



## **For a child friendly youth justice system**

### **The need for change**

The youth justice system in England and Wales\* has, in recent years, attracted criticism from a range of quarters. The United Nations Committee on the Rights of the Child, for instance, has maintained consistently that arrangements for dealing with children in conflict with the law fall some way short of compliance with the United Nations Convention on the Rights of the Child (UNCRC) and other international standards of juvenile justice.<sup>1</sup>

*\* Although England and Wales remains a single jurisdiction for the purposes of youth justice legislation, several commentators have argued that processes of political devolution are serving increasingly to define and distinguish discrete approaches to youth justice between the two countries in ways that appear to undermine the notion of a unified and monolithic jurisdiction (see for example, Cross et al, 2002; Goldson and Hughes, 2010; Haines, 2009; Hughes et al, 2009; Drakeford, 2010). Whilst NAYJ recognizes that there is some evidence of policy divergence between England and Wales, the principles articulated in this campaign document are intended to cover both countries.*

Cross, N., Evans, J. and Minkes, J. (2002) 'Still Children First? Developments in Youth Justice in Wales', *Youth Justice* 2(3): 151-162

Drakeford, M. (2010) 'Devolution and Youth Justice in Wales', *Criminology and Criminal Justice*, 10(2): 137-154

Goldson, B. and Hughes, G. (2010) 'Sociological Criminology and Youth Justice: Comparative policy analysis and academic intervention', *Criminology and Criminal Justice*, 10(2): 211-230

Haines, K. (2009) 'The dragonisation of youth justice', in W. Taylor, R. Earle and R. Hester (eds) *Youth Justice Handbook: Theory, policy and practice*. Cullompton: Willan

Hughes, G., Case, S., Edwards, A., Haines, K., Liddle, M., Smith, A. and Wright, S (2009) *Evaluation of the Effectiveness of the Safer Communities Fund 2006-2009: Final research report submitted to the Welsh Assembly Government by Cardiff University, Swansea University and ARCS Ltd*. Cardiff: Welsh Assembly Government.

<sup>1</sup> UN Committee on the Rights of the Child (2008) Concluding observations: United Kingdom of Great Britain and Northern Ireland. Geneva: United Nations

Within the jurisdiction, the Standing Committee for Youth Justice, a coalition of voluntary sector agencies, noted that the youth justice system is insufficiently distinct from that for adults and that there is a lack of congruence between provisions for children who offend and those for children and families more broadly, in respect of welfare, safeguarding, education and health.<sup>2</sup>

Research has shown too that: the system is marked by a significant overrepresentation of black and other ethnic minority children;<sup>3</sup> girls in trouble receive differential treatment that frequently operates to their disadvantage;<sup>4</sup> and children from socially disadvantaged backgrounds are at considerably greater risk of criminalisation than their more affluent peers.<sup>5</sup>

Under New Labour, those working within the field of youth justice have experienced a transformation in policy and practice that has, at times, been breathtaking in its pace and extent. While some of the changes have been welcome, others – perhaps the majority – have not. More significantly, it is clear that none of the modifications has even begun to address the deep seated problems highlighted by critics of the system. There is no indication that the inauguration of a new administration following the election in May 2010, will lead to a concerted attempt to address those underlying difficulties.<sup>6</sup> The National Association for Youth Justice (NAYJ) believes that, while there has been no shortage of innovation, the introduction of new measures in recent

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<sup>2</sup> Standing Committee for Youth Justice (2006) *Still waiting for youth justice*. London: SCYJ

<sup>3</sup> May, T., Gyateng, T. and Hough, M. (2010) *Differential treatment in the youth justice system*. London: Equalities and Human Rights Commission

<sup>4</sup> Bateman, T (2008) *Review of provision for girls in custody to reduce reoffending*. Reading: CfBT

<sup>5</sup> White, R and Cunneen, C (2006) 'Social class, youth crime and justice' in Goldson, B and Muncie, J (eds) *Youth crime and justice*. London: Sage

<sup>6</sup> The coalition government's plans for youth justice, as contained in the Legal Aid, Sentencing and Punishment of Offenders Bill, are a blend of positive and retrogressive proposals

years has constituted no more than piecemeal tinkering with a profoundly defective mechanism that is unfit for purpose, rather than representing a move towards the fundamental reform that is required.

In this context, NAYJ considers that it is vital to go beyond spelling out what is wrong with the current arrangements – important though that is – by starting to consider what an appropriate, high quality and effective response to youth offending would look like. Crucially, each of the various criticisms in their different ways highlights a failure of the present arrangements to view children who break the law as children first and foremost rather than as offenders who happen to be below the age of eighteen years. As a consequence, responses to offending behaviour do not adequately reflect the individual’s stage of development and are insufficiently informed by what is in the best interests of the child. In the view of NAYJ, the youth justice system should start from precisely the opposite premises to those that currently underpin it: as a matter of principle, the treatment of any child in conflict with the law should be informed primarily by his or her status as a child and by the nature of the response that would be most likely to promote his or her development and wellbeing. Interventions ought to be driven by a clear values base rather than by the mechanistic conformity with the procedural imperative that has increasingly come to dominate practice and policy in this area. In short, we require a *child friendly youth justice system*. NAYJ is committed to campaigning for just such a system.

### **Why a child friendly youth justice system?**

It is sometimes argued that the measure of a society is how it treats its young. This dictum is a recognition of the fact that children are – relative to adults –

both vulnerable and powerless. As a consequence, they are entitled to the protection that they may require while simultaneously being empowered to exercise their full array of rights according to their evolving and developing capacity. NAYJ takes the view that these basic principles are not negated where a child is alleged to have broken the law

There is a tendency evident within England and Wales to impose a sharp dichotomy between children in need of safeguarding and those requiring punishment depending on whether they come to the attention of the authorities for care related reasons or as a consequence of offending.<sup>7</sup>

Moreover, it is clear that this tendency has intensified as the issue of youth crime has become ever more politicised since the early 1990s.<sup>8</sup> It has helped to shape the current contours of the youth justice system in the recent period, ensuring a widening fracture between mainstream services for children and their families on the one hand and children in trouble on the other.

NAYJ believes that such a differentiation between ‘angels’ and ‘devils’ is unwarranted: there is abundant evidence that the circumstances of children who populate the youth justice system are strikingly similar to those who, for other purposes, would legitimately be regarded as children in need. Both groups are routinely drawn from the most disadvantaged sections of the community and are equally entitled to protection, support and empowerment.<sup>9</sup> It follows, as the Council of Europe has argued, that provision for children in trouble should be informed by a requirement that they are treated with:

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<sup>7</sup> Fionda, J (2005) *Devils and angels: youth, policy and crime*. Oxford: Hart publishing

<sup>8</sup> Goldson, B (2002) ‘New punitiveness: the politics of child incarceration’ in Muncie, J, Hughes, G and McLaughlin, E (eds) *Youth justice: critical readings*. London: Sage

<sup>9</sup> Curtis, S (2005) ‘The welfare principle’ in Bateman, T and Pitts, J (eds) *The RHP companion to youth justice*. Lyme Regis: Russell House

*'care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity. This treatment shall be given to them, in whichever way they have come into contact with judicial or non-judicial proceedings or other interventions and regardless of their legal status and capacity in any procedure or case'.<sup>10</sup>*

Commitment to such a principled approach does not, it should be noted, compromise public safety, for several reasons. The large majority of children who break the law commit comparatively minor offences that pose a minimal risk to members of the public.<sup>11</sup> Secondly, while it is clear that the use of child imprisonment is many times higher than is warranted by the seriousness of the offending, and there is little doubt that the conditions in which children are currently incarcerated represents a cause for real concern,<sup>12</sup> there is nothing inherent in a child friendly approach that would preclude placing children in secure conditions in the few instances where the circumstances required it.<sup>13</sup>

More pertinently, perhaps, it should be understood that the youth justice system as currently configured does little to promote public safety in any event. The failure in this regard is a consequence of the fact that *'those factors which appear to be most closely associated with serious and persistent youth crime, like disadvantaged neighbourhood of residence, poverty, early childhood abuse and rejection, illiteracy and so on, are also those which are*

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<sup>10</sup> Council of Europe (2010) *Final draft [recommendation containing] guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*. Strasbourg: Council of Europe

<sup>11</sup> Nacro (2010) *Some facts about children and young people who offend – 2008*. London: Nacro

<sup>12</sup> Jacobson, J, Bhardwa, B, Gyateng, T, Hunter, G and Hough, M (2010) *Punishing disadvantage: a profile of children in custody*. London: Prison Reform Trust

<sup>13</sup> Nacro (2003) *Counting the cost: reducing child imprisonment*. London: Nacro

*least amenable*' to the existing raft of youth justice interventions.<sup>14</sup> Custody, in particular, frequently justified on the basis of its contribution to public protection is, at best, a double edged sword since any advantage from taking children out of circulation for a period of time, is undermined by higher levels of reoffending on release back into the community.<sup>15</sup> An approach that focused on the child's welfare would be more likely to impact positively on the risk of further offending and thereby enhance public protection.

By the same token, research tells us that desistance from crime is a subjective process: community supervision is effective where it is directed towards giving the individual child a sense that he or she has the potential to succeed and aims to provide assistance in overcoming potential obstacles to achieving that success. Understood in this manner, it is obvious that the nature of the supervisory relationship matters. Enhancing public safety involves practitioners developing a respectful partnership with the children with whom they work, approaching them with patience and tolerance, taking account of their individual culture and identity, listening to their hopes, concerns and desires, negotiating the nature of the intervention, and showing that they care about what happens to them.<sup>16</sup> Further, it is clear that young people are more likely to respond positively where they regard authority as fair and legitimate and perceive those who exercise it as demonstrating an understanding of their circumstances.<sup>17</sup> Far from compromising public protection, child friendly supervision is, it turns out, consistent with the tenets of effective practice.

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<sup>14</sup> Bateman, T and Pitts, J (2005) 'Conclusion: what the evidence really tells us' in Bateman, T and Pitts, J (eds) *The RHP companion to youth justice*. Lyme Regis: Russell House

<sup>15</sup> Nacro (2003) *Counting the cost: reducing child imprisonment*. London: Nacro

<sup>16</sup> McNeill, F (2009) 'Supervising young offenders: what works and what's right' in Barry, M and McNeill, F (eds) *Youth offending and youth justice*. London: Jessica Kingsley publishers

<sup>17</sup> See for instance, Hinds, L (2007) 'Building police-youth relationships: the importance of procedural justice' in *Youth justice* 7(3)

NAYJ accordingly believes that the proper criterion for assessing current responses to youth offending, or any proposed reforms, is the extent to which they are consistent with a child friendly youth justice system.

**What might a child friendly youth justice system look like?**

It would not be appropriate to attempt to lay down a blueprint for a child friendly youth justice system in a briefing of this nature. As part of the campaign for such a system, however, NAYJ is committed to producing further briefings – drawing on research evidence, the expertise of practitioner communities and lessons from national and international experience – that will examine in greater detail how it might look and exploring the implications for policy and practice. For current purposes, it is nonetheless worth considering a number of prerequisites of any arrangements for responding to youth offending that purported to be child friendly.

A child friendly youth justice system would of necessity:

- Be totally distinct from the adult system of criminal justice. The current presumption that the youth justice system should, in large part, mirror that for adults with allowance for youth, would be supplanted by an understanding that the two systems would share features only where their child friendly credentials could be demonstrated
- Address as its main priority children's wellbeing. Punishment and retribution would have no place in such a system and intervention would be legitimated only to the extent that it was in the best interests of the child

- Be future orientated rather than dwelling on past behaviour or focusing on ‘risk factors’ and supposed deficits in the child and his or her family. The emphasis would accordingly be on identifying how the child’s proper development might best be promoted and on removing potential obstacles to that development
  
- Embody, at its heart, a commitment to children’s human rights. Procedural arrangements would be designed to be compliant with the UNCRC and other international standards. All forms of intervention would be informed by the principle that children who come to the attention of the system should be empowered to exercise their rights and to participate in determining the nature of services provided in accordance with their stage of development and capacity. A focus on due process would constrain unfettered practitioner discretion to ensure that considerations of welfare could not lead to disproportionate outcomes involving compulsory intervention not warranted by the seriousness of the young person’s offending behaviour. The incorporation of rights and the best interests of the child would culminate in the delivery of what has been called a ‘just welfare’<sup>18</sup>
  
- Acknowledge the adverse circumstances of the majority of children who come to its attention through the provision of advocacy and services aimed at maximising social inclusion and remedying social injustice
  
- Provide a child friendly experience for those progressing through it. Decision-making would be transparent and readily understandable to those

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<sup>18</sup> Drakeford, M (2001) ‘Children’s rights and welfare: towards a new synthesis’ in *Youth justice* 1(1)



whom it affected most directly. Decisions themselves would be explained and negotiated. The principal qualifications for practitioners would be a commitment to achieving social justice for children, the skills to engage young people effectively, and the ability to develop high quality, positive, relationships with those referred to the system. Children would, for the most part, recognise the benefit to themselves and their families of the services delivered and would be motivated to cooperate for that reason rather than by the threat of external sanction for non-compliance. There would be an expectation that children would experience involvement in the system as rewarding and a presumption that, wherever possible, activities should be fun.

### **How a child friendly youth justice system might differ from current arrangements**

It is obvious that a child friendly youth justice system, understood in the above terms, would differ profoundly from the current arrangements for dealing with children who offend. This is not the place to provide a detailed critique of the existing system from a child friendly perspective and NAYJ will, in the course of the campaign, produce further briefings that explore how aspects of the present system are antithetical to such an approach. There is nonetheless merit in considering in broad outline a few of the shifts in direction that NAYJ believes are required as a matter of urgency.

### **An increased tolerance for children**

The UNCRC has drawn attention a '*general climate of intolerance ... towards children, especially adolescents*' that explains in part the failure to adopt a

thorough going children's rights agenda in England and Wales.<sup>19</sup> Within the youth justice arena, this intolerance has been manifested in a demonisation of teenagers engaged in what has become known as 'anti-social behaviour' and an increasingly punitive approach to children who offend. The latter is typified by New Labour's exhortation that there should be '*No more excuses*' and finds expression in the denial, by influential politicians, of childhood status to those who come to the attention of the youth justice system. For instance, Jack Straw, in his previous post as Justice Minister, countered those who are concerned at current levels of custody by arguing that '*they are not children; they are often large, unpleasant thugs, and they are frightening to the public*';<sup>20</sup> more recently, Lord McNally, Minister of State for Justice, referred to those detained within the secure estate for children and young people as '*often ... large and quite violent young people—we use the word "children" very casually*'.<sup>21</sup>

By definition, a child friendly youth justice system would be predicated on a high level of tolerance for children in trouble that took account of the social circumstances, recognised their stage of development, acknowledged their identity, and aimed to match persistent offending with persistent practitioners.<sup>22</sup>

### Proportionate responses to need rather than risk management

Increasingly, youth justice practice has relied on devising interventions to address 'risk factors' that have been found to be correlated with criminality among young people. This focus has led to the mandatory adoption of an

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<sup>19</sup> United Nations Committee on the Rights of the Child (2009) op cit

<sup>20</sup> Hansard, House of Commons, column 155. 10 June 2008

<sup>21</sup> Hansard, House of Lords, column 973. 21 July 2010

<sup>22</sup> McNeill, F and Batchelor, S (2002) 'Chaos, containment and change: undertaking a local analysis of the problems of persistent offending by young people' in *Youth Justice* 2(1)

assessment tool, in the form of *Asset*, designed to identify the factors relevant to offending in the case of the particular child. More recently, under the 'scaled approach' developed by the Youth Justice Board, *Asset* scores have been used to determine the intensity, as well as the nature, of intervention, irrespective of the gravity or persistence of offending: the higher the score, the greater the level of punishment.

From a child friendly perspective, the focus on risk management in general, and the scaled approach in particular, is deeply disturbing in a number of respects. First, it runs counter to a rights based agenda since it requires compulsory intervention – more commonly known as punishment – on the basis of assessed future risk rather than what the child has done. Further, it inevitably marginalises any commitment to children's participation since there is little room for the child's view to influence decision-making which is determined by the assessment of risk.

It tends too to undermine the potential for effective engagement of young people. Rather than grounding the relationship between the child and his or her supervisor in the provision of support and other services that might benefit the former, the current approach prioritises public protection and encourages practitioners to conceptualise children as repositories of risk. Where higher levels of intervention are imposed, on the basis of the supervising officer's assessment, than would be warranted by the seriousness of the young person's offending behaviour, it is not unreasonable to expect that he or she will (rightly) feel unfairly treated.

Perhaps most worryingly, since a high *Asset* score is frequently indicative of the fact that the child also has extensive welfare needs, those individuals from the most disadvantaged circumstances, with the least parental or adult support, who experience reduced educational and other opportunities, are inevitably subject to elevated and more intrusive levels of criminal justice intervention. In effect, the risk led model is one that punishes children for their poverty.<sup>23</sup>

A child friendly youth justice system by contrast would prioritise wellbeing over the risk posed and require that sanctions be limited to those warranted by the gravity of the offending. It would promote a positive focus on maximising the child's long term potential rather than confining itself to the restricted, and negative, ambition of attempting to avoid particular forms of behaviour.

#### No child to be tried in an adult court

In spite of a requirement in the UNCRC that arrangements for dealing for children in conflict with the law should be distinct, current provisions ensure that considerable numbers are routinely subjected to procedures designed for adult offenders.

Seventeen year olds for instance are denied the support of an appropriate adult when arrested by the police. Children alleged to have committed certain 'grave' offences or considered potentially dangerous, as well as those who have co-accused older than eighteen years, may be tried in the Crown Court, a venue designed for adults whose criminality is of a more serious nature and where the limitations on sentencing powers of the youth court no longer apply. The

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<sup>23</sup> Bateman, T (2011) 'Punishing poverty: the 'scaled approach' and youth justice practice' in the *Howard Journal of Criminal Justice* 50(2)

situation is widely recognised as unsuitable, and the European Court of Human Rights has, on two occasions, found that they constitute a breach of the right to a fair trial. Nevertheless, the scale of the problem has worsened in recent years as legislation has progressively moved to expand the pool of children to whom the 'grave crime' provisions apply.

In a child friendly system, there would be no place for the adult court.

#### An increased age of criminal responsibility

At ten years, the age of criminal responsibility in England and Wales is the lowest in the European Union.<sup>24</sup> In statutory terms, it has remained unchanged since 1963. However, until 1998, the doctrine of *doli incapax* had afforded children below the age of fourteen a measure of protection by restricting prosecution to those cases where criminal capacity could be proved. Its abolition in that year represented an effective lowering of the age of criminal responsibility.<sup>25</sup> As a consequence, more than one in five children sentenced by a criminal court in 2008/09 was aged thirteen or younger.<sup>26</sup>

A child friendly youth justice system would aim to minimise the criminalisation of children by diverting them from criminal justice mechanisms to more appropriate mainstream provision wherever possible. One of the most effective, and straightforward, measures for achieving substantially higher levels of diversion than at present would be to raise considerably the age of

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<sup>24</sup> Goldson, B (2009) "“Difficult to understand or defend”": a reasoned case for raising the age of criminal responsibility' in *Howard journal* 48(5).

<sup>25</sup> Bandalli, S (2000) 'Children, responsibility and the new youth justice' in Goldson, B (ed) *The new youth justice*. Lyme Regis: Russell House

<sup>26</sup> Hibbert, P (2010) *A better way? Children in the criminal court in England*. London: Office of the Children's Commissioner

criminal responsibility. It is the view of NAYJ that the minimum age at which a child can be held criminally liable should be 16 years.

### Protection of privacy

There is a presumption of confidentiality in the youth court but the principle that children in trouble should have their privacy protected is compromised in a number of respects. First, the presumption is reversed in the case of children tried in adult courts, a relatively common occurrence as noted above. Secondly, children made subject to anti-social behaviour orders are also excluded from the general provisions and are frequently subject to naming and shaming. Thirdly, the Youth Crime Action Plan published by the government in 2008 positively encouraged magistrates to consider using their discretion to allow identification in cases involving older children.

Naming and shaming in these various ways is a clear violation of the UNCRC. It has no place in a child friendly youth justice system and would be rendered unlawful.

### Abolition of penal custody

It is widely acknowledged that the present youth justice system is heavily over-reliant on child incarceration and has become increasingly so. While the use of custody has fallen over the past two years, the imprisoned population remains significantly above that in England and Wales during the early 1990s as well as that in other jurisdictions. There is moreover a consensus that imprisonment is unnecessary, costly, counterproductive in terms of reoffending, and deeply damaging to children.<sup>27</sup>

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<sup>27</sup> Nacro (2003) *Counting the cost: reducing child imprisonment*. London: Nacro

Sustained high levels of custody are a reflection of the politicised approach to youth crime, the climate of intolerance, a preoccupation with risk and public protection, and a practice that is increasingly devoid of a values base. A child friendly youth justice system would generate substantially fewer custodial outcomes and would seek to implement a custody threshold that guaranteed that deprivation of liberty was used as a last resort.<sup>28</sup> But such a system would also impact upon the treatment of the much reduced number of children who would continue to require accommodation in secure facilities.

Currently, prison service young offenders institutions account for around 80% of placements within the secure estate for children and young people; privately managed secure training centres providing penal facilities for younger children constitute a further 13%; secure children's homes by contrast – residential child care establishments whose primary orientation is care based rather than correctional – make up just 8% of the total. A child friendly approach to youth justice would require that children who need to be in security should be placed in settings that prioritise their wellbeing. The reduction in numbers for whom such facilities would be required would facilitate the higher unit costs of such accommodation. Placement in penal custody – young offender institutions and establishments that exist to make profit – would be discontinued.

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<sup>28</sup> See for instance, Standing Committee for Youth Justice (2010) *Raising the custody threshold*. London: SCYJ

### **Towards a child friendly youth justice system**

The publication of this briefing coincides with the launch of a campaign by NAYJ for a child friendly youth justice system. But the organisation is keenly alert to the many obstacles that stand in the way of attaining that goal. It is aware too that there is much work to do to flesh out the details of what such a system would look like, consider the implications for practice, and identify what elements of the current arrangements might be worth salvaging.

These are issues for debate, to be informed by the evidence base, ongoing academic research, and the expertise of practitioners and policy staff. In that sense, the briefing is intended to mark the start of a process involving a broader audience. NAYJ hopes that the concept of a child centred youth justice system will have wide appeal and that those who endorse the values base it implies will become involved in that process.