

Child Defendants:

Can they defend
themselves?

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The 'ordinary' child witness

“[W]e have found that the experience of young victims and witnesses is affected by the shortcomings in the system overall but, for children and young people, the effects can be even more devastating... Young people are being left to flounder in an imperfect system.”

HM Inspectorates of CPS and Constabulary (Feb 2012) *Joint Inspection Report on the Experience of Young Victims and Witnesses in the Criminal Justice System*

‘Ordinary’ child witnesses in court: *Measuring Up?* (Plotnikoff & Woolfson 2009)

Sample: 182 witnesses (5-19 yrs) for prosecution

- ❖ **65%** reported one or more problems of comprehension, complexity, pace of questions that were too fast or having their answers talked over
- ❖ **55%** felt unable to tell the court they had a problem in comprehension even though they had been advised to do so
- ❖ **58%** said the cross-examiner tried to make them say something they did not mean
- ❖ **44%** were asked repetitive questions
- ❖ **20%** were asked questions that jumped around in time

'Ordinary' child witnesses in court: Plotnikoff & Woolfson (2)

- ❖ **20%** did not get to say everything they wanted to tell the court
- ❖ **59%** thought they were treated fairly in cross examination but **37%** thought they had been treated unfairly
- ❖ Questions on cross-examination prompted intervention from the court in only **38%** of cases

'Unordinary' young defendants:
disadvantages beyond age alone:
(a) mental health disadvantage

➤ **20-30%** of offenders have learning disabilities or difficulties [*Bradley Report: People with Mental Health Problems or Learning Disabilities in the CJS* (2009)]

➤ Children in the CJS have at least **3 times** the level of mental health disorders as general population [Hagell (2002)]

1999-2005: 99.3% of ASBO applications granted of which **41%** were against children 10-17

➤ **30%** of children receiving ASBOs had diagnosed mental health disorder or learning disability but often received no assessment prior to court appearance.

[*British Institute for Brain Injured Children* (2002)]

'Unordinary' young defendants:
disadvantages beyond age alone

(b) Educational disadvantage

HM Inspectorate of Prisons (2002) 6000 boys entering custody:

- **38%** achieved 7-year-old levels in numeracy and **31%** in literacy;
- **4%** had lower numeracy and literacy skills than a 7-year-old

Children tried by jury in the Crown Court

→ 'grave crimes' punishable by at least 14 years imprisonment in case of an adult, where child is likely to be sentenced to custody for at least 2 years

→ sexual assault

→ Homicide

→ firearms offences

→ if likely to be deemed 'dangerous' for sentencing purposes

→ Jointly charged with adult

Special Measures for Child and Vulnerable Defendants

Initial exclusion

The background of the slide is a dark blue-tinted image. On the left side, there is a bookshelf filled with books, with a wicker basket hanging from one of the shelves. On the right side, there is a pair of white scales of justice, symbolizing law and equity.

YJCEA 1999 (as amended 2009): all child witnesses under 18 except Defendants

Automatically deemed eligible due to age alone, on basis it will improve the quality of their testimony, for:

- testimony in chief by video interview
- cross-examination through videolink or behind a screen
- Intermediary
- Supporter of own choice whilst testifying
- Communication aids

**Special Measures for
Child Defendants:
Conditional access**



Special Measures Directions for Child and Vulnerable Defendants

[Coroners & Justice Act 2009]

- Eligible for special measures only if preconditions are met [ss. 33A(2), 33BA(2)]
- NO deemed eligibility by virtue of age
- Must show impairment beyond fact of age alone, unlike other child witnesses

Eligibility for live link

Under 18?

Ability to participate effectively as a witness compromised by D's level of

- intellectual ability OR
- social functioning?

[s.33A(4)(a)]

If so → Would live link enable D to participate more effectively as a witness by improving quality of D's evidence or otherwise?
[s.33A(4)(b)]

If so → is it in interests of justice to allow D to give evidence through a live link? [s.33A(2)(b)]

Eligibility for intermediary

not yet implemented

Under 18?

Ability to participate effectively as a witness compromised by D's level of

- intellectual ability OR
- social functioning?

[s.33BA(5)]

If so → is an intermediary direction necessary to ensure D receives a fair trial?[s. 33BA(2)(b)]

Eligibility for intermediary

Bryan et al (2007): > **60%** of children in CJS have communication disability, of whom about 50% had poor or very poor communication

BUT defendants are even less likely than prosecution witnesses to be assessed prior to trial

Recall: YJCEA 1999: all child witnesses under 18 except Defendants

Automatically deemed in need of:

- testimony in chief by video interview
- cross-examination through videolink or behind a screen
- Intermediary
- supporter of own choice whilst testifying
- Communication aids

Cp. Scotland: all child defendants are automatically eligible for all special measures available to other child witnesses except screens.

The human rights context: ECHR Art. 6

- Right to **equality of arms** with the prosecution
- **Right to participate** fully and effectively in the trial
- **Right to testify** and to call witnesses under the **same conditions** as the prosecution's witnesses

Fair trial rights also in the UN Convention on the Rights of the Child Art. 40 , EU Charter of Fundamental Rights Art. 47

Child-Friendly Justice Guidelines: Council of Europe (17.11.2010)

“Child-friendly justice” refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, ... giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is ...justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

Calls for reform

~~Lord Justice Auld, *Review of the Criminal Courts of England and Wales*(2001)~~

- All cases currently committed to the Crown Court for trial or sentence should be heard in private by **Youth Court bench** consisting of a **Crown Court judge** sitting with **two experienced magistrates** and with **Crown Court powers**
- rejected by Labour government

Calls for reform

UN Committee on the Rights of the Child
(2008) *Report on UK Compliance with
UNCRC ¶ 78:*

“Children in conflict with the law [should be] always dealt with within the juvenile justice system and **never tried as adults** in ordinary courts, **irrespective of the gravity of the crime** they are charged with.”

Calls for reform

Prison Reform Trust, *Vulnerable Defendants in the Criminal Courts* (Jacobson & Talbot 2009)

- Increase age of criminal responsibility to 14
- Provide for parity of treatment between child witnesses and child defendants.
- Remove child defendants from the Crown Court to a new form of the youth court
- Partially integrate family and criminal courts to permit a flexible and holistic response to the needs of child defendants

An alternative approach to criminalising children: Scotland's Children's Hearings

Kilbrandon Report (1964): guiding ethos

- ❖ A coherent and comprehensive child-centred decision-making system for vulnerable and troubled children from birth to 17
- ❖ Regardless of whether children are offenders or offended against, they are equally deserving to be considered as in need of social and personal care and should not be dealt with in the punitive juvenile justice system.

Kilbrandon Report (1964) Key Principles:

- A child in trouble with the law is a child in need and should be treated as such.
- separation between the establishment of disputed fact and decisions on the treatment of the child;
- use of a lay panel to reach decisions on treatment;
- vital role of the family in tackling children's problems; and
- the adoption of a preventive and educational approach to these problems.

* First implemented 1971

The Children's Hearings (Scotland) Act 2011

- Proceedings usually triggered by referral from police, local authority or a criminal or civil court – may be post-conviction and pre-sentence but most frequently a complete diversion from the CJS
- Close integration with the child protection system

Children's Hearings (Scotland) Act 2011

The hearing:

- A lay tribunal from an approved panel of volunteers representing a cross-section of the local community
- Function to safeguard and promote the welfare of the child throughout childhood as the paramount consideration
- unless this is displaced to a primary consideration where necessary to protect the public from serious harm
- An **inquisitorial**, not an **adversarial**, approach

Children's Hearings (Scotland) Act 2011

- Powers to grant compulsory supervision orders binding on the child and on the LA responsible for implementation
 - Support services LA is required to provide
 - Residence orders
 - Movement restrictions
 - Secure accommodation authorisation
 - Medical treatment
 - Orders restricting contact
 - Reparation and victim awareness programmes and treatment

Children's Hearings (Scotland) Act 2011

- Hearings in private, with one media representative
- ~~Child and caregivers must normally attend~~
- Social workers, teachers, health workers and educational psychologists typically attend
- Child's views must be heard, in a setting conducive to them being expressed
- Court may appoint a **safeguarder** to protect the child's interests in the process
- Child also may be represented, as may the family
- Entire process to take **maximum 90 working days**
- Any child who reoffends must be referred back by the criminal court to the panel before sentence

Children's Hearings Act 2011

- Children are not labelled as perpetrators or victims, but **merely as children in need**
- Almost all diversions from the CJS are initiated by the police
- Of 56,199 children referred in 2006-7, only 16,490 referred for offending behaviour and this is declining
- **most children aged 15 and under are diverted from the CJS**
- Only 100-150 Scottish children per year are prosecuted in court, for road traffic offences or for exceptionally serious crimes

[Scottish Executive, *Getting It Right for Every Child* (2004)]

