offences as children must have the opportunity to build meaningful futures and be treated fairly
- Long delays before a decision to charge has huge detrimental impact on the well-being of children
- Each year approximately 2,500 children offend as children but turn 18 prior to conviction
- Turning 18 prior to plea or conviction is likely to impact around 1-in-10 children who are cautioned or sentenced
- Turning 18 during this time has a significant impact on the person involved as they are prosecuted in adult courts and lose the opportunity to benefit from the youth justice system
- The same sentencing framework afforded to children should be available to those who have turned 18 between offence and conviction
- The increase in video link hearings for child defendants, both during the coronavirus pandemic and subsequently, severely compromises a child's rights to a fair trial and their ability to effectively participate
- Increased investment in the court system is needed to ensure that children's rights are not breached due to the backlog of court cases
- The Government should additionally introduce a mandatory and transparent system of Child Rights Impact Assessments (CRIAs) to be used in policy development and

budgetary decision-making, in implementing a COVID-19 recovery programme to tackle the growing backlog, to ensure the UNCRC is fully implemented

### **The impact of turning 18 between the commission of an offence and prosecution**

Data from the Ministry of Justice and the Youth Justice Board for England and Wales shows that, even before the coronavirus pandemic, the average number of days taken from offences to completion for youth criminal cases in England Wales in the year ending December 2019 was 160 days – that is over 5 months and nearly 23 weeks.<sup>1</sup> This is an increase of 58 days (8 weeks) from December 2011 – the earliest year with available data. Worryingly, there has been a year-on-year increase – this is despite the number of completed youth criminal cases having reduced by nearly two-thirds (65%) from 88,981 in 2011 to 30,905 in 2019. The coronavirus pandemic has exacerbated already existing delays in the criminal justice system.

New statistics showing longer delays in the justice system reflect our experience of working with children and young people. System delay is the main reason children turn 18 between the commission of an offence and prosecution, resulting in real injustice. Such delays have a huge detrimental impact on the well-being of children and young people, particularly because children coming into contact with the criminal justice system are some of the most vulnerable in our society. They have often suffered abuse or neglect, have care experience and high levels of mental health issues or learning disabilities.<sup>2</sup> In some cases, delays mean they have turned 18 prior to proceedings commencing and they lose the protections that would have been available had they been dealt with as children. The coronavirus crisis has exacerbated delays throughout the criminal justice system and the impact on children approaching their 18th birthdays will be grave.

The United Nations Committee on the Rights of the Child (the UN Committee), has made it clear that “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.”<sup>3</sup>

The *List of issues prior to submission of the combined sixth and seventh reports of United Kingdom of Great Britain and Northern Ireland*, published by the UN Committee on 9

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<sup>1</sup> Ministry of Justice and Youth Justice Board (2021) *Youth Justice Annual Statistics: 2019 to 2020 additional annexes*, Annex D1 <https://www.gov.uk/government/statistics/youth-justice-statistics-2019-to-2020>

<sup>2</sup> See for example: Charlie Taylor/ Ministry of Justice (2016) *Youth Justice Review: final report*; Prison Reform Trust (2016) *In Care, Out of Trouble: How the life chances of children in care can be transformed by protecting them from unnecessary involvement in the criminal justice system, An independent review chaired by Lord Laming*; Institute for Criminal Policy Research (2015) *The Youth Proceedings Advocacy Review: Final Report*; Lord Carlile of Berriew/ National Children's Bureau (2014) *Independent parliamentarians' inquiry into the operation and effectiveness of the youth court*

<sup>3</sup> United Nations Committee on the Rights of the Child (2019) *General Comment No. 24 on children's rights in the child justice system, para 31*  
<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsqlkirKQZLK2M58RF%2F5F0vEnG3QGKUxFivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4>

February 2021 specifically asks the State party to explain the measures taken or envisaged, across all devolved administrations, overseas territories and Crown dependencies, to “ensure the application of the child justice system to all children... and that it extends protection to children who were below the age of 18 at the time of the offence but who turned 18 during the trial or sentencing process.”<sup>4</sup>

The youth justice system gives children some special protections, for example, they are more likely to be diverted away from the formal criminal justice system through diversion schemes and their welfare must be considered by the various agencies involved. However, those who have committed offences as children, but are not dealt with until they have turned 18, are not able to benefit from those legal protections. This is contrary to what is stipulated by the UN Committee.

There is currently no principle to fast-track charging decisions in the cases of children, including those approaching their 18th birthday, a majority of whom are ‘Released Under Investigation’ for an unspecified period. This is despite the inequity which will follow if they are prosecuted once they have become adults. For their peers who committed an offence at the same age but who were dealt with before their 18th birthday, the outcomes will be vastly different. The damaging consequences of turning 18 between the date of the offence and prosecution include loss of anonymity, reduced likelihood of diversion, only being eligible for adult sentences, longer supervision periods (heightening the risk of breach) and much longer rehabilitation periods which reduce employment prospects and prevent people moving on with their lives. Longer rehabilitation periods also act as a barrier to a pro-social identity and inhibit young adults’ ability to build a crime-free future, which comes at a huge cost to society and the public purse.

#### *Loss of presumption of diversion*

If someone is under 18 at date of disposal there is a strong presumption in favour of diversion.<sup>5</sup> Youth cautions are only available to children aged 10-17 inclusive and cannot be given to an 18-year-old regardless of date of offence.<sup>6</sup> A young person who is 18 at the time of the disposal can only access adult cautions, and this has implications for the type of support they receive and how it is administered.

#### *Availability of Youth Offending Team (YOT) support*

Children given a youth caution are referred to the YOT who can offer interventions and support to reduce the likelihood of reoffending. Once 18, a young person is no longer eligible

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<sup>4</sup> United Nations Committee on the Rights of the Child (2021) *List of issues prior to submission of the combined sixth and seventh reports of United Kingdom of Great Britain and Northern Ireland*, para 31(b) [Treaty bodies Download \(ohchr.org\)](#)

<sup>5</sup> Crown Prosecution Service (2020) *Legal Guidance: Youth Offenders* [Youth Offenders | The Crown Prosecution Service \(cps.gov.uk\)](#), see also Home Office Circular 18/1994

<sup>6</sup> Ministry of Justice and Youth Justice (2013) *Youth cautions: Guidance for police and youth offending teams* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/354050/yjb-youth-cautions-police-YOTs.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/354050/yjb-youth-cautions-police-YOTs.pdf)

to be supported and supervised by the YOT, cutting them off from support designed to prevent re-offending. The support of the YOT can make a crucial difference in supporting those who committed offences as children to successfully complete any interventions and to move away from offending.

### *Adult Courts*

A child who turns 18 during a criminal case can continue to have their case heard in a youth court. However, if a child turns 18 before their case gets to court, their case must be dealt with by the adult courts. Despite their age at the date of the offence, defendants in the adult courts do not have access to the modified procedures and physical layout of the youth court, which were designed to help children and young people to understand and participate in the proceedings.

### *Adult sentences*

The principle aim of the youth justice system is undermined by the inequities experienced by children who turn 18 in the criminal justice system. If a child turns 18 before conviction, the youth court may retain sentence. If a child turns 18 before proceedings start, they can no longer receive youth sentences, regardless of the date of the offence. As a result, they become subject to the purposes of adult sentences which include deterrence and punishment of the offender. This is a significant shift from the sentencing of children and young people, which has the prevention of offending as its principle aim and the welfare of the child as a central consideration.<sup>7</sup> Those who offend as children should not lose the opportunity to benefit from the youth sentencing framework and shorter rehabilitation periods because of system delays that are no fault of their own, which existed before the coronavirus pandemic.

### *Loss of anonymity*

Children who turn 18 prior to conviction lose their automatic right to anonymity during the court process, despite being a child at the age of the offence. While reporting restrictions are automatic in the youth court, this is not the case post 18 where it is discretionary.

### **Increased use of video link hearings involving child defendants**

We are extremely concerned that the increase in video link hearings for child defendants, both during the coronavirus pandemic and subsequently, severely compromises a child's rights to a fair trial and their ability to effectively participate. We do not believe that an increased use of video link hearings is the answer to reducing the court backlog.

As noted above, children in the criminal justice system are some of the most vulnerable in society which make it more difficult for children to effectively participate in court

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<sup>7</sup> Sentencing Council (2017) *Sentencing Children and Young People: Definitive guideline*  
<https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-Young-People-definitive-guideline-Web.pdf>

proceedings. The findings of reviews of the youth justice system have identified the same.<sup>8</sup> The use of video link adds a significant extra layer of difficulty.

Although during the pandemic video and audio link proceedings have been implemented as an exceptional measure to facilitate the continuance of criminal justice proceedings, the long-term normalisation of this practice could undermine fair and equal justice for the foreseeable future, negatively impacting child defendants. It also conflicts with international legal standards on the right to a fair trial.

Multiple pre-pandemic studies have shown that remote justice proceedings are an inadequate substitute for in-person hearings, with vulnerable and younger defendants especially at risk of unfair hearings. Research has evidenced that remote hearings can interfere with defendants' rights to access effective legal assistance, to participate effectively at their own hearings, and to review and challenge information and evidence relevant to the proceedings, particularly in the case of vulnerable defendants. Vulnerable defendants are especially vulnerable to unfair trials where trial proceedings are conducted remotely. There is currently no reliable system to identify those who have mental health or neurodiverse needs and cognitive impairment disabilities, particularly considering that these are often 'hidden' disabilities and the defendant may be reluctant to disclose them.

Similar concerns have been highlighted in a recent report on the evaluation of a tool which enables first appearance remand hearings in the magistrates' court with the defendant appearing by video link. Whilst the report does not specifically assess the use of video courts in the context of youth proceedings, a number of findings for adult proceedings could well apply or be exacerbated in the context of youth proceedings. The data is complex but highlights some overarching issues with the use of video courts. The report, funded by the Home Office and carried out by the Sussex Police and Crime Commissioner in conjunction with the University of Sussex, found that "loss of face-to-face contact in video court can create challenges in terms of advocates developing trust and rapport with their clients" and that "appearing over the video link could make defence advocates less effective, particularly in relation to bail applications".<sup>9</sup> It concluded that individuals whose cases were handled remotely were more likely to receive a custodial sentence – those sentenced in the more traditional court setting were more likely to receive fines or other community sentences. A previous Ministry of Justice 2010 evaluation of a 'virtual courts' pilot also found that the rate of guilty pleas and custodial sentences were higher in the video court than in traditional courts.<sup>10</sup> These findings have very serious ramifications for our justice system as more

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<sup>8</sup> See for example: Charlie Taylor/ Ministry of Justice (2016) *Youth Justice Review: final report*; Prison Reform Trust (2016) *In Care, Out of Trouble: How the life chances of children in care can be transformed by protecting them from unnecessary involvement in the criminal justice system, An independent review chaired by Lord Laming*; Institute for Criminal Policy Research (2015) *The Youth Proceedings Advocacy Review: Final Report*; Lord Carlile of Berriew/ National Children's Bureau (2014) *Independent parliamentarians' inquiry into the operation and effectiveness of the youth court*

<sup>9</sup> Fielding, N., Braun, S., Hieke, G. and Mainwaring, C. (2020) *Video Enabled Justice: Evaluation* [Microsoft Word - VEJ Final Report \(Ver 12\).docx \(sussex-pcc.gov.uk\)](#)

hearings take place remotely and unsafe convictions harm victims and undermine public trust. These concerns should be noted as key concerns in the context of youth video hearings.

Children in court, many of whom have communication difficulties, struggle to understand what is happening and to participate effectively in proceedings. These problems are exacerbated by children appearing remotely by video link. Children are less likely to understand what is happening when on video link, cannot consult their lawyer properly nor communicate well with the judge. This is in contravention of the UN Convention on the Rights of the Child, which gives children clear participation rights, and sets out the fundamental right of the child to be heard in the context of criminal justice proceedings.<sup>11</sup>

In April 2018, The Standing Committee for Youth Justice (Alliance for Youth Justice) produced a report on child defendants and video links which found that the use of video link has a negative impact on children's ability to participate and outlined a number of specific concerns including a detrimental impact on child's ability to understand and participate, how a child's behaviour may be misinterpreted by the court and increased likelihood that a child is remanded into custody or found guilty.<sup>12</sup> The importance of building rapport and trust with a child, recognising non-verbal cues and identifying communication, social or learning difficulties are all impeded by the use of video link.

For these reasons we do not believe that the use of video links is a solution to addressing the court backlog.

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<sup>10</sup> Terry, M., Johnson, S. and Thompson, P. (2010) 'Virtual Court pilot: Outcome evaluation', in *Ministry of Justice Research Services 21/10*, [Virtual Court pilot outcome evaluation \(justice.gov.uk\)](https://www.justice.gov.uk/research-services/21-10-virtual-court-pilot-outcome-evaluation)

<sup>11</sup> UN Committee on the Rights of the Child (2009) *General Comment No. 12: The right of the child to be heard* CRC/C/GC/12, paragraphs 57 to 64 [Refworld | General comment No. 12 \(2009\): The right of the child to be heard](https://www.refworld.org/docid/4a6161d1.html)

<sup>12</sup> The Standing Committee for Youth Justice (2018) *They just don't understand what's happening or why: A report on child defendants and video links* [Microsoft Word - SCYJ Child Defendants and Video Link Report.docx \(squarespace.com\)](https://www.squarespace.com)