NAYJ Briefing

National Association for Youth Justice
Justice for Children in Trouble

Bridging the care-crime gap: reforming the youth court?

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A child first perspective: a challenge for the courts?

The contours of a child first agenda

The *National Association for Youth Justice* (NAYJ) campaigns for the rights of, and justice for, children in trouble. It seeks to promote the welfare of children in the youth justice system and to advocate for child friendly responses where children infringe the law (NAYJ, 2019). The Association has, more recently, endorsed the Youth Justice Board's adoption of a 'child first' model, first articulated in its Strategic Plan, published in 2018 (Youth Justice Board, 2018). The subsequent revised edition of National Standards for children in the youth justice system, published in 2019, is intended to provide a framework to support agencies in delivering a child first provision, by ensuring that they:

- '*Prioritise the best interests of children, recognising their needs, capacities, rights and potential;*
- *Build on children's individual strengths and capabilities as a means of developing a pro-social identity for sustainable desistance from crime. This leads to safer communities and fewer victims. All work is constructive and future-focused, built on supportive relationships that empower children to fulfil their potential and make positive contributions to society;*
- *Encourage children's active participation, engagement and wider social inclusion. All work is a meaningful collaboration with children and their carers*
- *Promote a childhood removed from the justice system, using prevention, diversion and minimal intervention. All work minimises criminogenic stigma from contact with the system'* (Ministry of Justice/Youth Justice Board, 2019: 6).

While applauding the Board's aspirations, *NAYJ* has noted that considerable reform is required if the philosophical underpinnings of a child first framework are to be achieved (Bateman, 2020a). Moreover, while the principles expounded in the latest National Standards provide a welcome starting point that demonstrates a significant shift in terms of policy towards children in trouble, they nonetheless fall short, in some crucial respects, of what the *NAYJ* considers to be required of a genuine child first approach. They do not, for example, preclude punishment as a purpose of youth justice intervention, a fundamental premise of a child first philosophy; nor do they explicitly entail that adults who make decisions that impact negatively on the disadvantaged children who populate the youth justice system, should be 'responsibilised', leaving open the possibility that youth justice policy and practice might continue to focus on making children responsible for their own behaviour, much of which occurs in contexts over which they have limited control (Haines and Case, 2015).

A thorough-going child first ethos would clearly embrace values of maximum diversion in accordance with the principles outlined in National Standards. Considerable progress in this regard has been made since the establishment of a target to reduce first time entrants to the youth justice system in 2008. However, that target pre-dated the adoption of a child first philosophy by the Youth Justice Board and so cannot be regarded as a consequence of it. Moreover, as Haines and Drakeford (1998: xiii) pointed out more than two decades ago, a child first vision demands, in addition, *'a much more proactive strategy*' that addresses the inequality and disadvantage that leads to disproportionate levels of criminalisation for some groups of children by supporting vulnerable children '*outside the criminal justice system as well as within it*'.

At the time of writing, the Youth Justice Board is revising Case Management Guidance to align with child first precepts, to provide practical assistance for those working in the system on how those precepts might be implemented at different stages of the youth justice process. Such guidance is urgently required as much of current practice inevitably continues to be influenced by approaches to children in conflict with the law derived from earlier, risk based, and much more punitive, understandings of youth justice intervention.

The role of the court is one area that poses evident difficulties in terms of implementing a child first system on the ground. Charlie Taylor, in his review of the youth justice system published in 2016, highlighted the need for a shift towards a child first understanding of youth justice but also drew attention to the '*challenges of dealing with children in the criminal courts'* (Taylor, 2016: 27).

The centrality of the court process

The court is a central feature of the administration of youth justice as currently configured in England and Wales. Its importance can be understood from two rather different, albeit interlocking, perspectives. First, and perhaps most obviously, the court discharges a range of decision-making functions, including the determination of:

- Issues of fact where there is a dispute, including questions of guilt or innocence
- The child's remand status during the course of proceedings
- The final disposal.

The court is thus the arbiter of whether of whether the child is acquitted, or found guilty, of any offences charged. It determines whether the child is granted or refused bail. The court is also responsible for deciding the nature and extent of any compulsory intervention if the child is convicted, including, crucially, whether the child is to be deprived of their liberty. Each of these decisions will inevitably have long-term repercussions for the child, influencing in significant ways their future through, for example, the impact of incarceration and the constraints on future opportunities associated with a criminal record.

But the court also provides the forum within which such decisions are made and this second function is equally important since it governs how the child experiences, and responds to, the decision-making process. This is significant because effective participation, a pre-requisite of a fair trial, requires that the child has a good understanding of the proceedings, their implications and potential outcomes. As the European Court of Human Rights (2020:32-33) has explained:

> '*It is essential that a child charged with an offence is dealt with in a manner which fully takes into account his or her age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings…. The right of a juvenile defendant to effectively participate in his criminal trial requires that the authorities deal with him [sic] with due regard to his vulnerability and capacities… The authorities must take steps to reduce as far as possible the child's feelings of intimidation and inhibition and to ensure that he [sic] has a broad understanding of the nature of the investigation and the stakes, including the significance of any potential penalty…*'.

The child's experience of court proceedings also has clear consequences for the effectiveness of any subsequent youth justice intervention. The concept of 'procedural justice', a model developed by Tom Tyler (2003) which has significant evidential support, suggests that engagement with supervision and the likelihood of beneficial outcomes from the supervisory

process are predicated on the child regarding the sentence, and the process by which it was arrived at, as legitimate. The child's perception of what happens in court accordingly has a direct impact on their willingness to comply with any order made, with corresponding implications for their subsequent response to the exercise of authority by youth justice practitioners. In other words, the effectiveness of a court disposal is '*closely tied to the fairness of how [the child was] treated…. It is not enough to be fair; citizens must perceive that the process is fair*' (Gold Lagratta and Bowen, 2014: 2).

As a matter of principle, these core functions need not necessarily be undertaken through the criminal courts. In Scotland, for example, responses to children's offending – at least up to the age of 16 years – are largely determined outside of the court structure through the Children's Hearing system (see for instance, Brown, 2020). The possibility of dispensing, to a large degree, with the court in England and Wales has recently been aired. Charlie Taylor's review, while acknowledging adaptions to make proceedings less formal, found that children are nonetheless '*subject to what are essentially modified versions of the same processes and procedures that apply to adult defendants'* (Taylor, 2016: 27). Describing the core of the problem, Taylor (2016: 29) noted that:

> '*Too often children are the passive recipients of justice and do not understand the process to which they have been subjected. In addition, the way children are currently dealt with in the criminal courts does not provide sufficient opportunity to understand the causes of their offending'*.

To address these difficulties, Taylor proposed that, except in cases involving very serious offences, the role of the court should be restricted to determining issues of guilt or innocence where the child denies the offence. He argued that decisions as to what should happen to the child, once guilt is established, should be delegated to a new system of Children's Panels consisting of specially trained magistrates who would put '*in place a rigorous Plan that will tackle the factors associated with the offending'* (Taylor, 2016: 53). The government, it its response to the review, indicated that it was not persuaded of the proposal, which it maintained would be too radical a departure from existing arrangements. It did however indicate support for what it described as, '*the principles underpinning the recommendation*' and committed to adopting '*where possible, the characteristics of a problem-solving approach*' (Ministry of Justice, 2016: 20).

As the *NAYJ* has previously observed, it is hard to discern any progress in this regard in the intervening period (Bateman, 2020a) and it is apparent that there is little real prospect that any reforms to limit the role of the criminal courts within the youth justice system will be introduced in the near future. In this context, a range of commentators have focused on proposals for enhancing the problem-solving capacities of the youth court, many of which could be implemented with limited statutory changes and would certainly result in some improvements to children's experiences of the court process (see for instance, Carlile, 2014; Hunter et al, 2020). A more radical proposal that would involve combining the youth and family court into a single jurisdiction has also attracted some attention (see for instance, Munby, 2017; Stanley, 2021. The same solution is also referred to in Carlile (2014: 64) as '*a long-term aspiration'*).

The purpose of the current paper is to clarify the position of the *NAYJ* in relation to that latter, more far reaching, reform. In summary, the Association believes that bringing together care and crime into a single jurisdiction would be unlikely to provide a solution for the difficulties that it is intended to address without a broader thoroughgoing transformation of the youth justice system. There are, moreover, some potential unintended consequences of combining

care and crime proceedings that may have negative implications for children in conflict with the law. The *NAYJ* does not therefore support the creation of a single jurisdiction in isolation from a series of wider reforms. Nevertheless, the *NAYJ* considers that there is scope for the introduction of measures, short of merger, to align more closely decision-making in the two jurisdictions. Such changes would have the potential to deliver a more child friendly court experience and would accordingly be warranted in the absence of more radical reform.

The case for merging jurisdictions

It is important to note that the underlying rationale for combining care and crime into a single jurisdiction draws on the well evidenced observation that the population of children who come to the attention of social care services as in need of care and protection is in many respects similar to that of children who are processed for behaviour that infringes the criminal law. Indeed, the two populations frequently overlap: many children known to children's services will have experience of the youth justice system, and vice versa.

The disproportionate criminalisation of looked-after children, in particular, has rightly received considerable attention over the course of recent years (see for instance, Laming, 2016; Day et al, 2020). Figures published by the Department for Education (2019) indicate that looked-after children are between three and five times more likely than their peers in the general population to be made the subject of a formal youth justice disposal. Data of this sort is consistent with 'welfarist' accounts of youth crime which understand much children's lawbreaking as a manifestation of unmet underlying need (Bateman, 2020b) since the life experiences of children in care are typically characterised by high levels of abuse, neglect, victimisation, deprivation and other forms of adversity which appear to make delinquent behaviour more likely (Day et al, 2020) although this is not to deny that negative aspects of the care experience itself and systemic over policing of looked-after children might also help to explain the overlap between the care and crime populations (Bateman et al, 2019).

If children who appear in the criminal courts and those subject to family proceedings frequently share the same set of underlying needs, there is, it might be argued, a logic in having a shared decision-making process rather than a relatively arbitrary division which allocates children to the justice or care route on the basis of the reason that they have come to the attention of the relevant authorities. Moreover, to the extent that underlying welfare problems are, as Stanley (2021:16) puts it *'the main contributors to offending*, it follows that prevention of offending depends on tackling those underlying causes. There is a general consensus among those who argue for a single jurisdiction that criminal courts are simply not equipped for that task. For instance, Lord Carlile's report (2014: xi) observed that youth courts '*are only able to focus on the offence, and not the child and the wider circumstances contributing to their behaviour'*. In similar vein, Stanley (2021: 16) contends that the youth court '*does not have the means to identify and tackle the [child's] underlying problems*.' Sir James Munby (2017) makes the additional, but related, point that where children are subject to both care and youth justice proceedings, a not infrequent occurrence, there is little co-ordination between the two systems, each of which pursues its own set of (often conflicting) objectives. There are, he observes: '*no mechanisms to facilitate collaborative, joint or even joined-up decision-making*' (Munby, 2017: 3). Even if such mechanisms were available, there is little understanding across the jurisdictions of each other's operation or the principles according to which they work; a divide that is reflected in different ministerial responsibilities for youth justice and other children's services, including social care. In the worst case scenario, decisions made in one jurisdiction might actually impede the planning undertaken in another:

> '*On occasions, … the perception of a family court is that the sentencing decision of the criminal court is not helpful in furthering the family court's planning for a disturbed teenager. On occasions one finds that the two jurisdictions simply do not 'marry-up' sensibly'* (Munby, 2017: 3).

The nature of the challenges posed where children are prosecuted, and the shortcomings of the youth court in particular, are thus all too apparent. The question remains however as to whether a unified jurisdiction, dealing with both care and crime, represents an adequate solution to the problems described. In considering that question, it is worth recalling that there was a single jurisdiction for most of the twentieth century: the youth court is a relatively recent development in historical terms. There is accordingly ample concrete experience on which we might draw to ascertain whether a merged court system would necessarily benefit children in conflict with the law.

The youth court in historical perspective

Until the mid-nineteenth century, the criminal legislative framework and institutional provisions (including courts) for children were identical to those for adults, though it was accepted that there should be some mitigation for youth (Arthur, 2010). From the 1850s onwards, there was a gradual process of differentiation, commencing with the emergence of separate custodial institutions and culminating in 1908 with the establishment of the juvenile court by the Children Act of that year, as the primary venue for criminal proceedings against children. The new court had jurisdiction over children aged between 7-16 years who were charged with an offence, but importantly for current purposes, it also dealt with care related proceedings (Bateman, 2020b).

While the creation of a discrete court for children in conflict with the law clearly represented progress by comparison with their previous treatment as adults, the existence of a unified jurisdiction did not act to ensure that the focus of decision-making was the child's welfare or that addressing the factors that might be thought to explain their offending was a high priority. In the course of the debate that accompanied the passage of the Children Act 1908 through Parliament, it was clarified that the new '*courts should be agencies for the rescue as well as punishment of children*', emphasising that those who offended would follow a different pathway from those who were in need of care and protection, despite cases being heard in the same venue (Curtis, 2005:53). Indeed, it was subsequently argued that, far from providing a mechanism which ensured that vulnerable children would have their needs addressed irrespective of the reasons for judicial intervention, the juvenile court represented '*an awkward co-existence of welfare and justice*' (Goldson, 2008:207). As Harris and Webb (1987: 9) were to observe some eighty years later, the court was, from the outset, characterised by '*conflict and confusion*'.

Over the next 60 or so years, the structure of the juvenile court remained largely unchanged, albeit with some amendment to the age range of children over whom it had criminal jurisdiction, in line with changes in the minimum age of criminal responsibility (see Bateman, 2012). The uneasy melding of welfare and justice considerations continued to give rise to contradictory policies and divergent outcomes for children in trouble. For example, the Criminal Justice Act 1948 introduced a number of restrictions on the use of custody for children, consistent with a welfarist ethos, while simultaneously introducing the attendance centre order and the detention centre order, with the latter designed as a 'short sharp shock'

for children who, it was determined, would not be reformed through more benign means (Goldson, 2020).

This ambivalence about the role of the court took on an increasingly problematic form in the wake of a failed attempt at *'the decriminalisation of the English juvenile courts*' (Bottoms, 2002: 216). A Labour party White Paper, published in 1965, took the increasingly influential welfarist inclinations to their logical conclusion, proposing the abolition of the juvenile court which was to be replaced by the establishment of Family Councils in each area '*as a new means of dealing with young persons who come before the courts*' (Bottoms, 2002: 222). Perhaps unsurprisingly, the proposal was met with a welter of opposition and, for reasons of political expediency, the juvenile court survived. The Children and Young Persons Act 1969 did, however, provide for a range of more welfare-oriented disposals for offending, that mirrored those available in family proceedings, including most critically making available 'criminal' care orders (as they came to be known) and supervision orders in cases where children had offended.

It was anticipated that these new forms of sentence would come to replace child imprisonment as the superiority of treatment was demonstrated in practice, but this expectation proved overly optimistic (Bateman, 2020b). The new measures were simply grafted onto existing arrangements, expanding the range of options available to sentencers and giving rise to what was termed a decade later '*the worst of all possible worlds*' (Thorpe et al, 1980: 8).

A process of net-widening ensued, drawing increasing numbers of children into the criminal justice system in response to the prospect that the juvenile court might henceforth deliver treatment rather than punishment: criminal convictions of children rose from 79,300 in 1974 to 96,000 in 1978 (Bateman, 2020b). A growing cohort of children were removed from home as a consequence of the availability of the criminal care order, which by default lasted until the child became an adult. The measure was initially used widely (6,700 such orders were imposed in 1973 (Home Office, 1984)) often for relatively minor lawbreaking, as a response to what was regarded, by the courts and social workers as the criminogenic impact of dysfunctional families. These welfare inspired disposals had, moreover, no positive impact on the rising tide of child incarceration. Child imprisonment grew to a level that Spencer Millham (1997) described as being without historical precedent. Such experiences would seem not only to confirm that a unified jurisdiction is no guarantor of child-friendly outcomes but also to demonstrate that ambiguous (half-hearted) attempts at expanding the role of welfare in the youth justice arena can have negative, unintended, consequences.

Nor is this experience unique to England and Wales. The juvenile court in the United States is also a merged jurisdiction which purports to provide a venue where children's lawbreaking can be dealt with outside of the criminal justice system, although a process of 'waiver' allows children to be transferred to the adult jurisdiction under circumstances which varies from state to state (see for instance Hockenberry, 2021). While waiver (that is being processed as adults) exposes children to the possibility of significantly longer periods of incarceration, and outcomes tend to be worse for the group who experience transfer to the adult criminal court, there is nevertheless some evidence that children are more likely to regard their treatment in the adult jurisdiction as being fairer than those dealt with by the juvenile court, at least in part because there is more attention on due process (O'Kaasa et al, 2018). Perhaps more importantly, the purported welfare orientation of the latter venue does not result in what would, from most perspectives, be regarded as child friendly disposals: in 2018, for example, more than one in four (26%) 'delinquency' cases heard in the juvenile court resulted in detention (Hockenberry and Puzzanchera, 2020), an astonishingly high rate of incarceration. (It

should be acknowledged that rates of detention in the United States are considerably higher across the Board than in England and Wales; but the figure demonstrates that combined jurisdictions do not necessarily generate improved outcomes).

Returning to the historical overview of court reform in England and Wales, the apparently punitive consequences associated with ostensibly welfare initiatives during the 1970s, stimulated a rapid rejection of the notion that the role of youth justice practice was to treat deficits in the individual child or his or her family. A vociferous 'back to justice' lobby led to the creation of specialist juvenile justice teams whose underlying ethos centred on the assumption that compulsory intervention should never exceed that which was proportionate to the gravity of the child's offending. Given the minor nature of much youth crime, this amounted to a call for less intrusion (whether justified on grounds of welfare or punishment) in the lives of children appearing before the juvenile court, since the large majority of those who offended would in any event '*grow out of crime*' (Rutherford, 1992). The short-term result of this mounting antipathy towards welfare was a spectacular reduction in child convictions, from 89,900 in 1980 to 24,600 in 1991, accompanied by an even sharper fall in custodial sentences, from 7,500 to 1,400 (Bateman, 2020b).

It might be noted too that the understanding that welfare and justice ought to be separate concerns was not confined to the youth justice arena. As Sarah Curtis (2005:53) has observed, reservations could also be found from within children's social care:

> '*The stigma of criminality was thought to extend to children and young people who were the victims of adult abuse or neglect, but whose future was determined in a court associated with crime*.'

This alliance of voices prompted a growing consensus that it was in the interests of both populations of children to separate the functions of the juvenile court. There was accordingly little dissent when the Children Act 1989 established the family proceedings court, separate from the juvenile court, thereby severing the organisational link between children who offend and those in need of care and protection (White et al, 1990). The Act also abolished the criminal care order, the use of which by this time had dwindled to around 100 per annum (Home Office, 1993).

Henceforth, the remit of the juvenile court was thus restricted to dealing with children alleged to have broken the law. Its existence was however short-lived. The Criminal Justice Act 1991 extended the court's jurisdiction to include 17-year-olds, in the process renaming it as the youth court. The Act also confirmed that the extent of compulsory intervention should be proportionate to the nature of offending, although the requirement that the court should have regard to the child's welfare, enshrined in the Children and Young Persons Act 1993, continued to apply (Rutherford, 1992).

Is one jurisdiction better than two?

Nothing in the foregoing should be taken as implying that a child first approach favours principles of proportionality over a commitment to the child's best interests. It is also important to acknowledge that the youth court has shown itself to be equally compatible with harsh punitive measures, as in the decade from 1993 when the use of child imprisonment grew at an alarming rate, as well as permitting practices which favour diversion and decarceration, as in the more recent period from around 2008 to the present (Case and Bateman, 2020).

The historical record does however demonstrate that a merged jurisdiction does not necessarily result in better outcomes. In some circumstances, the conflation of welfare and justice may even operate to the detriment of children. In large part, such difficulties have arisen as a consequence of attempting to reconcile notions of punishment with treatment. But it is also worth recalling that formal system contact, even in jurisdictions, such as Scotland, where children referred for offending are subject to the same processes and interventions as those referred on non-offence grounds, is frequently counterproductive, increasing the risk of reoffending (McAra and McVie, 2007). It would be naïve to regard the problems for 'crossover kids', (i.e. those who are known to both child protection services and youth justice agencies) as being simply a consequence of the lack of communication between the two systems (Baidawi and Sheehan, 2019). There is abundant evidence that the youth justice system frequently functions as a '*backstop*' for children failed by other services (Centre for Social Justice, 2012: 11) and that the over criminalisation of looked-after children is, at least in part, a consequence of decision-making within children's social care. Even if the two jurisdictions were merged, children who had offended would continue to attract different disposals and be subject to different decision-making processes, informed by a different (and largely punitive) philosophical base. In short, it is highly unlikely that unification would, in and of itself, engender more positive outcomes for children in conflict with the law.

The *NAYJ* is therefore not persuaded that simply re-creating a single jurisdiction would address the shortcomings of the youth court identified earlier in this paper, unless it was accompanied by a much more thoroughgoing, and radical, reform of arrangements for dealing with children in trouble that dispensed with notions of punishment and holding children to account (see for instance, National Association for Youth Justice, 2019; Case and Haines, 2020). Combining the family court and the youth court in the absence of such wider reforms (although it may be a sensible step as part of such a transformation) also carries the risk of widening the criminal justice net, drawing larger numbers of children into the court process, and increasing levels of compulsory intervention in children's lives.

In this context, there is merit in considering what other types of changes, short of wholesale reform, might in the interim help to improve children's experience of the youth court and increase the potential for court disposals to provide support to children to improve their longer-term wellbeing.

What about children in the adult court?

Before turning to what such reforms might look like, it is important to acknowledge that not all criminal hearings involving children take place in the youth court. For instance, children charged and refused bail by the police will be detained overnight and taken to the first available court. If there is no youth court sitting the following day – an increasingly likely prospect as a consequence of court closures (an issue discussed in more detail below) - this will be an adult magistrates' court. The absence of any published data means that it is not possible to determine the scale of the problem. It is clear however that many areas have only one youth court sitting each week with the consequence that children refused bail by the police on any other day will inevitably be put before the adult court. There is moreover evidence that these children are at greater risk of having bail refused (Gibbs and Ratcliffe, 2018). The number of children appearing in the adult magistrates' court is further swelled by the requirement that where a child has an adult co-defendant, they will be 'carried' by that adult into the adult court.

The principle that children are generally 'carried' by an adult with whom they are co-charged applies equally to cases where the latter elects for Crown court trial or the magistrates' court refuses jurisdiction in respect of the adult. Although the Sentencing Council (2017: paragraph 2.11) has indicated that the higher court:

> '*should conclude that the child … must be tried separately in the youth court unless it is in the interests of justice for the child or young person and the adult to be tried jointly'*,

it is apparent from the data cited below that this guidance is often not followed. Even where children *are* subsequently remitted to the youth court, they are disadvantaged by the considerable delays associated with the case first being heard in Crown court and by the intimidating experience of appearing in that adult venue before their eventual trial in the youth court.

Children may also face Crown court trial where they are alleged to have committed a 'grave crime' (Sentencing Council, 2017) and the youth court refuses jurisdiction on the basis that a sentence of greater than two years – the maximum penalty available in the youth court – should be available (Sentencing Council, 2017). In such circumstances, the maximum adult penalties become available for the child, irrespective of their age. Whereas custodial sentences can only be imposed in the youth court on children aged 12 years or older, the Crown court also has the power to imprison children from the age of ten (Nacro, 2007).

While there has been a substantial reduction in the number of children appearing in Crown court in recent years, with a fall of 78% between 2010 and 2020 (Ministry of Justice, 2020), this is not due to a decline in the proportion of cases where jurisdiction is refused but simply a consequence of the fall in the number of overall court proceedings over the same period. Indeed, the contraction in the number of Crown court cases is slightly lower than would be anticipated given the trends in relation to overall prosecutions of children (Bateman, 2020). In any event, the number who continue to appear in Crown court remains considerable: during 2020, 665 children were dealt with in the higher court of whom 252 were sentenced to custody (Ministry of Justice, 2020).

Many commentators who have been critical of the youth justice system in recent years have acknowledged that the adult court is not a suitable venue for children. Nonetheless, they have, for the most part, stopped short of calling for an end to Crown court trial. Charlie Taylor (2016: 31) describes the Crown court as '*intimidating ... for children*' and as being '*like a circus'* but goes on to argue that the higher court '*should be reserved for exceptional circumstances*'. (To be fair, Taylor does allow that '*ultimately… consideration could be given to trials involving children no longer taking place in the Crown Court*'.) Similarly, the Carlile inquiry (2014: iv and 39) describes children in the Crown Court as '*doubly vulnerable*' and '*subject to a negative and terrifying experience*'. The report nevertheless recommends no more than the introduction of a statutory presumption of youth court trial with cases heard in the Crown court being exceptional.

The difficulty with these proposals, from the perspective of the *NAYJ*, is that the statutory guidance already requires that Crown court trial should be an exceptional course. The Sentencing Council (2020: paragraphs 2:10-2:11) notes that the '*proper venue for the trial of any child or young person is normally the youth court*' and makes clear that children should only be sent to the Crown court for offences of '*such gravity that a custodial sentence substantially exceeding two years is a realistic possibility*' (Sentencing Council, 2020: paragraphs 2:10-2:11). These provisions are, however, clearly insufficient to prevent large numbers of children appearing at Crown court as the data cited above attest.

The *NAYJ* (2019: 6) accordingly believes that '*no child should ever be tried or sentenced in an adult court. Children should never appear in the crown court*'. It is of course true that where children are liable to receive lengthy (adult type) custodial sentences, they should not be disadvantaged by comparison with adults, by, for instance, not having the option of jury trial. But this objection does not imply that Crown court trials may be unavoidable. It would for instance be possible to modify youth proceedings in cases involving 'grave crimes' to accommodate a jury (Auld, 2001; Nacro, 2002). An alternative, or complementary, solution would be to introduce a child specific maximum term of imprisonment, significantly shorter than the equivalent available sentence for adults and abolish life sentences for children, thereby potentially reducing the need for jury trial. Such a reform would, it might be noted, be consistent with youth justice guidelines produced by the UN Committee on the Rights of the Child (2019: 13) which describes lengthy imprisonment as '*grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child*'.

● Strengthening youth court links to the family court (without amalgamation) and attenuating connections with the adult criminal justice system

One of the, perhaps unintended, by-products of the separation of jurisdictions by the Children Act 1989, was to firmly locate youth court magistrates within the criminal justice arena. Juvenile court magistrates had a clear focus on decision-making in relation to children, whether in care or criminal proceedings. By contrast, magistrates who sit in the youth court apply initially to work in the adult criminal court. After two years adult work, those who wish to do so undertake additional training that allows them to preside also over youth proceedings, but they continue to sit in both (criminal) courts (Carlile, 2014). In consequence, they have no experience of dealing with cases that focus on children as being in need of protection and have a limited understanding of care-related legislation or the operation of children's services. The youth panel might thus be seen as being in vertical alignment with the wider criminal justice system rather than having a horizontal orientation with court structures for determining issues in relation to children's upbringing.

The negative repercussions of this vertical alignment have been exacerbated over time by two main factors. First, when the jurisdictions were separated, juvenile court magistrates were allocated to either care or crime work, ensuring an element of continuity in the youth court as the large majority of those sitting on the bench had a recent history of family proceedings. Over time, this child focused expertise was inevitably diluted as older members of the youth panel were replaced by new appointees whose prior experience was exclusively in the adult criminal court.

Secondly, over the past decade, more than half (51%) of magistrates' courts have closed (House of Commons Library, 2020). Separate figures are not available for youth courts (Pidd, 2019), but given the much sharper decline in prosecutions of children, it would be reasonable to assume that the impact of closures has been at least as consequential in that sector as the overall figure would suggest (Bateman, 2020a). There are a number of problematic features associated with these cuts in provision (for instance, an increased prospect that children going to court from police custody will appear in the adult court – an issue described earlier in the paper - and a rise in the average period from charge to sentence (Bateman, 2020a)), but the principal concern from the current perspective is that, as youth courts sit less frequently, magistrates who are qualified to sit in children's cases do so increasingly rarely. Sentencers

accordingly spend proportionately more time dealing with adult criminal cases leading to a distinct loss of youth court expertise and a corresponding risk that they will be more likely to bring adult-oriented assumptions with them when dealing with children.

It seems probable that this dilution of specialism has led to the youth court becoming less child friendly than it may have been when it was first established. Certainly, recent evidence makes it clear that children's understanding of and participation in the hearing is currently compromised and that courts lack the necessary depth of understanding of problems affecting the child. The Youth Court Bench Book does draw attention to the importance of engagement (Judicial College, 2020) but research confirms that children frequently struggle to comprehend what is happening in court and proceedings are often characterised by jargon and difficult language. Engagement between the child and the judiciary is generally limited; children's participation is commonly restricted to confirming their name, address, and plea, with subsequent conversations taking place exclusively between court professionals. These failings, the research suggests, can be explained, in part, by a lack of appreciation by decision-makers of the extent of the social, cultural and age gulf between them and the child defendants, which on occasion leads to anxious or uncomfortable behaviour on the part of the child being misinterpreted as insolence or disinterest (Hunter et al, 2020).

Critics of existing arrangements in the youth court have proposed potential reforms which, while falling short of the wholesale transformation of the justice system which the *NAYJ* considers necessary for the implementation of a fully child first practice, would better align arrangements for dealing with safeguarding and youth crime without the need to combine jurisdictions. Of these, perhaps the most important would involve divorcing decision-making in relation to children from that in the adult criminal justice system, resulting in a more child focussed youth court culture. This might be achieved in a number of ways:

- Youth court magistrates should not be required to have experience of sitting in adult magistrates' courts before being able to preside over children's cases
- Magistrates, and district judges, presiding in the youth court should be selected specifically for work with children
- Youth court magistrates should not simultaneously sit in adult proceedings. There should be a clear choice of focusing on adult or children's work
- Youth court magistrates should also sit in the family court – or at least have the option of so doing. It might be noted that this is not unprecedented; members of the Inner London youth panel, who were appointed separately from other magistrates by the Lord Chancellor, continued to sit in both care and crime cases for some years after the dissolution of the juvenile court (Curtis, 2005).

This closer alignment between decision-making in youth justice and care proceedings would have a number of material benefits. Attention to the welfare principle, a requirement of both courts, would inevitably have a higher profile where youth court magistrates were child specialists rather than spending the greater part of their time hearing adult criminal cases. Magistrates' training, instead of being split between adult and child jurisdictions, could all be child focused leading to an improved understanding, and awareness of:

- the nature of child development (including speech, language and communication needs)
- the context in which youth crime occurs (largely a normalised response to environments over which the child has precious little control (France et al, 2012))

- the negative consequences of incarceration and the experiences of children in the secure estate, and
- the natural process of maturation by which most children 'grow out of crime', a process which can nevertheless be impeded by over-intrusive youth justice intervention (Rutherford, 1992).

Indeed, a cogent case could be made that youth court and family magistrates should share, at least some, training (Carlile, 2014).

The specialist nature of the youth panel would also ensure that magistrates were better placed to ask relevant questions of pre-sentence report authors, ensuring that issues pertinent to the child's welfare needs and any plans in place to address these, were thoroughly explored. It might also be anticipated that the recruitment of child specialists who had explicitly chosen to focus on children's work would go some way to improving engagement within the youth court and facilitating children's understanding of, and participation in, the process.

The establishment of a distinct child-oriented youth panel should be accompanied by a corresponding specialisation of other professionals working in the court arena. This would include, perhaps most importantly, defence lawyers, whose standard of representation of children in conflict with the law, at present, leaves much to be desired (Wigzell et al, 2015; Taylor, 2016; Carlile, 2014; Hunter et at, 2020). The poor quality of advocacy is in part a consequence of a perception, reflected in rates of remuneration, that the youth court has a lower status than other courts; changing this perception will require improving rates of pay for youth court work, encouraging legal representatives to recognise youth work as a legitimate specialist career path; and supporting that specialism through dedicated, child focused, training (Wigzell et al, 2015). Legal advisors and prosecution lawyers working in the youth court should also be specialists.

Specialist youth court professionals should be able to practice in premises that are properly adapted to hearing cases involving children, rather than mirroring the structures of adult criminal courts. This would necessitate a wholesale redesign, in most areas, of existing youth court rooms, to ensure that they are distinct from adult courts, with seating on a single level and docks dispensed with, in a manner that encourages informality and participation (Hunter et al, 2020).

The benefits arising from increased specialisation might be further strengthened though other measures. A range of commentators have, for instance, suggested that the youth court should be afforded the power to direct a local authority to undertake an investigation of the child's circumstances with a view to determining whether an application for a care or supervision order would be appropriate (see for example, Michael Sieff Foundation, 2013; Carlile, 2014; Curtis, 2005). This option is currently available to the family court, under section 37 of the Children Act 1989, and extending that provision to youth justice proceedings would help to ensure a greater involvement of children's social care in cases where that was deemed appropriate.[1] Such an extension might be usefully linked to the duty on local authorities, under

[1] It might be noted that section 9 Children and Young Persons Act 1969 already places a duty on the local authority, where it becomes aware that a child in its area is being prosecuted for an offence, to undertake an investigation of the child's circumstances and provide the court with information on '*home surroundings, school record, health and character of the person in respect of whom the proceedings are brought as appear to the authority likely to assist the court*' unless it is of the opinion that '*it is unnecessary to do so*'. The section also empowers courts to request such an investigation by the local authority, This power is rarely, if ever, used, suggesting that most local authorities and courts consider that the duty is discharged through the provision of pre-sentence reports. Unlike section 37, it does not include a duty on the local authority to consider whether an application for a supervision order or care order is necessary (for more detail, see Carlile, 2014).

schedule 2 of the Children Act 1989, to '*reduce the need to bring… criminal proceedings against … children*' in their area and *'to encourage [such] children not to commit criminal offences*'. The power to require local authorities to report to the youth court might also be, enlarged, as suggested by Carlile (2014), to encompass education, health, housing and other agencies with a legal responsibility, under s11 of the Children Act 2004, to discharge their functions '*having regard to the need to safeguard and promote the welfare of children*' (HM Government, 2018: 58).

A complementary reform would allow youth courts to have, as a matter of course, access to any recent assessments prepared for the family court (and vice versa), ensuring that orders imposed in sentencing proceedings would take account of, and be consistent with, care plans (Munby, 2017). Moreover, when dealing with children involved in both family and offence related proceedings, youth courts could be encouraged to delay – perhaps through use of a deferred sentence – final disposal until the outcome of family proceedings was known and could be properly considered.

Changes within the court arena should of course be mirrored by associated modifications to the broader structures that influence court decision making. The national Criminal Justice Board might, for instance, have a distinct youth court subgroup meeting on a regular basis with the Family Justice Board. These arrangements could be replicated at the local level, with youth court subgroups of local Criminal Justice Boards having joint meetings with their Family Justice counterparts. Court users' groups might be amalgamated or convene joint meetings. Such greater integration would facilitate the shared training of youth and family panels referred to earlier. Such adjustments would also need to be reflected in closer collaboration between mainstream children's services and youth offending teams (YOTs). Despite the intentions of the architects of the Crime and Disorder Act 1998, who envisaged YOTs as multi-agency mechanisms for embedding partnership working, the reality, as Charlie Taylor (2016: 7) noted in his review of the youth justice system, is that:

> '*the shutters come down when YOTs try to get support from social care, education, housing or health for a child who needs a coordinated response*'.

Closer alignment of decision making in the youth court and family proceedings would be enhanced by services responding to children's needs in a holistic manner rather than responses being determined by the pathways by which children come to the courts' attention. It would also simultaneously incentivise services to work together to ensure integrated planning of provision for children.

Conclusion

The *NAYJ* considers that little would be gained from a unification of the youth and family court (which, conversely, carries the risk of unintended negative consequences) unless that reform was accompanied by a radical transformation of our wider arrangements for dealing with children in trouble with the law.

Short of such a transformation (one that dispenses with the notion of retribution) the culture and functioning of the youth court could however be improved considerably by having a child specialist workforce, thereby reducing the importation of assumptions and practices from the adult criminal justice system. Developing mechanisms for communication between the youth and family courts, alongside a reconfiguration of the wider frameworks for supporting children, would help to promote closer co-operation and a shared, child-focused, and increasingly child first, ethos.

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