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## The over-representation of neurodivergent children in Youth Justice Systems and The Youth Court

### *Setting the Scene*

Decisions within the youth court have profound longer-term implications for the child. It is therefore crucial, and a central principle of the CJS, that a child understands and can effectively participate in all stages of the court process. Some of the challenges facing neurodivergent children relate to the processing of speech, language and communication. Further, we still know very little about how neurodivergent children process information within the court setting, whether they can effectively participate, and the impact that this has on decision making by the court or by the child.

A review of the Youth Justice System in England and Wales in 2016, Charlie Taylor concluded that:

‘Too often children are the passive recipients of justice and do not understand the process to which they have been subjected.’ (Taylor, 2016: 29).

Clasby et al (2022: 193) found that ‘courts are not designed to respond to neurological differences often seen in young people who engage with them’.

Neurodivergent children<sup>1</sup> are significantly over-represented in youth justice systems nationally and internationally. Three quarters of children with speech, language and communication needs are not identified prior to justice involvement (many of whom will also have an underlying neurodivergent condition that impacts on their SLCN), and 80% of children in the youth justice system in England and Wales are identified as having special educational needs and disabilities (SEND) (Department for Education, 2022). It is estimated that between 60 and 90% of children in custody have speech, language and communication needs (Hughes and Peirse-O’Byrne, 2016), and they experience

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<sup>1</sup> Neurodivergence encompasses a range of conditions including ADHD, ASD, FASD, DLD, Dyspraxia, Dyslexia, intellectual disability and communication difficulties (Hughes, 2015).

significant levels of emotional, mental and physical harm once in this environment (Day et al, 2020). It is also estimated that the rate of children in custody with a neurodivergent condition is higher than those serving community sentences.

In an Australian study, 89% of children had at least one neurodevelopmental impairment, 36% of whom had also been diagnosed with FASD (Foetal Alcohol Spectrum Disorder) (Bower et al, 2018). In another Canadian study it was estimated that youths with FASD were at least 19 times more likely to be incarcerated than those without FASD (Popova et al, 2011). These concerns are mirrored in the adult criminal justice system. A UK Criminal Justice Joint Inspection (2021) considered the experiences of neurodivergent adults in the criminal justice system. The inspection found that there were 'serious gaps, failings and missed opportunities at every stage of the system' (CJJI, 2021: 10). At court, neurodiverse adults were more likely to be remanded in custody before trial (CJII, 2021); over a fifth did not understand what was going on in court or why they were there (Talbot, 2008); and neurodiversity was not considered in sentencing decisions (CJII, 2021). Data for England and Wales in relation to neurodivergent children is currently not available but we anticipate findings similar issues.

### *The Youth Court*

The Youth Court is a central feature of the administration of justice for children in England and Wales (Bateman, 2021), and make a range of decisions including guilt or innocence; whether a child is remanded in custody or bailed; and sentencing. Young people aged 10 - 17 are generally sentenced in the Youth Court, though some serious offences are dealt with in the Crown Court. The main differences between the Youth Court and the adult court system are that it is less formal, and that it is a 'closed court'. This means that only people who are directly involved with the case are allowed into the courtroom, which includes support workers and appropriate adults who are encouraged to attend. Any court dealing with a young person has an obligation to consult with the local authority. The local YOT (Youth Offending Team) takes the role of the local authority in the courtroom.

However, in the Youth Court it has been found that children may be judged adversely because of their communication skills (Maras et al, 2019). This can affect the fairness of the trial process. There are also problems on sentencing: The Sentencing Council Guidelines for Children and Young People state that upon sentencing the court should consider 'any speech and language difficulties' that the child may have (Sentencing Council Guidelines, 2017). The recent case of *ZA v R* (2023) reaffirmed this stating that when sentencing a child this means taking care to explain the reasons for it to them in words that they understand.

### *Effective participation in court*

Concerns surrounding children's effective participation in court processes are long standing. For example, it was highlighted in 2012 that **all children** struggle to understand the court processes that they are subject to (Haines et al, 2012). The Carlile Independent Parliamentary Inquiry (2014) was launched in England and Wales due to concerns that the youth criminal courts were not preventing reoffending and having regard for the welfare of the child. They noted that that children's mental ill

health and/or neuro developmental disability further hinders their understanding of court processes and there is no way to identify these consistently at present, as routine screening of children for neurodivergent conditions does not exist until they are sentenced to custody. Children in the youth court are also more likely to be refused bail because they cannot understand the conditions, lack support to help them comply with the conditions (Gray, 2009; Hepworth, 2011), or receive overly stringent requirements with which they cannot comply and set them up to fail.

A range of principles for due process protections exist for children, including the Article 6 right to a fair trial under the European Convention on Human Rights. The Convention on the Rights of Persons with Disabilities (CRPD) involves a right to equality and non-discrimination under Article 5, and Article 40 the United Nations Convention on the Rights of the Child (UNCRC) offers protections for children in the juvenile justice system including the right to a fair trial. This includes being able to 'participate effectively in a criminal trial' (Stanford v UK 1994). Despite these principles for protections and guidance, the right to 'effective participation' remains unclear (Owusu-Bempah, 2018) which has led to concerns that the law and current legal processes cannot effectively safeguard this right for children in the youth courts (Ibid, 2018; Sixsmith, 2024). In view of this, the UN Committee on the Rights of the Child recently noted that children with developmental delays or neurodevelopmental disorders or disabilities 'should not be in the child justice system at all' (Hughes et al, 2020: 163).

### *Reforms*

Due to their over-representation within the offending cohort in England and Wales, policy makers have finally begun to focus on the needs of this population). For example, the Criminal Justice Joint Inspection (2021) recommended a universal screening tool, specialist training for criminal justice professionals, and improved joint working across agencies to improve outcomes for neurodiverse adults in the CJS (CJI, 2021). A range of reforms to the youth court have also been proposed including replacing it with Children's Panels (Taylor, 2016); adopting the Scottish 'Children's Hearings' Model (Carlile, 2014); specialist Magistrates for children; having Crown Court hearings affecting child defendants in the Youth Court (Bateman, 2021); and replacing the Youth Courts with 'problem solving courts' (Centre for Justice Innovation, 2023). Although the Youth Justice Board (Government body with responsibility for overseeing the youth justice system in England and Wales) has recently stated that the Youth Court is a priority area of focus, very little reform has followed.

Despite this, there is some evidence of pockets of good practice across the UK. A range of 'special measures' can be introduced into the court hearing to support children such as the removal of wigs and gowns in senior courts, using plain language and the provision of specialists to provide additional support. However, the use of such measures has been found to fluctuate considerably across courts in the UK (Turner and Hughes, 2022). Child-defendants can also access the support of an intermediary throughout criminal justice processes (YJLC, 2021a). Further guidance has been offered by the Youth Justice Legal Centre on whether a child may need an intermediary and how to apply (YJLC, 2021a) and on whether a child can effectively participate in the court hearing, and be considered fit to plead (YJLC, 2021b). The Advocate's Gateway is another useful online resource that provides good practice guidance when preparing for trial – toolkits 5, 6, 7 and 8 particularly useful for children (The Advocate's Gateway, 2024). All of this depends on defence lawyers identifying a need and courts and prosecutors engaging in the process, including in serious cases where advocacy can be highly adversarial.

In 2022, the National Autistic Society published a report which described autistic children's negative experiences in the youth justice system in England and Wales (NAS, 2022). Rather helpfully, the report also suggested a range of reasonable adjustments that could be made to all stages of the CJS to better meet the needs of autistic children in the YJS. Resources have also emerged examining experiences in Nottingham police station (University of Nottingham, 2020). Finally, in all cases where a child has suspected SLCN and/ or SEND, an intermediary should be called to consider the communication needs of young witnesses or defendants in criminal trials. Further guidance can be accessed here (YJLC, 2021c) [\[10\]](#). Examination of the effectiveness of the implementation of such guidance from the children themselves is not fully researched but could be available if cases began with a screening process and were evaluated afterwards.

### *Concluding Thoughts and Recommendations*

We know neurodivergent children are over-represented in the justice system (Day, 2022), and that they have negative experiences throughout the criminal justice system (National Autistic Society, 2022). However, to date the research has focused on experiences within the police station and custodial settings. Much less is known about neurodivergent children's experiences within youth courts. This is concerning, given that this is the key institution that makes decisions impacting on children's bail, trial and sentencing outcomes and potentially future life chances. Although more research is needed into this area so that we can understand children's experiences more fully, as a starting point we would recommend universal routine screening for neurodivergent conditions at point of entry into the youth justice system. The results of the screening could then go onto inform next steps for the child in the justice system by way of a paper hearing prior to the child's attendance at court. This hearing could consider whether expert reports should be ascertained; whether an intermediary should support the child in court; and finally, what other special adjustments should be made to meet the child's needs and ensure they are able to effectively participate during court proceedings. While this would require a significant amount of resources, political will and be a significant undertaking, we consider that this is feasible and absolutely necessary to ensure justice for children in the criminal justice system.

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