



Standing Committee for Youth Justice

Standing Committee for Youth Justice response: Justice Select Committee inquiry Access to Justice impacts of courts and tribunals reform

Overview

The Standing Committee for Youth Justice (SCYJ) is an alliance of over fifty non-profit organisations working for a better youth justice system in England and Wales. Our response focuses on the HMCTS Reform Programme in the criminal courts as it affects child defendants, especially on the use of video links and online pleas.

Our response is based on the latest information we have available on the Youth Reform programme, which “will look specifically at the needs of children and young defendants to ensure that [HMCTS] do not apply adult processes to children.” To date, the programme is set to include the use of video links with child defendants, and proposals for allowing children to submit pleas online are currently being considered.

We believe the use of video links and online pleas, along with the closure of courts, will negatively impact access to justice for children in trouble with the law. We are concerned by the approach taken by HMCTS, such as the lack of research, impact assessment, information sharing, public consultation and stakeholder engagement on key elements of the reform programme. When the programme began there appeared to be a complete lack of consideration of the needs of children as a distinct and vulnerable group, although we believe they are now taking some steps to address this.

Children in court

Children in the criminal justice system are vulnerable due to their young age, compounded by the difficulties significant numbers face, including Special Education Needs (SEN), low literacy levels, and communication difficulties. When children attend court, they are therefore usually afforded protections and adjustments in an attempt to safeguard their welfare and maximise their understanding of proceedings.

Despite these protections, the Carlile Review (2014) and the Taylor Review of the Youth Justice System (2016) both highlighted serious concerns about the experience of children in both the youth and Crown courts, particularly a lack of engagement, understanding and participation in proceedings, thus compromising the right to a fair trial (Article 6, European Convention on Human Rights and Article 12, UN Convention on the Rights of the Child (UNCRC)).

Child defendants’ access to justice is therefore already at risk. It is vitally important that reforms to the court system consider the distinct needs of children, maintain and increase existing protections, and ensure that a child’s ability to engage with court proceedings is not further damaged in any way. We do not believe HMCTS adequately considered these needs before undertaking key pieces of work, and in fact believe the court reform programme to be directly at odds with the direction of travel towards greater participation recommended by Charlie Taylor and Lord Carlile in their reviews.

For example, children’s rights are protected by the legal entitlement to an Appropriate Adult at the police station, and to a parent or guardian being present with them in court (mandatory for 10-to-15-year-olds and an expectation for 16- and 17-year-olds). The proposals fail to ensure these safeguards.

There are also numerous issues within the court process that contribute to racial disproportionality in the criminal justice system (Lammy 2017), which we believe the reform programme is likely to exacerbate. The access to justice implications will therefore be worse for Black Asian and Minority Ethnic (BAME) children. For example, distrust in the system will affect how BAME children enter pleas online (Lammy 2017), and opportunities for diversion are more likely to be missed. Unconscious biases, stereotyping, and negative perceptions of a child's behaviour could be exacerbated by the lack of physical presence of a child appearing over video link. Lawyers will also struggle particularly with BAME children to build trusting relationships within the restrictions of the digital reforms.

Video links

While video links may be appropriate for vulnerable witnesses, the use of video links with vulnerable defendants is extremely concerning. SCYJ recently carried out research on the impact of video links on child defendants (SCYJ 2018), attempting to address a dearth in research into the impact of court modernisation on court users, especially children. The report examines testimony from practitioners involved in video hearings with children. It raises concerns that video links severely erode levels of communication and support between child defendants, their lawyers, youth offending teams and family.

“They just don’t understand what’s happened or why. They’ve not got the benefit of having a family member or an appropriate adult sat with them. They’ve got nobody to ask questions of, because the prison officers are just there to deal with the video link and they’re on a strict schedule. So, I think it’s probably quite, on a range of frightening through to completely pointless because they just don’t have anybody to support them, or ask questions of really.” - YOT worker, SCYJ 2018

Practical issues and strict time constraints leave few opportunities for a child to ask questions and seek clarifications. Lawyers struggle to build the necessary trust and rapport with a child in the conference time allowed, while YOT members struggle to fulfil their statutory duties by assessing a child's safety and wellbeing before, during and after the hearing. As well as this, it is more difficult to gauge protected characteristics such as mental health and communication difficulties over video link, and children's behaviour and perceptions of their behaviour can be affected. If they can't understand what is happening, they are less likely to fully realise the seriousness of the situation, and more likely to disengage or act out.

“Almost impossible [to discern physical or mental difficulties of a child over video link]. You can only see their face and there is little interaction. In my experience unless you have time with the young person to prepare, it is very hard to tell the difference between surly teenage behaviour, a total lack of confidence and/or significant learning difficulties and a lack of understanding.” - YOT worker, SCYJ 2018

Specific concerns are also raised for looked after children, who have many more practitioners involved in their cases. Lawyers need to discuss the case fully with the professionals and then have further conversations with the child, which waiting for video link conference sessions restricts. Care needs and risk factors also change so quickly that new information may come to light as the court case is about to be heard, but video links prevent quick consultation with the client.

Our research raised concerns that the use of video links negatively prejudice justice outcomes, with testimony that children appeared more likely to be refused bail and remanded to custody when appearing via video link. These indications from our research

are supported by a 2010 Ministry of Justice research report – the only government report on video links in criminal courts - that indicated that adult defendants appearing from police stations by video link were more likely to be unrepresented and to receive a custodial sentence (MoJ 2010).

Overall, SCYJ's report finds a clear consensus that the use of video link exacerbates the problems children already experience with understanding and appropriately engaging with court processes. Video links erode protections currently afforded child defendants in court, and in doing so interfere with the child's right to a fair trial and access to justice. It therefore also risks a potential increase in miscarriages of justice and judicial reviews and appeals.

HMCTS should therefore be extremely cautious about expanding the use of video links, and in-depth ethnographic research should be undertaken to examine children's experiences in court and the impact of video link, addressing the lack of evidence available. We are concerned that a recent evaluation¹ of virtual hearings in the tax tribunal was hailed as a success by the government, yet the report finds significant issues with the implementation (MoJ 2018a)

When HMCTS began the programme of reform, we were concerned by the attitude to video links and assumption that they would be widely suitable for children. We have been somewhat encouraged by the shift in HMCTS's stance towards a more thoughtful consideration, and have been offered assurances that the assumption will be that video links are only used with children for administrative hearings. However, it remains that the decision for a child to appear via video link will be left to judicial discretion.

Current Criminal Practice Directions already recommend that children should usually be produced in person at court, with applications for video link considered on a case-by-case basis, taking into account individual needs and involving consultation of relevant parties including YOTs. They recommend that video links should only be used for onward remand hearings where there is no bail application, or case management hearings, and are clear that sentencing children over video link is inappropriate (with caveats such as overly long distances to court or significant mental health difficulties). Despite these recommendations, SCYJ's report suggests the use of video link for children is already quite widespread, including appearing from police stations, submitting pleas, bail applications, and sentencing. Appropriate consultation by the court does not appear to be occurring, with some testimony that practitioners had tried and failed to persuade the bench that a vulnerable child should not appear over video.

"I have unsuccessfully argued many times for a Defendant to be produced to court due to difficulties with communication (mental health, very low IQ, youth, etc.). I am always told that policy is to conduct hearing by video-link, and my judgement is ignored" - Criminal lawyer, SCYJ 2018

We are therefore concerned that if the decision is left to the judiciary, we will continue to see video links used inappropriately with child defendants in increasing numbers. The current guidance is too open to interpretation and abuse, and with many children held in institutions far away from their court, children could commonly be sentenced over video link. Criminal Practice Directions must be tightened and legislation should be put in place to prevent the use of video links in unsuitable hearings, compromising children's access to justice.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740275/Implementing_Video_Hearings_web_.pdf

Online pleas

A number of studies have found that many children do not understand basic legal language, such as plea and breach. It is likely that many children will not really understand what entering a plea means, its implications, or even whether or not they are guilty of the specific offence with which they are charged. These issues with understanding will be exacerbated by proceedings in writing, and it will be extremely difficult to ensure they are intelligible to children as young as ten years old. The problem with communicating inherently complex information in writing to children of any age will be compounded by the difficulties faced by many children in the youth justice system. The Literacy Trust report that “25% of young offenders are said to have reading skills below those of the average seven-year-old. 60% of the prison population is said to have difficulties in basic literacy skills” (Clark and Dugdale, 2008: 6). YOTs believe official figures underestimate the rate of literacy difficulties amongst children (Talbot, 2010: 31).

As such, we were extremely concerned that the proposals for online pleas in the abandoned Prisons and Courts Bill (2017) would have allowed children to indicate their plea in the absence of legal advice or parental supervision or knowledge. We have since received assurances from HMCTS that children would not have direct access to the online platform, instead indicating a plea through their legal representative. However, a number of concerns remain. The approach would rely on the child’s representative communicating the information to the child effectively, and there has been no mention of presence or support from the child’s YOT. It is unclear what, if any, plans there are for the number of children who do not receive legal representation. Of great significance is the concern that online pleas remove the mechanism for lawyers to ask for a case to be reviewed, with diversion in mind, which is available if a child comes to court.

Children’s ability to decide how to plead is “compromised by their impulsivity and limited capacity to determine the consequences of their decisions (Farmer E, 2011, cited in Centre for Social Justice, 2012: 203). Children “are both more suggestible (‘the tendency to change one’s mind as a result of pressure or suggestion from others’) and compliant (‘the tendency to go along with others’ propositions or instructions without internal agreement’).” (Farmer E, Gudjonsson G H, cited in Centre for Social Justice, 2012: 203). And they are more likely than adults to admit to offences they did not commit (Drizin S A and Leo, R A, cited in Centre for Social Justice 2012: 203; The American Bar Association 2016:12). Children may also already be subject to pressure to indicate a guilty plea, including significant peer pressure.

Attending court affords children some protection against the above, all of which is likely to be lost where proceedings are conducted in writing, undermining children’s access to justice.

Court closures

Assessments for the suitability and economic and social impact of court closures have been made based on the assumption that vast amounts of court business will be conducted online, including through widespread use of video links and online pleas (MoJ 2018b). Yet there has been no public consultation and very little research or evaluation on virtual hearings and online pleas, and it is not yet possible to understand the extent to which it will be suitable to move court business online, particularly in relation to child defendants. The impact of court closures on access to justice may therefore be much larger than has been considered.

The travel standards adopted in the HMCTS Fit for the Future estates strategy – that all users should be able to attend court on time and return within a day – are significantly lower than the previous government target of reaching a court within one hour by public transport. These new standards, justified by HMCTS because of the assumption that

most users will not attend court in person, have allowed for the confirmed closure of a number of courts, and may dictate more closures moving forward. As we have discussed above, this is not a suitable assumption for child defendants. As a result, children living in areas subject to court closures will either have to travel far to attend court, or the overly long journeys will be used to justify having more children indicate pleas online and appear in court via video link.

Since 2010, over half of magistrates courts in England and Wales have closed. A senior District Judge described the impact of the closures on her role: "One of the things I think is really important is for me to know where I'm talking about" and on children: "In London the closures have had a lot of impact. It's so dense that people don't often travel as far as you think they might. It's a series of villages. Are you going to ask your youth to travel somewhere they've never been?"²

Longer journeys to court will mean children are less likely to be accompanied by an adult, as a child's carer will frequently have other responsibilities and children to care for. This will leave children, many of whom face significant difficulties, undertaking long and often complex journeys by themselves. They will be more likely to be reliant on public transport and will therefore face longer journeys, impacting their welfare. Vulnerable children should not be travelling to and attending court without support from their parents or carers. Less parental involvement in a child's court proceedings goes against recommendations made in the Taylor Review (2016), and as outlined above, parents or carers provide vital emotional support and help courts understand and navigate a child's communication difficulties, facilitating participation in court.

Longer journeys to court will also lead to more missed appointments due to journey disruption, causing delay and waste in the court system and interfering with timely access to justice.

Engagement

We are disappointed with the level of consultation, engagement, and information sharing regarding the reform programme. We are also concerned about the overall lack of impact assessment and research that has taken place and/or been made publicly available.

The public consultation 'Fit for the Future: Transforming the Courts and Tribunal Estate' was based on the assumption of widespread use of digital services, yet there has been no public consultation on either video links or online pleas.

There has been a lack of wider stakeholder engagement, and many organisations that are experts in children's and courts policy have been excluded.

HMCTS has been reluctant to publish or share information, including any research they may be undertaking. It is difficult or impossible to find progress updates online and nothing has been published about the Youth Court programme.

² <https://www.thestar.co.uk/news/district-judge-naomi-redhouse-interview-in-my-view-every-type-of-criminal-offence-is-serious-1-9614313>

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