The Children's Law Centre

Written Evidence to the Committee for Justice on the Justice Bill 2014

1. The Children's Law Centre

1.1 The Children's Law Centre (CLC) is an independent charitable organisation established in September 1997, which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and where every child can achieve their full potential.

1.2 CLC undertakes education, training and research on children's rights, produces information on a wide range of children's rights topics and makes submissions on law, policy and practice affecting children and young people. We have a dedicated free phone legal advice line for children and young people and their parents and carers, known as CHALKY, through which we offer free legal advice and information on a wide range of children's legal rights issues. CLC also has a youth advisory group called youth@clc that act as peer advocates and inform our work.

CLC provides free legal representation in strategic cases. We represent at the Special Educational Needs and Disability Tribunal, School Admission and Expulsion Appeals Tribunals and the Mental Health Review Tribunal. We also provide legal representation in a limited number of strategic cases via judicial review and have experience of submitting written and making oral interventions as a Third Party to proceedings in a small number of cases with a particular focus on children's rights.

Within our policy, legal, advice and representation services we deal with a range of issues in relation to children and the law, including the law with regard to some of our most vulnerable children and young people, such as looked after children, children who come into conflict with the law, children with special educational needs, children living in poverty, children with disabilities, children with mental health problems and children and young people from ethnic minority backgrounds, including Traveller children.

1.3 Our organisation is founded on the principles enshrined in the United Nations Convention on the Rights of the Child (UNCRC), in particular:

- Children shall not be discriminated against and shall have equal access to protection.
- All decisions taken which affect children's lives should be taken in the child's best interests.
- Children have the right to have their voices heard in all matters concerning them.

1.4 We believe that the human rights standards contained in the UNCRC should be reflected in all laws and policies emanating from the Northern Ireland Assembly as one of the devolved regions of the UK Government. The UK Government as a signatory to the UNCRC is obliged to deliver all of the rights contained within the Convention for children and young people. From its perspective as an organisation which works with and on behalf of some of our most vulnerable and socially excluded children and young people, both directly and indirectly, CLC is grateful for the opportunity to provide evidence on the Justice Bill. CLC has been very involved in

discussions and consultation processes leading up to the introduction of this Bill. Given the length of the Bill and the scope of the issues covered by it, we do not intend to comment on each clause of the Bill, restricting our comments instead to areas of particular concern and those of most relevance to children and young people and therefore to the work of CLC.

CLC would welcome the opportunity to present oral evidence to the Committee for Justice on the Justice Bill, as we believe that the Bill has potentially far reaching implications for the protection of children's rights in a number of areas.

2. International Human Rights Standards

2.1 CLC believes that consideration of the Justice Bill must be directed by the international children and human rights standards, in particular the European Convention on Human Rights (ECHR), as incorporated into domestic law by the Human Rights Act 1998 and the UNCRC. CLC would submit that consideration of the Justice Bill should also take into account all of the Committee on the Rights of the Child's[1] Concluding Observations made following examinations of the United Kingdom's compliance with the UNCRC and relevant General Comments issued by the Committee to assist in interpreting the obligations under the UNCRC. CLC welcomed the commitment made under the Hillsborough Agreement to review how children and young people are processed at all stages of the criminal justice system, including detention, to ensure compliance with international obligations and best practice[2] as a recognition of the fundamental importance of international children and human rights standards in relation to youth justice.

2.2 Through the ratification of the UNCRC the Government has committed to giving effect to a set of non-negotiable and legally binding minimum standards and obligations in respect of all aspects of children's lives. Government has also committed to the implementation of the Convention by ensuring that United Kingdom (and that of the devolved administrations) law, policy and practice relating to children is in conformity with UNCRC standards. The UK Parliamentary Joint Committee on Human Rights in its report[3] on the UNCRC described the obligations the UNCRC places on Government as follows:

"The Convention should function as the source of a set of child-centred considerations to be used as yardsticks by all departments of Government when evaluating legislation and in policy-making… We recommend, particularly in relation to policy-making, that Government demonstrate more conspicuously a recognition of its obligation to implement the rights under the Convention."[4]

2.3 All children and young people under 18 are entitled to enjoy the protection of all rights afforded by the UNCRC and to the rights enshrined in other international standards such as the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),[5] the United Nations Standard Minimum Rules

[1] The independent body that monitors implementation of the UNCRC by its States parties.
[2] 'Agreement at Hillsborough Castle' 5th February 2010, Section 1, para.7.
[3] Joint Committee on Human Rights 'The UN Convention on the Rights of the Child' Tenth Report of Session 2002 – 03, HL Paper 117, HC 81.
[4] *Ibid*, para 25.
[5] Adopted by General Assembly Resolution 45/112 of 14th December 1990.

for the Administration of Juvenile Justice (the Beijing Rules)[6] and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules).[7]

3. Part 1 – Single Jurisdiction for County Courts and Magistrates' Courts

3.1 Part 1 of the Justice Bill (clauses 1 – 6) provides for the creation of a single court jurisdiction for the County Court and Magistrates' Courts. The Explanatory and Financial Memorandum for the Bill explains that historically, court boundaries for these courts have been based upon local government districts. This presents limitations on the ability to manage the distribution of court business and it is suggested that a single territorial jurisdiction would allow greater flexibility in the distribution of court business, by allowing cases to be listed in, or transferred to, an alternative court division where there is good reason for doing so.[8] Clause 2 of the Bill provides for powers to divide Northern Ireland into administrative court divisions, including divisions for specified purposes of a court (for example for the purposes of a County Court sitting as a Family Care Centre).

3.2 CLC made a submission to the Northern Ireland Court Services Consultation on this proposal in May 2010 and also commented on these proposals as part of our response to the Department of Justice's (DoJ) Equality Consultation on the Justice Bill in May 2013. Whilst we are neither in favour of nor fundamentally opposed to the proposal to create a single jurisdiction in Northern Ireland for Magistrates' Courts and the County Court, we highlighted that the focus of these proposals appeared to be about providing additional flexibility to facilitate more effective management of court business, with our concern being that the main benefit of the proposals to make the system more flexible would be for the Court Service and not the user, who could be required to travel some distance to attend court proceedings. In CLC's view, court users who are children should be able to have full access to justice at a convenient court. Children and young people can regularly be involved in legal proceedings at both the Magistrates' Court and County Court level, such as young people involved in criminal proceedings in the Youth Court. In 2013, there were 2,241 youth criminal defendants received into the Youth Court.[9] These children can often have considerable difficulty travelling to their local court which would be exacerbated if they were expected to travel to a court further afield. Many of the children who use CLC's services and particularly those who come into contact with the criminal justice system come from economically deprived backgrounds. For children like these access to transport would be a difficulty when it comes to attending court. The consequence for these children in certain circumstances if they do not attend court can be extremely serious, such as an arrest warrant being issued.

3.3 It had been CLC's understanding that under the proposals put forward by the Northern Ireland Court Service for the creation of a single jurisdiction for County Courts and Magistrates' Courts, the distribution of court business would be underpinned by an administrative framework.[10] The Northern Ireland Courts Service was clear in its proposals that providing customers with access to justice at a convenient court location would always be a significant consideration when listing

[6] Adopted by General Assembly Resolution 40/33 of the 29th November 1985.
[7] Adopted by General Assembly Resolution 45/113 of the 14th December 1990.
[8] 'Justice Bill – Explanatory and Financial Memorandum' NIA Bill 37/11-15 EFM, para.71 - 72.
[9] 'Judicial Statistics 2013' Northern Ireland Courts and Tribunals Service, Table E.7.
[10] 'Redrawing the Map' A Consultation on Court Boundaries in Northern Ireland, Northern Ireland Courts Service, March 2010, para.1.3, para.3.3, para.4.1.

court business.[11] The administrative framework proposed in this consultation document provided for a 'guiding principle' in relation to the allocation of court business, but set out that this guiding principle may be departed from with the agreement of the Lord Chief Justice or local judiciary for 'good reason'. The document stated that such a 'good reason' may include for example, the place in which the witnesses, or the majority of witnesses, reside, the avoidance of unnecessary delay, the efficient management of court accommodation, the request of a party, victim or witness to the proceedings (for example a victim in a domestic violence case, or a child witness), or to facilitate the efficient distribution and disposal of business. The consultation document released in 2010 stated that a case may be transferred where a court or judge considers it appropriate to do so, having regard to the Guiding Principle and that the factors to be taken into account when considering a transfer included those mentioned above.[12] In the summary of responses to the consultation, the Courts Service proposed to develop a protocol which would supplement the administrative framework and would prescribe the manner in which an application to depart from the guiding principle should be made, give affected parties a right to make representations and set out specific grounds on which parties could object.[13]

CLC would respectfully suggest that in scrutinising this part of the Justice Bill, the Committee may wish to inquire as to status of the proposal for an administrative framework to underpin the distribution of court business and a protocol to supplement that framework. Whilst we note that Clause 3 of the Bill provides the Lord Chief Justice with the power to give directions detailing the arrangements for the distribution of business among the County Courts and Magistrates' Courts and for transferring business from one County Court or Magistrates Court to another County Court or Magistrates Court, this does not clearly provide for the development of the type of administrative framework previously consulted upon, nor does it clearly state how applications to transfer business from one court to another will be made. CLC would welcome any proposed policy, directions, administrative framework or protocol being developed in relation to the distribution of court business being subject to further public consultation. In the summary of responses to the consultation carried out by the Courts Service, it was indicated that a draft of both the administrative framework and the protocol would be consulted on prior to the introduction of the single jurisdiction reforms.[14] In its equality consultation on the Justice Bill, the DoJ stated that the single jurisdiction model would be underpinned by an administrative framework, set out in Directions issued by the Department and the Lord Chief Justice respectively after appropriate consultation.[15] In relation to the administrative framework described above, CLC believes that consideration should not only be given to the facilitation of victims and witnesses, which we would welcome, in deciding to depart from normal listing arrangements, but that consideration should also be given to the requests of all children involved in cases, including child defendants in criminal cases.

3.4 CLC is also concerned by the impact that the creation of a single court jurisdiction could have on the promotion of equality of opportunity under Section 75 of the

[11] *Ibid*, para.3.3.
[12] *Ibid*, Annex C.
[13] 'Redrawing the Map' A Consultation on Court Boundaries in Northern Ireland – Summary of responses and proposed way forward, Northern Ireland Courts Service, October 2010, para.3.10.
[14] *Ibid*, para.4.4.
[15] 'Equality Consultation for a proposed Justice Bill (NI) 2013' Department of Justice, March 2013, para.5.4.

Northern Ireland Act 1998. In responding to the Courts Service consultation on the proposals in 2010, CLC highlighted our concern that the policy may have a differential adverse impact upon children as they will have considerable difficulty with travelling to courts other than their local court. We requested that full consideration be given as to how to mitigate against this potential differential adverse impact, such as by providing transport or making provision for the cost of transport. However in the Equality Consultation on the Justice Bill in 2013, the DoJ concluded that any impacts on those with disabilities, those with dependants and people of different ages would be minor and, in the main, positive, a conclusion that CLC does not support.[16] As a designated public authority for the purposes of section 75 of the Northern Ireland Act 1998, the DoJ is required to take action to mitigate against adverse impact or inequality as well as to proactively promote equality of opportunity. We are challenged as to how the DoJ can assert that this policy will only have a negative impact in exceptional cases[17] or that it is only anticipated small numbers of children and young people will be affected[18] when no quantitative evidence has been provided to support these assertions. As we have already highlighted above, large numbers of children and young people in Northern Ireland can be involved in court proceedings. Even if the numbers affected will be small, as suggested by the DoJ, the potential consequences for children who may not be able to attend court are so grave that they constitute a major impact on their enjoyment of equality of opportunity. CLC notes that in the summary of responses to its Equality Consultation on the Justice Bill, the DoJ states that safeguards will be contained in the administrative framework and that a final version will be consulted upon.[19] However, we were also concerned to note that the DoJ has already rejected the idea of amending the framework to provide that precedence should be given to the needs of young people, on the basis that developing this kind of priority list could create an artificial hierarchy and could fetter the judge's discretion in a way that is unhelpful.[20] CLC welcomes the prospect of further consultation on these issues and would emphasise that we do not wish to see judicial discretion fettered, but rather exercised in a way that has the best interests of all children and young people, be they victims, witnesses or defendants, as a primary consideration as required by Article 3 of the UNCRC. We would welcome the Committee considering how these concerns can be addressed.

4. Part 3 – Prosecutorial Fines

4.1 Part 3 of the Justice Bill (clauses 17 – 27) provides for the creation of prosecutorial fines, through which a Public Prosecutor can offer a person alleged to have committed a summary offence the opportunity to deal with the case through the payment of a fine of up to £200 as an alternative to the case being prosecuted through the courts. Clause 17 of the Bill is clear that a prosecutorial fine cannot be offered unless the alleged offender was aged over 18 at the time of the offence, or offences. CLC is supportive of this aspect of the Bill. CLC has previously expressed serious concerns about the payment of money by young people for low level offending and minor offences, in that we believe there is potential for the payment of money to disproportionately impact on groups with very low incomes who are already living in socially deprived areas who may not possess the means to pay. The

[16] *Ibid*, para.5.5.
[17] 'DoJ Section 75 Equality Screening Form – Single Jurisdiction', Department of Justice, 2012, p. 20.
[18] *Ibid*, p. 15.
[19] 'Report of the Equality Consultation on the Proposed Justice Bill (Northern Ireland) 2013' Department of Justice, June 2013, para.4.40.
[20] *Ibid*, para.4.45.

National Association for the Care and Resettlement of Offenders (NACRO) has expressed its concern about the use of fixed penalty notices for young people and has stated that they do not believe that fines are either an effective deterrent or an effective punishment for many. They have stated their opposition to the use of fines for young people as they do not believe that they will reduce bad behaviour or address the underlying causes, stating that any approach to get to the root causes of bad behaviour should be done after an assessment of need, so that the appropriate services can be brought in to intervene if required. The young person is unlikely to be 'punished' by the fine or payment of money, so there will be little incentive for them to change their behaviour. Instead the punishment will fall to the parents, who are unlikely to have spare money to pay, causing undue hardship. NACRO has warned that this could also put increased stress on the parent/child relationship, with parents blaming their child for the extra financial burden they have created and the child rebelling with more bad behaviour.[21]

5. Part 4 – Victims and Witnesses

5.1 Part 4 of the Justice Bill (clauses 28 – 35) relates to the establishment of Victim and Witness Charters and provides a statutory entitlement to be afforded the opportunity to make a victim personal statement. Clause 28 of the Bill requires the DoJ to issue a Victim Charter, which must set out the services which are to be provided to victims by specified criminal justice agencies and the standards which are to be expected in relation to those services, as well as the standards which are to be expected in relation to the treatment of victims by such agencies. The DoJ is currently separately consulting on a draft Victim Charter. Clause 30 of the Bill requires the DoJ to issue a Witness Charter, which must set out the services which are to be provided to witnesses by specified criminal justice agencies and the standards which are to be expected in relation to those services, as well as the standards which are to be expected in relation to the treatment of witnesses by such agencies. Clause 32 states that if a criminal justice agency fails to comply with either Charter, that failure does not make the agency liable to criminal or civil proceedings. However, the Charter is admissible as evidence in such proceedings and a court may take a failure to comply with the Charter into account when determining a question in proceedings. Clause 33 provides victims with the opportunity to make a statement. If the victim is under 18, a parent of the victim is also afforded this opportunity in addition to the victim. Under clause 35, such statements must be considered by the court when determining sentence following conviction of the person.

5.2 The needs of children and young people who are victims or witnesses of crime are recognised throughout the UNCRC. In particular Article 39 provides that State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. The UN Committee on the Rights of the Child has recommended during its examinations of the United Kingdom's compliance with the UNCRC both in 2002 and 2008 that it should be ensured that abused children are not victimised during legal proceedings and that the

[21] NACRO *Policy Lines* http://www.nacro.org.uk/criminal-justice-expertise/policy-lines/on-the-spot-fines-for-children-and-young-people,214,NAP.html

care, recovery and reintegration of victims is provided for.[22] The Committee has also recommended in 2008 that appropriate measures be adopted to protect the rights and interests of child victims and witnesses of crime at all stages of the criminal justice process.[23]

5.3 It is generally acknowledged that children and young people are more likely to be the victims, rather than the perpetrators of crime. NSPCC has noted that between 1st April 2008 and 31st March 2010, 63,325 sexual offences and offences against the person were recorded by the PSNI, 19% of which (11,927) involved children and young people aged 0–17 years as victims. The NSPCC also recognised that those who report violent crime are only a minority of those who are victims.[24] This report also refers to numerous pieces of research which indicate that a frequently cited reason for victims withdrawing their complaints was not wishing to go through the investigative or court process and that both professionals and parents will likely play an important role in encouraging/discouraging the young person's continued engagement with the criminal justice process.[25] In a report commissioned by the Department of Justice in 2011, NSPCC and Queen's University Belfast examined the views and experiences of young witnesses giving evidence in criminal proceedings in Northern Ireland. 40.5% of young witnesses involved in the report suggested some changes to the way witnesses are supported, with a number suggesting more pre-trial contact and support to help prepare them for court, whilst others thought more post-trial support should be provided.[26]

5.4 CLC is broadly supportive of this Part of the Bill as we believe that it has the potential to improve the experience of child victims and witnesses within the criminal justice system. However, we believe that there other issues which must be considered and taken forward in relation to child victims and witnesses outside of the measures outlined within the Bill. These include ensuring that children who are victims of crime can recover from their experiences through the provision of adequate counselling and therapy where necessary and ensuring that children are not victimised during proceedings. It is CLC's view that the strength of these provisions will lie in their effective implementation, particularly through measures such as the draft Victim Charter which is currently being consulted upon.

5.5 In relation to the specific clauses themselves, CLC would welcome clauses 28 and 30 of the Bill making reference to the need to include within both the Victim Charter and the Witness Charter a requirement that in all actions concerning child victims and witnesses, that their best interests will be a primary consideration. This would reflect the requirements of Article 3 of the UNCRC and would also be in keeping with the requirements of EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.[27] Currently, the DoJ is seeking to

[22] United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/15/Add.188, 9th October 2002, para.40. United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/GBR/CO/4, 20th October 2008, para.51.
[23] United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/GBR/CO/4, 20th October 2008, para.78(h).
[24] 'Child Victims in contact with the criminal justice system in Northern Ireland' Lisa Bunting, 2011, NSPCC Northern Ireland Policy, Practice and Research Series, p.6.
[25] *Ibid*, p.11.
[26] 'The Experiences of Young Witnesses in Criminal Proceedings in Northern Ireland – A Report for the Department of Justice (NI)' Hayes, Bunting, Lazenbatt, Carr and Duffy, May 2011, p.57.
[27] EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, para.14, Article 1(2).

transpose this EU Directive into Northern Ireland via the draft Victim Charter.[28] We note that under clause 28, victims will have the opportunity to make a complaint to an independent body against a criminal justice agency in relation to any provision of the Charter which has not been resolved by that agency. We believe that it would be useful to also extend this right to witnesses under clause 30. As we outline below in more detail in relation to criminal records, CLC would also welcome consideration being given at this stage as to how children and young people wishing to make a complaint will be supported and assisted in doing so. The Committee on the Rights of the Child has previously commented on the need to ensure that complaints mechanisms are accessible and child friendly.[29]

5.6 CLC also notes that the DoJ intends to bring forward an amendment to the Bill, setting out that certain information would be shared between specific organisations for the purposes of informing victims and witnesses about available services. This would appear to be designed to create a system where victims would 'opt out' of being approached regarding support rather than 'opting in'.[30] Whilst CLC can see the merits of such an approach in order to ensure that victims receive as much information and support as possible, we wish to emphasise the need for the sharing of personal data and sensitive information to be disclosed/shared only when absolutely necessary, shared discreetly and with the minimum information disclosed in order to protect the rights of the child about whom personal data is being shared. The privacy and security of child victims and witnesses must be ensured at all times and information relating to a child should only be shared when it is in their best interests.

6. Part 5 – Criminal Records

6.1 Part 5 of the Justice Bill (clauses 36 – 43) relates to arrangements for the disclosure of criminal records checks. The Explanatory and Financial Memorandum for the Bill refers to how full consultation exercises have been completed on proposals relating to the reform of the criminal record regime[31] and reference is made to the consultation document on Part One of the Review of the Criminal Records Regime in Northern Ireland (March 2012).[32] The Explanatory and Financial Memorandum then goes on to state that many of the provisions of the Bill have been developed following comprehensive options appraisals,[33] but in relation to criminal records reference is only made to the recommendations made by Sunita Mason, the Independent Adviser for Criminality Information Management for England and Wales, in her report on Part One of her review of the criminal records regime in Northern Ireland.[34] CLC is very disappointed to note the lack of reference to consideration having been given to the recommendations of the Youth Justice Review around the disclosure of criminal record information in relation to children and young people.

6.2 The Youth Justice Review considered the issue of the disclosure of criminal record information in the context of considering how young people who offend should be reintegrated and rehabilitated. The Youth Justice Review stated that:

[28] 'Draft Victim Charter: A Department of Justice Consultation' Department of Justice, May 2014, para.4.
[29] 'General Comment No.5 (2003) General measures of implementation of the Convention on the Rights of the Child' United Nations Committee on the Rights of the Child, CRC/GC/2003/5, 27th November 2003, para.24.
[30] Letter to Christine Darrah, Clerk to the Committee for Justice, 24th June 2014.
[31] *Op Cit* 8, para.8.
[32] *Ibid*, p.4.
[33] *Ibid*, para.15.
[34] *Ibid*, paras.32 – 36.

''*It is somehow perverse that while all the research evidence suggests that providing offenders with stable employment is one of the most powerful ways of preventing re-offending, the current system of informing potential employers of an offender's criminal history acts as the most potent barrier to accessing such employment. What chance do young offenders have of securing employment when the only entry on their CV is a criminal record?*''[35]

The Youth Justice Review noted that even those diverted from formal proceedings, who are not convicted, can receive a criminal record that can subsequently be disclosed under pre-employment checks and that this can lead to confusion. The Review also referred to the mistaken belief expressed in the consultation with young people which VOYPIC (Voice of Young People in Care) carried out for the review, that some young people believed that a criminal record gained as a juvenile would not affect their later life as it would be wiped clean at 18.[36] The Review noted the importance of young people being able to reach fully informed decisions about whether to accept a "diversion" or challenge the case in court and highlighted that if the disclosure implications of diversionary disposals became widely known, there is every possibility that increasing numbers of young offenders would choose to take their chances in court, thus undermining the whole purpose of diversion.[37] In relation to the disclosure of criminal records, the Youth Justice Review was clear that if young people's futures were not to be unfairly jeopardised by their offending behaviour while growing up, there is a need for change. The Review also recognised the importance of screening out from the workforce those who pose a real danger to children and vulnerable adults but stated that the vast majority of children and young people who offend do not however fall into this category.[38] The Review team also noted that their perspective on these issues was somewhat different to the review conducted by Sunita Mason.[39]

The Youth Justice Review set out a number of principles that should underpin any new arrangements on the disclosure of criminal records. Firstly, children must be protected and so if a young offender presents a real and serious risk, there can be no objection to the relevant information being made available as part of pre-employment or pre-training checks. The Youth Justice Review also stated that relevancy is best assessed at a time close to the incident and in a transparent process in which challenge is possible. Secondly, the public must be protected and the Review highlighted that one of the most effective ways to reduce offending is by helping young people acquire stable employment, meaning that artificial and unnecessary barriers to achieving that aim should be removed wherever possible. Thirdly, children and families must be treated fairly, with disposals offered as "diversionary" truly constituting diversion away from the criminal justice system and all of the consequences of involvement in that system. Diversionary disposals should not, in principle, constitute a criminal record and be subject to employer disclosure. Where children are convicted, the consequences must be proportionate to the real risk they present, which should be reviewed regularly. Fourthly, children must be given the best possible chance to succeed in life and become responsible citizens, meaning that they should be given every opportunity to put youthful misdemeanours and even serious offending behind them. In most cases, there should be a real possibility of

[35] 'A Review of the Youth Justice System in Northern Ireland', September 2011, p.82.
[36] *Ibid*, p.82.
[37] *Ibid*, p.83.
[38] *Ibid*, p.84.
[39] *Ibid*, p.84.

having the "slate cleaned" at age 18 or 21 on application by the young person.[40] The Youth Justice Review recommended therefore that:

"*21. Policy and legislation relating to the rehabilitation of offenders should be overhauled and reflect the principles of proportionality, transparency and fairness. Specific actions should include:*

a. diversionary disposals should not attract a criminal record or be subject to employer disclosure;

b. young offenders should be allowed to apply for a clean slate at age 18;

c. for those very few young people about whom there are real concerns and where information should be made available for pre-employment checks in the future, a transparent process for disclosure of information, based on a risk assessment and open to challenge, should be established. The decision to disclose and the assessment on which it is based should be regularly reviewed."[41]

6.3 CLC is supportive of the recommendations of the Youth Justice Review with regard to the disclosure of criminal records. Similar to the concerns expressed by the Youth Justice Review, CLC is extremely supportive of children being diverted **away** from harmful contact with the formal criminal justice system, as we see diversion as a positive response to youth crime which avoids the formal retribution of the criminal justice system. We believe however that the operation of diversionary measure at present do not have enough emphasis on diversion **out of** the formal criminal justice system where this is possible. CLC is aware that there are competing rights of children and young people engaged with regard to the retention and disclosure of criminal records. The UNCRC is clear about the rights of children to be protected from violence, abuse and exploitation as provided for under Articles 19, 34, 36, 37, and 39. However, the UNCRC is also clear that the treatment to be accorded to children in conflict with the law should take into account the child's age and promote the child's reintegration and the child's assuming a constructive role in society (Article 40). The Committee on the Rights of the Child's General Comment on Juvenile Justice makes it clear that this principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child.[42] This General Comment also recommends the introduction of rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions (e.g. not having committed an offence within two years after the last conviction).[43] The Beijing Rules provide that records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorised persons. Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.[44]

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[40] *Ibid*, p.84 – 85.
[41] *Ibid*, p.85.
[42] 'General Comment No.10 (2007) Children's rights in juvenile justice' United Nations Committee on the Rights of the Child, CRC/C/GC/10, 25th April 2007, para.13.
[43] *Ibid*, para.67.
[44] *Op Cit* 6, Rule 21.

6.4 It is our view that the approach to the retention and disclosure of criminal records of young people as advocated in the Youth Justice Review is the correct approach in terms of balancing the competing rights of children and young people who require protection and those who have offended. We also believe that the approach advocated by the Youth Justice Review is as per the commitment under the Hillsborough Agreement, i.e. in line with international children's rights standards and has the rehabilitation and reintegration of young people who offend at its core. It has always been CLC's main concern with regards to the retention and disclosure of criminal records that their disclosure can prevent children and young people from accessing mainstream education, training and employment, which are so important in facilitating their successful reintegration into society and preventing reoffending. In particular the evidential link between employment and successful reintegration and resettlement in the community is unequivocal. Research shows that people with convictions who get into – and stay – in jobs are significantly less likely to engage in criminal behaviour than those who do not. Employment can reduce reoffending by between a third and a half.[45]

6.5 It was with some concern therefore that CLC has noted the new arrangements for filtering that came into operation on 14th April 2014. Under these arrangements, Access NI will filter some old and minor convictions and other criminal information such as cautions from Standard and Enhanced checks. However all informed warnings, cautions, details of diversionary youth conferences and convictions held on criminal record databases will be considered for disclosure in the first instance.[46] Access NI has not, since April 2011, routinely disclosed informed warnings, cautions or details of diversionary youth conferences on certificates.[47] Whilst some cautions, diversionary youth conferences or informed warnings for certain offences will be filtered after a period of time, some will not be. Any conviction or caution, diversionary youth conference or informed warning for 'specified offences' will not be filtered. Any conviction resulting in a custodial sentence (including suspended sentences), regardless of offence, will not be filtered. A conviction will only be filtered if there is no other conviction on the individual's record. A conviction for a non-specified offence will be filtered after a period of 5½ years for those under 18 at the time of the conviction. Cautions and diversionary youth conferences will be filtered after 2 years for those under 18 at the date of the caution; with informed warnings being filtered after 1 year. However, if the caution, diversionary youth conference or informed warning was for a 'specified offence', then these will not be filtered at all. This list of 'specified offences' contains almost 1200 offences. CLC accepts that the majority of these offences relate to sexual or violent offending, though offences such as possession of drugs and criminal damage are also contained in this list. However, we do not believe that it is compliant with international standards or the recommendations of the Youth Justice Review that all convictions, cautions, informed warnings or diversionary youth conferences for such offences should be automatically disclosed. CLC is of the view that only information relating to convictions should routinely be considered for disclosure. **Information relating to cautions, informed warnings and diversionary youth conferences should only be disclosed in exceptional circumstances where the offence is sufficiently serious, is relevant and where there are concerns for public safety**

[45] 'Breaking the Circle:a report on the review of the Rehabilitation of Offenders Act', Home Office, July 2002, p.II.
[46] http://www.dojni.gov.uk/index/accessni/disclosures/filtering.htm
[47] http://www.dojni.gov.uk/index/accessni/disclosures/ani-1-2014---filtering-of-old-and-minor-convictions-and-cautions.pdf

if the disposal were not to be disclosed. Information about old and minor convictions should only be disclosed where there is a proven risk of harm due to the potential negative impact on the training and employment prospects of young people of disclosure. CLC considers the current filtering arrangements to be rigid and incapable of taking into account the particular circumstances of a child's case, or the genuine risk which exists to the public from the young person, on a case by case basis.

6.6 We believe that the rigid nature of the current filtering arrangements will disproportionately and negatively impact on many young people who have had contact with the criminal justice system but who now wish to seek education, employment and training opportunities; which are evidenced as the most positive influencers in reintegrating young people. The challenge for these young people is particularly difficult in the current economic climate even without the disclosure of information in relation to their contact with the criminal justice system. The implications of being excluded from education, employment and training are far reaching. A report from the Centre for Social Justice[48] commented that the disillusionment surrounding worklessness amongst young people has become a critical problem in Northern Ireland. Young people aged between 16 and 24 are particularly affected by worklessness. In January - March 2014, there were 14.6%, which equates to 32,000 young people (aged from 16 to 24) in Northern Ireland who were Not in Education, Employment or Training (NEET).[49] Youth unemployment in particular remains high. From April – June 2014, the rate of unemployment amongst young people aged 18 – 24 was 19.4%. The rate was as high as 24.7% in July – September 2013.[50] A recent study found that a third of long term unemployed young people have contemplated taking their own lives. The research found that long term unemployed young people were more than twice as likely as their peers to have been prescribed anti-depressants. One in three (32%) had contemplated suicide, while one in four (24%) had self-harmed. The report found 40% of jobless young people had faced symptoms of mental illness, including suicidal thoughts, feelings of self-loathing and panic attacks, as a direct result of unemployment.[51]

6.7 CLC also shares the concerns of the Youth Justice Review that the disclosure implications of diversionary disposals could increase the numbers of young offenders who choose to go to court, thus undermining the whole purpose of diversion and the DoJ's 'Faster, Fairer Justice' agenda. If a young person is accused of a specified offence and is offered the opportunity to have the offence dealt with by way of diversion, they may be less inclined to admit guilt and accept the informed warning, restorative caution or diversionary youth conference which is offered if they are aware that this will always be disclosed in future.

6.8 CLC is concerned that there is currently no transparent process for the disclosure of information, based on a risk assessment which can be challenged, nor is there any mechanism to regularly review the decision to disclose and the assessment on which the decision to disclose was based. There is no opportunity under the filtering scheme for young people to apply for a clean slate at the age of 18. We do not believe that the current approach sufficiently promotes the child's reintegration, nor

[48] Breakthrough Northern Ireland, September 2010.
[49] 'Northern Ireland Labour Force Survey' January – March 2014, p.17 http://www.detini.gov.uk/lfs_quarterly_supplement_january-march_2014.pdf?rev=0
[50] http://www.detini.gov.uk/index/what-we-do/deti-stats-index/labour_market_statistics/stats-labour-market-unemployment.htm Table 2.9 'Unemployment by age'.
[51] The Prince's Trust Macquarie Youth Index, January 2014

does it allow for an automatic removal from criminal records of the name of the child who committed an offence upon reaching the age of 18 in line with international children's rights standards and the Youth Justice Review recommendations. CLC also believes that the current filtering arrangements are in conflict with the proposed new aim of the youth justice system, set out in clause 84 of the Justice Bill, which we discuss below. In our view, a more balanced and proportionate system for the disclosure of criminal records is required.

6.9 We are encouraged to note that the DoJ has indicated its intention to bring forward amendments to the Justice Bill to provide for a review process to give effect to the recommendation of the Attorney General that there should be provision for a person to ask for discretion to be exercised in their particular case. This will require an amendment to section 117 of the Police Act 1997 and reference is also made to the Department drawing up guidance as to how such a scheme would operate. The DoJ therefore states that it wishes to introduce a review mechanism as soon as possible and believes that it will strengthen the filtering regime, making it more compatible with Article 8 ECHR and will reduce the scope for legal challenge.[52] It is of concern to CLC that the DoJ clearly believes that the current filtering arrangements are not currently compatible with Article 8 ECHR, given that section 6 of the Human Rights Act 1998 makes it unlawful for the Department to act in a way which is incompatible with a Convention right. We are challenged as to why the DoJ would have proceeded to propose to introduce the filtering scheme prior to the creation of a review mechanism if it did not believe that the scheme was fully compatible with the ECHR at that time. We would have welcomed sight of the draft clauses in relation to the review process to enable us to make informed comment on them. We would encourage the Department to publish its draft clauses as soon as possible to enable the Committee and stakeholders to engage with them on their new proposals.

6.10 In CLC's view, the recent judgment of the Supreme Court in *R (on the application of T and another) v. Secretary of State for the Home Department and another*[53] should be considered highly relevant in developing any review mechanism and in ensuring that arrangements for the disclosure of criminal records are compliant with the ECHR. In this judgement, the Supreme Court was asked to consider the cases of two individuals, T and JB. In 2002 the police issued two warnings to T, who was then aged 11, in respect of the theft of two bicycles. T had no other criminal record. In 2008 a football club, to whom he had applied for part-time employment, required T to obtain an enhanced criminal record certificate ("an ECRC") under section 113B of the Police Act 1997 Act. Under the law which existed at that time in England, disclosure was made of 'every relevant matter' contained on the Police National Computer, which included any caution or conviction. The certificate initially disclosed the warnings. In 2010, T applied for enrolment on a sports studies course, which was to entail his contact with children. The college required him to obtain an ECRC and this certificate again disclosed the warnings.

In 2001 the police issued a caution to JB, then aged 41, in respect of the theft from a shop of a packet of false fingernails. She had no other criminal record. In 2009 she completed a training course arranged by the Job Centre for employment in the care sector. The provider of the course asked her to obtain an ECRC, which disclosed the caution. It then felt unable to put her forward for employment in the care sector.

[52] *Op Cit* 30.
[53] [2014] UKSC 35.

Both T and JB claimed that the reference in certificates issued by the state to cautions given to them violated their right to respect for their private life under Article 8 of the ECHR. T further claimed that the obligation upon him to disclose the warnings violated Article 8. The court held here that the cautions issued did form part of the private life of T and JB. The court was also satisfied that the disclosure of the data relating to the cautions was an interference with the right protected by Article 8(1). Lord Reed pointed out here that whilst T was eventually allowed to enrol on the sports studies course and that it was possible, albeit unlikely, that notwithstanding the refusal of the provider of the training course to put her forward for work in the care sector, JB could have secured the post by direct application, the point was that, in both cases, the disclosure of the cautions issued to them significantly jeopardised entry into their chosen field of endeavour. This meant that the disclosure of the information was not just capable of interfering with the rights under Article 8 of the two applicants but did interfere with them. The majority of the Supreme Court took the view that the interference in the private lives of T and JB as a result of the Police Act 1997 had not been in accordance with the law, as would be required to comply with Article 8. Lord Reed highlighted that legislation which requires indiscriminate disclosure of personal data does not contain adequate safeguards against arbitrary interference with Article 8 rights. He further notes that there is undoubtedly a public interest in ensuring the suitability of applicants for certain positions, including those involving the supervision or care of children or vulnerable adults, but that in this case he could not see any rational connection between minor dishonesty as a child and the question whether, as an adult, the person might pose a threat to the safety of children with whom he came into contact.[54]

It should be noted that this judgment considered a system of disclosure in England under which disclosure of all spent as well as unspent convictions and of all cautions was required in specified circumstances, rather than the present system in Northern Ireland. CLC would submit however that the principles outlined throughout the judgment must be complied with in order to ensure that any review mechanism and arrangements for the disclosure of criminal records are compliant with the ECHR.

6.11 CLC has already had positive engagement with the DoJ in relation to a potential Independent Review mechanism and we look forward to taking part in further consultation and engagement with the DoJ on this. In CLC's view, the creation of an Independent Review mechanism provides a significant opportunity to greater reflect the recommendations of the Youth Justice Review and to ensure the current filtering process is rendered ECHR compliant. Any new Independent Review mechanism should be set within the framework of the ECHR, UNCRC and the other relevant international standards. However we are concerned that the DoJ has to date only referred to targeted consultation taking place with key stakeholders on the draft guidance and that no commitment is made to consulting on the nature of the Review mechanism itself or the new clauses that will be put in place within the Justice Bill.[55] CLC believes that in compliance with its statutory obligation under section 75 of the Northern Ireland Act 1998 the DoJ must carry out a full public consultation on its proposed Review mechanism.

6.12 In relation to the clauses currently contained within Part 5 of Justice Bill that relate to criminal records, CLC would have a number of comments. Clause 36 of the Bill repeals various pieces of existing legislation so that only applicants will now routinely

[54] CLC has compiled a summary of this case and an analysis of its relevance to criminal records disclosure which we will make available to the Committee on request.
[55] *Op Cit* 30.

receive a copy of a certificate, rather than employers or registered persons. CLC is supportive of disclosures being sent to the applicant, as opposed to the applicant and the registered person. CLC also believes that it is vital in the interests of due process that an applicant should have the opportunity to challenge or appeal information contained on a disclosure certificate and that such a challenge is overseen by an independent and competent authority, and we note the proposals for an Independent Review mechanism and clause 39 of the Bill in this regard. However, we are concerned that Clause 36 still allows for registered persons to have access to certain information about certain certificates that stops short of indicating whether the certificate contains convictions or other information. Clause 36 allows the Department to indicate that a certificate has been issued and to indicate that the certificate contained no information if that was the case. The clause also provides that Standard or Enhanced certificates must be provided to the registered person or employer in certain circumstances. CLC would welcome clarity as to the circumstances in which this obligation would apply, as this is presently unclear. We are concerned that these exceptions could undermine the purpose of sending a certificate to the applicant only in the first instance. The implication of the Department not indicating to a registered person that a certificate contains no information will be that it does contain information, even though the applicant may proceed to challenge that information.

6.13 Clause 37 of the Bill provides that children under the age of 16 should not be subject to criminal records checks except in prescribed circumstances. These 'prescribed circumstances' are not set out in clause 37, though the DoJ suggests in the Explanatory and Financial Memorandum that they would include those under 16s in home-based occupations.[56] The exact circumstances where criminal record checks against children under the age of 16 would be allowed are unclear. We welcome any limitation of the circumstances in which criminal records checks could be sought against children, as we believe that such an approach is in keeping with the international standards outlined above. However, we are concerned that the clause only applies to children up to the age of 16 rather than 18 in line with the definition of a child under the UNCRC.

6.14 Clause 39 of the Justice Bill amends the test that is applied by the police when deciding whether information should be included on an enhanced criminal record certificate. Currently, section113B of the Police Act 1997 allows information to be disclosed where the police judge that it might be relevant and ought to be disclosed. This test will be amended so that the police must now reasonably believe the information to be relevant and that it ought to be disclosed. CLC welcomes the fact that a more stringent test is now being put in place for the disclosure of information such as police intelligence. CLC believes that disclosure of police intelligence must be open and transparent and compliant with human and children's rights standards. Where possible, we believe that there should be a presumption of non-disclosure of 'soft intelligence' up to the age of 18, which we believe would be in compliance with international standards. As a minimum, decisions around the disclosure of police intelligence information in relation to a child or young person under 18 must be made at, at least Assistant Chief Constable level, within a framework for the proper consideration of all of the children's rights issues, with the best interests of the child as a primary consideration.

CLC notes that Clause 39 provides for the publication of guidance in relation to the disclosure of information, which the police will be required to have regard to. The

[56] *Op Cit* 8, p.30.

DoJ has also indicated that it intends to amend the Bill so that this Code of Practice must be published.[57] We would welcome urgent consultation on the Code of Practice and also the Committee exploring how the Department intends to discharge its obligations under section 75 of the Northern Ireland Act 1998 with regard to the Code of Practice which is a policy in its own right, and should be subject to all of the section 75 processes.

CLC also notes that Clause 39 will allow persons to apply to an Independent Monitor to determine whether information disclosed is relevant and ought to be disclosed. This application will be made in writing. The Independent Monitor will then ask a chief officer to review the information, though the ultimate decision appears to rest with the Independent Monitor. Both the chief officer and the Independent Monitor must have regard to the Code of Practice published by the Department. It is extremely important that that this process is entirely independent. However, if the application is to be referred to the police, the Bill should clearly specify that the application will be referred to a different chief officer then the one who made the initial decision to disclose the information. CLC would also welcome consideration being given as to how children and young people wishing to apply to the Independent Monitor will be supported and assisted to make an application to the Independent Monitor. This is particularly important given the profile of children likely to come into contact with the criminal justice system i.e. disproportionate levels of children with Special Educational Needs (SEN), learning disability, mental health, literacy and communication problems and English as an additional language.

6.15 Clause 40 of the Bill provides for the creation of portable certificates, meaning that individuals will not have to apply for a new certificate for each job or volunteering opportunity for which one is required. CLC is supportive of the concept of 'portability' as it would enhance the operation of the checking system, while making the entire checking process less burdensome for individual applicants. However, we would again emphasise that the importance of disclosures being sent to the applicant in the first instance, to allow them the opportunity to challenge or appeal against any new information. Under clause 40, a 'relevant person', which the Explanatory and Financial Memorandum states will in many circumstances will be an employer, will be permitted to ask whether there is any new information.[58] The response which the registered person can receive will either indicate effectively that there is no new information, or that a new certificate should be applied for. We are again concerned that the implication of indicating to a registered person that a new certificate should be sought is that there is information to disclose, even though the applicant may proceed to challenge that information.

7. Part 6 – Live Links in Criminal Proceedings

7.1 Part 6 of the Justice Bill (clauses 44 – 49) relates to expanding the use of live video links in courts to include committal proceedings, first remands at weekends and public holidays and breach proceedings for failure to comply with certain orders. This part of the Bill would also allow persons detained under the Mental Health Order to appear in court via video link and would extend the circumstances in which witnesses may give evidence via video link. **CLC has serious concerns with regard to the use of live links in criminal cases which involve children and young people, as we believe they are potentially in breach of Article 6 of the ECHR and Articles**

[57] *Op Cit* 30.
[58] *Op Cit* 8, p.31.

3, 12 and 40 of the UNCRC. Article 12 of the UNCRC provides children with the right to be heard in judicial or administrative proceedings affecting them.

7.2 CLC is concerned that extending the use of live links will remove any personal connection that would otherwise have been established had the child been present in court. This is also true of the child's relationship with their legal representative. We believe that a child needs to have personal contact with their own legal representative so that they can instruct their legal representative and communicate effectively. If the child is not present in court and does not have direct personal contact with their legal representative there may be huge implications for establishing informed consent. It is well acknowledged that effective communication with children, particularly vulnerable and marginalised children with disabilities who are disproportionately more likely to come into contact with the criminal justice system, is challenging and that barriers exist. If the child is not present in court, the child's legal representative and the court itself are greatly disadvantaged in being able to determine the competency of the child to give instructions and understand the implications of the hearing and participate effectively, particularly with regard to children as young as ten.

7.3 The need for children to be able to fully participate in and understand proceedings in which they are involved have been identified as fundamental to guaranteeing the right to a fair trial under Article 6 of the ECHR by the European Court of Human Rights. In the case of *T & V v UK* [59] the European Court of Human Rights stated in its judgment that it is essential that in the case of children charged with an offence that steps must be taken to ensure that children are able to understand and participate in the proceedings. In the case of *S.C* v *UK*[60] the European Court of Human Rights found that the right of an accused to effective participation in his or her criminal trial generally included not only the right to be present, but also to hear and follow the proceedings. In the case of a child it was essential that he or she be dealt with in a manner which took full account of his or her age, level of maturity and intellectual and emotional capabilities and that steps were taken to promote his or her ability to understand and participate in the proceedings, including conducting the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition. Further comment has also been made by the High Court in England in the case of *TP* v *West London Youth Court.*[61] The High Court found that there were a number of measures which should always be taken to ensure that a child receives a fair hearing including keeping the child's level of cognitive functioning in mind, using concise and clear language, having regular breaks, taking additional time to explain court procedures, being proactive to ensure that the child has access to support, explaining and ensuring the child understands the charge as well as explaining possible outcomes and sentences and ensuring that cross-examination is carefully controlled so that questions are short and clear and frustration is minimised. In this jurisdiction, the Lord Chief Justice has issued a Practice Direction in relation to the Trial of Children and Young Persons in the Crown Court, which includes as part of its overriding principle that:

[59] *T & V* v *UK* (EurCtHR), App. No. 24724/94 and App.No.24888/94, (16th Dec 1999).
[60] EurCtHR, App No 60958/00, (15th June 2004).
[61] [2005] EWHC 2583.

''*All possible steps should be taken to assist the young defendant to understand and participate in the proceedings. The ordinary trial process should so far as necessary be adapted to meet those ends.*''[62]

It goes on to state that:

''*The court should explain the course of proceedings to a young defendant in terms he can understand, should remind those representing a young defendant of their continuing duty to explain each step of the trial to him and should ensure so far as practicable that the trial is conducted in language which the young defendant can understand.*''[63]

In CLC's view, the use of live links has the potential to exacerbate the difficulty of ensuring that vulnerable children can understand the proceedings in which they are involved and would in our view be potentially inconsistent with the judgments cited above

7.4 A report commissioned by the Northern Ireland Office (NIO) in 2008 has been used by the DoJ as evidence in support of extending the use of live links. This report indicated that three quarters of the 20 young people sampled were in favour of video links on the grounds of convenience and speed. However, this report also identified that one young person sampled justified his preference for being escorted to court on the grounds that he could hear what was happening better in court, and that he preferred speaking to his solicitor in person.[64] The report also noted that in a few cases there were some difficulties, mainly of a technical nature, concerning sound and picture quality, for example when it was not always easy to hear what participants were saying. This question was also referred to by some interviewees, who spoke of occasional technical difficulties with the sound and picture, though some young people identified that hearing properly could be a difficulty when physically present in court. The report also identified a very small number of instances where an apparent lack of communication between the court or the defence solicitors and the staff in Juvenile Justice Centre resulted in longer than normal waits for the children, and even occasions when cases were heard in the child's absence.[65] The report also notes in its conclusions that young defendants did appear confused at times when they were unable to hear their solicitor or other court personnel, and they would sometimes turn to the member of staff to ask questions. They also occasionally appeared to be confused about the outcome.[66]

CLC believes that this evidence highlights concerns regarding the use of live links and their potential to adversely affect a child's ability to participate in and understand legal proceedings, which should be given serious consideration before decisions are taken to extend their use. We note that Include Youth conducted consultations with young people in both the Juvenile Justice Centre and Hydebank Wood Young Offenders Centre in February 2012 that suggested that, four years on from the NIO

[62] Practice Direction 2/11, 'Trial of Children and Young Persons in the Crown Court', 14th February 2011, para. 3.
[63] *Ibid*, para. 11.
[64] 'Evaluation of the Woodlands Juvenile Justice Centre Youth Court Video Link' Northern Ireland Office Statistics and Research Branch, NIO Research and Statistical Series: Report No. 19, Independent Research Solutions Helen Dawson, Seamus Dunn and Valerie Morgan, June 2008, p. 19.
[65] *Ibid*, p. 2.
[66] *Ibid*, p. 22.

report, there remained significant problems with technical difficulties in the use of live links and issues regarding children's ability to fully participate through a live link.[67]

More recent research carried out by Include Youth concluded that the majority of the issues raised as being problematic with the use of live links remain unaddressed, that young people do not appear to be fully aware of the available options when it comes to using live links, that young people using live links can feel removed from the process, that technical problems are an issue and that some young people cannot accurately hear proceedings and that the quality of the engagement with solicitors appears to be called in to question.[68]

Given the importance of the child's right to a fair trial we would be supportive of the DoJ being as robust in the implementation of its policy proposals as possible, relying on recent independent research into the use of live links in proceedings involving children and scrutinising the impact on the child's ability to participate in and understand the court proceedings. It is extremely disappointing that the DoJ has not moved to commission such research, given CLC's recommendation that it do so in responding to the initial consultation on some of these proposals in September 2012. In its summary of responses to that consultation, the DoJ undertook to review the operational capacity of existing systems on which any new facilities would be built before any additional services arising from the current proposals are put in place.[69] However, in its summary of responses for the equality consultation on the Justice Bill, the DoJ stated that it could not provide further details as to what this would mean in practice, as the legislation had not yet received assent. The DoJ did however reaffirm its commitment to review the operational aspects of the system before any of the live links proposals are actually brought into force.[70] Given the problems with the current operation of the live link system, CLC is challenged as to why the DoJ would delay any review of the system until after legislation was passed. In our view, before proposing to extend the use of live links, the DoJ must be satisfied that the current system is working effectively and fundamentally that the use of live links can ensure the child's right to a fair trial. In the summary of responses for the consultation undertaken on extending the use of live links to weekend courts, the DoJ indicated that it would take the suggestion for consultation with young people forward as part of the review to improve the operation of live links in young people's cases.[71] We would welcome the Committee inquiring as to whether the DoJ has taken forward consultation with children and young people to improve the operation of live links for them.

7.5 CLC also notes with some concern that the various consultation documents released by the DoJ on these proposals have made reference to the expanded use of live link facilities helping to ''*obtain maximum value from the equipment already installed*''.[72] We firmly believe that the use of live video links must always be driven by the interests of justice and the best interests of the child and not simply by what is cost

[67] Include Youth Response to Department of Justice consultation on proposals to extend the use of live links in court, September 2012.
[68] Include Youth Response to the Department of Justice consultation on proposals for the use of live links in weekend courts, 31st May 2013.
[69] 'Summary of responses and way forward: Consultation on proposals to extend the use of live links in court' Department of Justice, October 2012, p. 13.
[70] 'Report of the Equality Consultation on the Proposed Justice Bill (Northern Ireland) 2013' Department of Justice, June 2013, p.23.
[71] 'Consultation on Live Links in Weekend Courts – Summary of Responses and Way Forward' Department of Justice, July 2013, p.8.
[72] *Op Cit* 15, para. 5.27.

effective or to *"obtain maximum value from the equipment already installed"*. We have noted the DoJ's assertion in the summary of responses to the consultation on this issue in 2012 that the DoJ accepts that administrative ease or financial expediency must never take precedence over the rights of often extremely vulnerable children and young people and that it will ensure that that is not the case.[73]

7.6 Notwithstanding CLC's opposition to the use of live links, we would make the following comments on the draft clauses contained in Part 6 of the Justice Bill. CLC notes that several of the new scenarios in which live links may be employed under the Bill require the consent of the accused person (clauses 44 and 46). Whilst the DoJ did not accept, in the summary of responses to the consultation on this issue in 2012, that a live link would diminish the ability of the defendant to instruct their legal representative to make representations on their behalf around the prosecution of their offence, it did recognise the importance of informed consent and support, particularly where young people are concerned. The Department has therefore undertaken to establish enhanced procedures for young people involved in considering the use of a live link to ensure that informed consent is present.[74] However, in its summary of responses for the equality consultation on the Justice Bill, the DoJ indicated that it again could not provide any further detail on what this would mean in practice, as the legislation had not yet received assent. Whilst the DoJ reaffirmed its commitment to this proposal for enhanced procedures and indicated that it will provide information publicly in due course,[75] CLC is challenged as to why the DoJ is proposing to bring forward this legislation without having firm safeguards in place to protect young people. CLC has major concerns about the use of live links and obtaining informed consent and this issue should be resolved before the use of live links with children and young people is legislated for.

7.7 In equality screening the proposals for the equality consultation on the proposed Justice Bill in 2013, it was also stated by the DoJ in relation to children and young people, that legislative safeguards will be put in place to ensure that direct participation in the proceedings is maintained, similar to those that exist within current live link provisions.[76] In this regard we note the reference within clauses 44 and 45 to the court being under a responsibility to adjourn proceedings where it appears to it that the accused is not able to see and hear the court and be seen and heard by it, if this cannot be immediately corrected. We do not however see any reference to this safeguard within clause 46 of the Bill which deals with breach proceedings for failing to comply with certain orders or licence conditions. We would suggest that this safeguard also be added in clause 46.

7.8 Clause 44 of the Bill allows for the accused to appear at committal proceedings via live link and to give evidence at committal proceedings via live link. The accused must consent to appearing at the hearing via live link and to giving evidence in this way. Our concerns regarding the child's ability to participate and understand proceedings through a live link and the importance of personal contact with the court and legal representatives also apply here. Clause 46 allows for proceedings for failure to comply with certain orders, such as probation orders, attendance centre orders, youth conference orders or the supervision requirements of Juvenile Justice Centre Orders to occur via video link. In all of the proceedings set out in clause 46

[73] *Op Cit* 69, p. 10.
[74] *Ibid*, p. 12.
[75] *Op Cit* 70, p.23.
[76] 'DoJ Section 75 Equality Screening Form – Extending the use of live links' Department of Justice, p.13.

that will now be capable of being undertaken via live links, children and young people may be required to participate to a large degree, either personally or through their legal representatives. For example, the young person may dispute that they have breached the requirements of their supervision or their youth conference order, or may offer a reasonable excuse as to why they breached the requirements of their supervision. CLC would question whether a child or young person will be able to effectively participate and understand proceedings if they appear in such proceedings via live link. We accept that children will have to consent to attend breach proceedings via live link, but again we would have concerns that children and young people may consent without fully understanding the consequences of doing so, believing that the live link will simply be a more convenient course of action.

7.9 Clause 45 of the Bill introduces a power to hold hearings where an accused is appearing before the court for the first time on a Saturday or Sunday or a public holiday. These proposals were subject to a separate consultation exercise in 2013 to which CLC responded. The DoJ's proposals at this time were to create a more centralised system of weekend bail courts based on the use of live link facilities. Currently at weekends, when a person is charged with an offence, a court is often specially convened for bail purposes. This process is replicated across Northern Ireland and the DoJ argued that this provides a very inefficient and costly judicial system as often a spread of courts have to be arranged across a number of court districts with defendants brought to them and police, court and legal costs incurred. Under the proposals a bail court would sit in a centralised location or locations linked to "feeder" locations by video link. This would allow cases from across Northern Ireland to be considered by a single judge. Operationally, hearings would be scheduled from around those feeder locations into a weekend rota court. The DoJ argued that cases could be dealt with speedily and a more efficient police, court and judicial system would be provided.[77]

CLC wishes to again highlight that the use of live video links must always be driven by the interests of justice and the best interests of the child and not what is considered to be more efficient or cost effective. CLC continues to have concerns at the lack of clarity regarding whether legal representatives will physically attend court to represent their clients under these arrangements, or whether they will be expected to also appear via video link from the 'feeder' location. If legal representatives are expected to travel to the centralised location and appear physically in court, then CLC could envisage significant practical problems arising, including implications for the solicitor's ability to effectively communicate with the young person and take instructions, as they may have to make lengthy journeys under significant time pressures. This could also impact on their ability to challenge the prosecution case, particularly if the prosecution is objecting to the child or young person being granted bail. There could be equally significant implications if legal representatives are instead expected to represent their clients via video link from a 'feeder' location. Whilst personal contact between the child and their legal representative will be maintained, there will be absolutely no personal connection between the child, their legal representative and the court. In its summary of responses to the consultation on these proposals, the DoJ indicated that any weekend remand hearing to be held by live link could see persons taken to a number of "feeder" courthouses where their legal representatives could be available for connection to a judge at a central location and that a fully operational model would be developed ahead of legislation.[78] This

[77] 'Consultation on proposals for the use of live links in weekend courts' Department of Justice, March 2013.
[78] *Op Cit* 71, p.9.

situation is not clarified by clause 45 and CLC would welcome the Committee considering this issue, particularly in relation to the operational model which the DoJ intends to put in place.

CLC also has concerns at the lack of reference to the need to secure the informed consent of the child to appear via video link prior to the video link hearing. It is stated in the Explanatory and Financial Memorandum that the provisions of the Bill relating to live links do not change a patient or defendant's entitlement to be present at a hearing.[79] Clause 45 however makes no reference to the need to secure the consent of the accused to appear via video link, which is a major difference between this power and other powers that allow the appearance of a person in court via video link. The requirement that an accused person consent to the use of video links has been presented as a safeguard within the process in the past, allowing children and young people to appear physically in court if they so wish. In any event, even if the child was asked to consent, CLC has already expressed concerns that in practice, it will be exceptionally difficult for children to object to the use of live link in this way. For example, if a child has been arrested and charged in Enniskillen and objects to the use of live link, insisting instead that they wish to appear personally in court, but the centralised court location is Belfast, how will they be securely transported there? How will the child have the opportunity to provide full instructions to their legal representative if they are forced to make such a significant journey in order to appear in person? What if the court sittings for that day will conclude by the time the child arrives? These considerations in relation to the consent of the child reaffirm our concern that these proposals are being driven by what is considered to be efficient and cost effective, rather than what is in the best interests of the child. The absence of the requirement for an accused person to consent to appear via video link and the difficulties that an accused person may encounter in objecting to appearing via video link, even if consent were required, makes clause 45 in our view fundamentally flawed.

7.10 Clause 49 of the Bill extends the use of live links in certain court proceedings to include patients detained in hospital under Part 2 of the Mental Health (Northern Ireland) Order 1986. Part 2 of the 1986 Order relates to persons compulsorily detained in hospital in relation for assessment or treatment of a mental illness. Currently, only patients detained under Part 3 of the 1986 Order, i.e. those patients compulsorily detained via the criminal justice system, are able to appear via video link. Whilst we appreciate that the DoJ's rationale behind these proposals may be to avoid disturbance to patients and to assist with the management of risk, patients who are detained under Part 2 *for the purposes of being assessed* and who have criminal proceedings pending alongside their status under Part 2 should not be required to attend court at all, regardless of whether this is in person or via video link. We believe this to be justified given that the assessment period is a maximum of 14 days. The need to ensure that a child can understand and participate in proceedings is more acute whenever that child or young person is being treated for a mental illness and appearing in court via live link could prove to be a confusing and disorientating experience. Such children and young people are in need of intensive, specialist help in order to understand and participate in criminal proceedings and we would question whether this can be readily achieved via live link. We note that several of the legislative provisions around preliminary hearings, which clause 49 will amend in order to extend them to include Part 2 of the 1986 Order, do not require that the person consents to appearing via video link, which we have expressed concerns about above.

[79] *Op Cit* 8, para.86.

The Department has previously recognised in equality screening these proposals that live links arrangements for young people and patients in psychiatric hospitals will require particular consideration and development and indicated that arrangements will be made to consult with these groups and the locations where they will be used. It was also indicated that guidance notes for practitioners would be produced to ensure that live links are only used in appropriate circumstances.[80] CLC welcomed the prospect of consultation with children and young people, as one of the groups likely to be affected by this policy and would welcome the Committee exploring the results of such consultation with the Department as part of scrutinising the Bill. CLC is unaware of any guidance produced by the Department to ensure that live links are only used in appropriate circumstances and we would welcome the Committee enquiring as to the status of such guidance. We would welcome full public consultation on guidance produced by the Department in line with section 75 of the Northern Ireland Act 1998.

CLC would also welcome the Committee enquiring as to whether the DoJ has considered the potential impact that the proposed Mental Capacity Bill will have in relation to these proposals. It is expected that the Mental Capacity Bill will lead to the repeal of the Mental Health (Northern Ireland) Order 1986 in its entirety for those aged 16 and over. For under 16s, the Mental Health (Northern Ireland) Order 1986 will be retained with some amendments due to the assumption that under 16s may lack capacity due to immaturity.

8. Part 7 – Violent Offences Prevention Orders

8.1 Part 7 (Clause 50 – 72) of the Bill proposes the creation of the Violent Offences Prevention Order (VOPO). VOPOs would allow the courts to place conditions on the behaviour of those convicted of violent offences and would also require such persons to notify the police of various personal details. VOPOs will be civil orders imposed on convicted violent offenders. They will impose conditions on violent offenders which they must comply with or actions which they must refrain from. Breach of a VOPO will be a criminal offence which may result in up to 5 years in prison. CLC believes that the imposition of additional conditions through the application of VOPOs to under 18s is unnecessary, as violent young offenders being released from custody should in reality be already subject to conditional release, such as release on licence. In addition, VOPOs are civil orders, breach of which is a criminal offence with criminal consequences, which will draw young people further into the criminal justice system and are in conflict with the fundamental principles of reintegration and rehabilitation as clearly detailed in international children's rights standards. **Similar provisions do not apply to under 18s in England and Wales**.

8.2 Proposals for the creation of VOPOs were first consulted upon in 2011. VOPOs were at this point referred to as the Violent Offender Order (VOO). This consultation did not address the issue of the age of persons to whom VOPOs would be applied specifically. However, at that point the proposals for VOPOs were based on the VOO in England and Wales, which can only be applied to persons aged 18 and over under the Criminal Justice and Immigration Act 2008, a point which was made in the

[80] 'DoJ Section 75 Equality Screening Form – Extending the use of live links' Department of Justice, p. 25.

consultation paper.[81] It was not proposed in the consultation paper that VOOs should be extended to apply to under 18s.

8.3 Following this consultation, CLC was notified by the DoJ that it intended to make VOPOs available in respect of all eligible offenders, regardless of their age, including under 18s. The DoJ indicated to CLC that the key criminal justice agencies had asked for these proposals to more fully replicate provisions made for Sexual Offences Prevention Orders, upon which the VOPO proposals were now being modelled.[82] It appears that following the public consultation process on the creation of VOPOs, a small number of criminal justice agencies made a proposal that VOPOs should be extended to under 18s. As we have already stated, this was not part of the original consultation proposals and CLC is unaware of any consultee having suggested that VOPOs be extended to under 18s. CLC was asked for its views on this issue of age thresholds and expressed firm opposition to the extension of VOPOs to under 18s. However the extension of VOPOs to under 18s appears to be reflected within the Justice Bill; clause 50 does not exclude under 18s from persons who may be subject to VOPOs, clause 53 of the Bill does not specifically exclude under 18s from the definition of a 'qualifying offender' for a VOPO and clauses 51 and 52 do not limit the ability of the courts to make VOPOs in respect of under 18s.

8.4 **CLC is strongly opposed to the proposal that VOPOs should be made available in relation to children and young people and we would welcome the Justice Bill being amended to clearly define that a VOPO can only be sought against a person who was aged over 18 at the time that they committed the relevant offence or offences which have led to a VOPO being sought.**

8.5 CLC is concerned that VOPOs have not been developed with the intention of rehabilitating children who commit violent offences and reintegrating them into society, which in CLC's view is the best method of protecting the public from future offending. VOPOs appear to be focused only on the protection of the public from the risk of serious violent harm rather than on the child's rehabilitation and reintegration. The Bill allows a wide discretion in terms of the conditions that a VOPO may contain. Clause 54 states that a VOPO may contain provisions prohibiting the person subject to it from doing anything described in the order, or requiring them to do anything described in the order. These prohibitions or requirements may only be included if they are necessary to protect the public from the risk of serious violent harm. In notifying CLC of the intention to extend VOPOs to include under 18s, the DoJ informed CLC that VOPOs would place requirements and prohibitions on young people, such as their access to certain places, premises, events or those persons to whom it is considered that they will pose a risk.[83]

8.6 CLC would also question the practical need for VOPOs in this jurisdiction in relation to children and young people. VOOs, which exist in England and Wales and which formed the basis for the original proposals for VOPOs, cannot be applied to under 18s. In our view, the DoJ has provided no evidence that suggests that VOPOs are needed in relation to children and young people in Northern Ireland. Indeed, the DoJ has proposed extending VOPOs to under 18s on the basis that they would only be applied for against young offenders in a very few exceptional cases, with data

[81] 'Sex Offender Notification and Violent Offender Orders – Proposals for Legislation' Department of Justice, 2011. p.41.
[82] Letter to Paddy Kelly, Director of Children's Law Centre, 4th March 2014.
[83] Paper attached to Letter to Paddy Kelly, Director of Children's Law Centre, 4th March 2014.

demonstrating that those eligible for a VOPO may be in the region of 7 per year, and that only a proportion of the 7 identified as eligible may have an order applied.[84] In our view, such information does not support the extension of VOPOs to children and young people. Numerous orders currently exist that can be used by the courts when dealing with children and young people found guilty of violent offences, and which all contain elements of supervision or prohibition of activities. These include Juvenile Justice Centre Orders, Youth Conference Orders and Probation Orders. Failure to comply with the requirements of these orders can result in the child being returned to court to be dealt with in an alternative manner. Various orders can also be made to detain children in custody where they have been found guilty of 'serious' or 'specified' offences, which are listed in Schedules 1 and 2 of the Criminal Justice (Northern Ireland) Order 2008, and which relate generally to violent or sexual offences. Before making these orders, the courts are required to consider whether there is a significant risk to members of the public of serious harm occasioned by the commission by the child of further 'specified' offences. Children and young people can only be released on license under these orders where the Parole Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that they should be confined. Licenses vary in length under this legislation, depending upon the sentence imposed, but they can be revoked and individuals can be recalled to custody. Article 45 of the Criminal Justice (Children) (Northern Ireland) Order 1998 also provides the courts with an additional option in relation to the punishment of what it describes as certain grave crimes. This again involves releasing the child on license at some point, with the Parole Commissioners again directing release once they are satisfied that it is no longer necessary for the protection of the public from serious harm that the child should be detained. The Department of Justice has the power to revoke the license and recall the child to custody.

8.7 Given that this menu of legislative disposals already exists, we are challenged as to why VOPOs are considered necessary in relation to children and young people at all. In particular we note that under clause 51 and 52 of the Justice Bill, a court cannot make a VOPO unless it is satisfied that it is necessary to make such an order for the purpose of protecting the public from the risk of serious violent harm caused by the person. A risk of serious violent harm is defined under clause 50 as meaning serious physical or psychological harm caused by that person by committing one or more specified offences. Under clauses 51 and 52 of the Bill, the courts may only make a VOPO in respect of persons convicted of a specified offence, which is defined under clause 50 as meaning an offence listed under Part 1 of Schedule 2 of the Criminal Justice (Northern Ireland) Order 2008. These considerations all appear to be very similar to the considerations that the courts will already be required to have undertaken when deciding whether to make an order under the Criminal Justice (Northern Ireland) Order 2008, as outlined above. If the court is of the view that a sentence under the Criminal Justice (Northern Ireland) Order 2008 is required, which will result eventually in the person being released on license, we are challenged as to why a VOPO will be necessary at all. If a VOPO is sought for a young person who has been released on license under the 2008 Order, on the basis that a person continues to pose a risk of serious violent harm to the public, it should be remembered that the Parole Commissioners will not have directed the release of the young person unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the person should be confined. In circumstances where the Parole Commissioners have determined that the person can be released on license, it would seem incongruous to then apply to the court for

[84] *Op Cit* 82.

a VOPO on the basis that the person continues to pose a risk of serious violent harm to the public.

8.8 We note that under clause 52, the Chief Constable will have the power to apply for a VOPO in relation to persons who have been convicted of specified offences. The court must be satisfied that the person's behavior since their conviction makes it necessary to make a VOPO for the purpose of protecting the public from the risk of serious violent harm caused by the person. In deciding whether to make such an order, the court is required to consider whether any other statutory provision or measures are operating to protect the public from the risk of harm. It is not clear from this provision whether such applications will be decided on the civil standard of proof i.e. proof on the balance of probabilities, or the criminal standard of proof i.e. proof beyond reasonable doubt. The Explanatory and Financial Memorandum for the Bill states that VOPOs will be a civil preventative measure,[85] which implies that applications for VOPOs will be decided on the balance of probabilities. The use of the civil standard of proof in such proceedings would greatly concern CLC, as we believe it would blur the distinction between criminal and civil proceedings, as the VOPO could be granted on the civil standard of proof, but with breach of the VOPO being a criminal offence. Clause 66 of the Bill states that failure to comply with the requirements of a VOPO is an offence, punishable by imprisonment of up to 5 years or a fine, or both.

8.9 CLC also has serious concerns with regard to the DoJ's compliance with its statutory equality obligations under section 75 of the Northern Ireland Act 1998 in the development of these proposals. Since being notified of the DoJ's intention to extend the use of VOPOs to under 18s, we have been concerned to note that there has been no evidence that these proposals have been assessed for their impact on the promotion of equality of opportunity through equality screening and equality impact assessment (EQIA). As outlined above, proposals for the creation of VOPOs were first consulted upon in 2011 (at this stage they were referred to as VOOs) and an equality screening was conducted at this time. It was not proposed in the consultation paper that VOOs should be extended to apply to under 18s. Following this consultation process, CLC was made aware that it was now proposed that VOPOs should be available in respect of all eligible offenders, regardless of their age, meaning that the order could be applied for in relation to children and young people under the age of 18. Given that this was a new policy proposal, it should have been subject to thorough equality screening and a comprehensive EQIA, including direct consultation with children and young people, should have been carried out. CLC has requested that the DoJ comply with its obligations under section 75 of the Northern Ireland Act 1998 as a matter of urgency by carrying out an urgent screening exercise on its proposals to extend VOPOs to children and young people, and where differential adverse impact or ways to greater promote equality of opportunity are identified as we believe they will be, to carry out a comprehensive EQIA. This request has not been responded to.

9. Part 8 – Miscellaneous

Early Guilty Pleas

9.1 Clauses 77 and 78 of the Justice Bill relate to the issue of encouraging early guilty pleas in Northern Ireland. Clause 77 of the Bill requires a court in passing sentence to indicate the sentence that it would have passed had the defendant entered a guilty

[85] *Op Cit* 8, para.87.

plea at the earliest reasonable opportunity. The court is only required to do this when the defendant did not plead guilty at any stage of the proceedings, or pleaded guilty to the offence or indicated an intention to plead guilty, but did not do so in the opinion of the court at the earliest reasonable opportunity. In the Explanatory and Financial Memorandum for the Bill, it is stated that this clause is intended to increase awareness of the availability of sentencing credit for an early guilty plea and to add clarity around the level of credit that may be awarded.[86] Clause 78 of the Bill requires defence solicitors to advise their clients of the effect of Article 33 of the Criminal Justice (Northern Ireland) Order 1996 when representing them in connection with the investigation of an offence or in proceedings against them for the offence. Article 33 of the 1996 Order requires a court, when sentencing a person who has pleaded guilty, to take into account the stage at which a person indicated an intention to plead guilty and the circumstances in which that indication was given. Clause 78 also requires that the solicitor must advise the client of the likely effect on any sentence that might be passed on the client if convicted, of pleading guilty to the offence at the earliest reasonable opportunity or indicating an intention to plead guilty at the earliest reasonable opportunity. CLC is conscious that the DoJ intends that these clauses will provide legislative support to a non-legislative scheme being developed to provide a structured early guilty plea scheme in the Magistrates' Courts and Crown Court, as indicated in the Explanatory and Financial Memorandum for the Bill.[87] We would welcome the Committee exploring the status of this scheme as part of its scrutiny of the Bill, with particular consideration being given to the issues we have outlined below.

9.2 CLC has a number of concerns regarding putting in place adequate safeguards and protections to ensure that proposals aimed at tackling delay, such as encouraging early guilty pleas, do not interfere with the child's fundamental right to a fair trial under Article 6 of the ECHR as incorporated by the Human Rights Act 1998. As we have highlighted above in relation to live links, case law is unequivocal with regard to the need for a child to be facilitated to adequately participate in and understand proceedings in order to have the right to a fair trial under Article 6 of the ECHR upheld. In implementing clauses 77 and 78 of the Bill and in taking forward any non-legislative early guilty plea scheme, CLC wishes to see the Department proactively taking measures to protect and uphold the child's right to a fair trial as outlined above. There is a need for adequate safeguards and protections for young people in any system aimed at encouraging early guilty pleas. These safeguards and protections must be clear and robustly applied to ensure that young people in the criminal justice system are aware of the implications of pleading early and have their right to a fair trial upheld. CLC appreciates that there are already provisions in the criminal justice system for defendants to plead early and that there is significant discretion for judges to reduce an offender's sentence where there is an admission of guilt at an early stage. We also appreciate that the DoJ has previously emphasised when consulting on these proposals that the intention of the proposals is not to encourage more guilty pleas overall, or seek to diminish the presumption of innocence, but only to encourage those offenders who are guilty and who will eventually plead guilty to do so earlier. However, we have some concerns about the profile and vulnerabilities of young people who come into contact with the criminal justice system, who are more likely to have special educational needs, learning disabilities, mental health issues and literacy and communication problems.

[86] *Ibid*, p.43.
[87] *Ibid*, para.92.

9.3 The Criminal Justice Inspectorate (CJINI) published a report on early guilty pleas in February 2013, within which it conducted 62 interviews with sentenced prisoners, both male and female who represented a broad range of ages from young offenders (including those who were juveniles at the time of their offences) to older offenders. Also included were a range of minority groups including some from the Travelling Community and foreign nationals, including Chinese, Polish and Lithuanian nationals. CJINI noted that:

''*Across the broad range of individuals who are before the courts there are a wide range of vulnerabilities. This is a widely accepted principle. Indeed during the course of inspection, Inspectors heard from some consultees who expressed direct concern at the possibility of early guilty plea schemes impacting negatively on vulnerable defendants''*[88]

CJINI went on to note concerns about vulnerable defendants and those with learning disabilities expressed by the Prison Reform Trust as well as empirical studies which strongly suggest that suspects and defendants with learning disabilities are 'vulnerable.' These can include vulnerabilities by reason of age (young or old) and those with mental health and cognitive understanding issues. CJINI also referred to its own previous inspection reports around mental health in the criminal justice system and noted that:

''In the course of fieldwork Inspectors did not hear any specific concerns on the negative effect of an early guilty plea scheme. However, we did experience a range of cognitive understanding amongst the group of offenders spoken to. This reinforced the need to ensure that whatever steps are taken to encourage guilty pleas that the range of vulnerabilities for those in the justice system are considered and given due weight. Inspectors considered that in any early guilty plea scheme it will be important to ensure that the rights and understanding of an accused person in pleading guilty early are protected. This will largely mean that defence practitioners must ensure adequate advice is provided and that the courts should ensure unrepresented defendants are adequately informed of their rights.''[89]

9.4 CLC believes that there is considerable potential for vulnerable young people to be more susceptible to pleading guilty at the earliest possible opportunity, particularly where they feel pressured or intimidated by court proceedings or wish the case to be over. It will be extremely important that the particular needs of the child are taken into account when applying these clauses and any non-legislative early guilty plea scheme, in relation to children with learning disabilities, those with additional needs and/or mental health problems and those for whom English is an additional language. These particular needs may result in a lack of understanding of the implications of pleading guilty and may impact on the child's enjoyment of his/her right to a fair trial.

Avoiding delay in criminal proceedings

9.5 Clauses 79 and 80 of the Justice Bill confer regulation making powers onto the DoJ in relation to the issue of delay in criminal proceedings. Clause 79 provides the DoJ with the power to make regulations imposing a general duty on persons exercising functions in relation to criminal proceedings in the Crown Court or the Magistrates' Court to reach a just outcome as swiftly as possible. Clause 79 provides that the

[88] 'The use of early guilty pleas in the Criminal Justice System in Northern Ireland',Criminal Justice Inspection Northern Ireland, February 2013, para.4.42.
[89] *Ibid*, para.4.45 – 4.46.

regulations must in particular take account of the need to identify and respect the needs of persons under the age of 18. Clause 80 of the Bill provides the Department with the power to make regulations in relation to the management and conduct of criminal proceedings in the Crown Court or the Magistrates' Court. These regulations may impose duties on the court, the prosecution and the defence and may confer functions on the court in relation to the active case management of criminal cases. Clause 80(4) then outlines the features that active case management should include, such as the early identification of the real issues, encouraging co-operation in the progression of the case and discouraging delay.

9.6 CLC is extremely supportive of reducing delay in children's case in line with Article 40 and 37(d) of the UNCRC, Article 6 of the ECHR and the various CJINI reports on this issue.[90] The Youth Justice Review also placed a great deal of emphasis on the need to tackle delay within the youth justice system, stating that the issue of delay stands out above all others as being in urgent need of reform.[91] The Youth Justice Review highlighted that delay is a serious problem that impacts on virtually every judicial process and practice, from bail and remand to sentencing and rehabilitation.[92] The Youth Justice Review recommended that statutory time limits should be introduced for all youth justice cases, providing for a maximum period from arrest to disposal of 120 days, a recommendation which CLC supports. The issue of **avoidable** delay is an area which requires immediate attention, not least due to unacceptable delays in processing children through the criminal justice system in Northern Ireland breaching children's rights and domestic obligations. However, CLC would emphasise that the delay which requires addressing is **avoidable** delay and in addressing avoidable delay, the child's rights under Article 6 of the ECHR and their UNCRC rights should not be compromised.

9.7 CLC notes that clause 79 specifically requires any regulations to take account of the need to identify and respect the needs of persons under the age of 18. We welcome this aspect of the clause and believe that a similar requirement should be included within clause 80. We are concerned that no definition is provided within the Bill in relation to reaching a 'just outcome'. We believe that this should be further clarified in order to ensure that the duty imposed under clause 79 is implemented consistently. **We would also welcome the Committee, as part of its consideration of these clauses, inquiring as to the DoJ's plans for consulting on the development of any regulations under clauses 79 and 80.**

<u>Aims of the youth justice system</u>

9.8 Clause 84 of the Justice Bill will amend section 53 of the Justice (Northern Ireland) Act 2002, which sets out the statutory aims of the youth justice system in Northern Ireland. Section 53 of the 2002 Act currently states that:

"(1) The principal aim of the youth justice system is to protect the public by preventing offending by children.

(2) All persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim in exercising their functions, with a

[90] 'Avoidable Delay', Criminal Justice Inspection Northern Ireland, June 2010. 'Avoidable Delay: A Progress Report' Criminal Justice Inspection Northern Ireland, January 2012.
[91] *Op Cit* 35, p.68.
[92] *Ibid*, p.68.

view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions.

(3) But all such persons and bodies must also have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development."

Clause 84 proposes to amend section 53 of the 2002 Act by substituting the following in place of section 53(3):

"(3) But all such persons and bodies must also

(a) have the best interests of children as a primary consideration; and

(b) have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development."

9.9 CLC has consistently raised concerns about the fact that the current statutory aims of the youth justice system are not in compliance with international standards due to the failure to include the 'best interests' principle within the Justice (Northern Ireland) Act 2002. This is contained within Article 3(1) of the UNCRC, which 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 UN Committee on the Rights of the Child, in its 2002 and 2008 Concluding Observations following an examination of the United Kingdom's compliance with the UNCRC, has recommended that the United Kingdom take all appropriate measures to ensure that the principle of the best interests of the child be adequately integrated in all legislation and policies which have an impact on children, including in the area of criminal justice.[93] CLC particularly welcomed the recommendation within the Youth Justice Review that section 53 of the 2002 Act should be amended to fully reflect the best interest principle as set out in Article 3 of the UNCRC.[94]

9.10 CLC welcomes the amendment to the aims of the youth justice system but we are aware that the strength of any legislation is judged by its implementation and operation. We wish to see the translation of the best interest principle into a meaningful reality for children coming into contact with the youth justice system. All professionals coming into contact with children within the criminal justice system must have comprehensive and ongoing training on how to apply the amended aims of the youth justice system and how to implement these in practice. Effective training must be taken forward as a matter of urgency, given that under clause 91 of the Bill, clause 84 will come into operation on the day that the Act receives Royal Assent.

[93] United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/GBR/CO/4, 20th October 2008, para. 27. United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/15/Add.188, 9th October 2002, para. 26.
[94] *Op Cit* 35, Recommendation 28.

10. Conclusion

10.1 The Children's Law Centre is grateful for the opportunity to submit evidence on the Justice Bill and we hope that the Committee finds our comments helpful in examining the contents of the Bill. We would very much welcome the opportunity to provide oral evidence to the Committee on the contents of the Bill, and are happy to further discuss or clarify anything within this written evidence in advance of this.