

The International Journal of Children's Rights

Welfare, Justice, and Diverse Models of Youth Justice: A Children's Rights Analysis --Manuscript Draft--

Manuscript Number:	CHIL-1178	
Full Title:	Welfare, Justice, and Diverse Models of Youth Justice: A Children's Rights Analysis	
Short Title:		
Article Type:	Full Length Article	
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Funding Information:	Irish Research Council for the Humanities and Social Sciences	Dr Louise Forde

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Abstract:

While States have a legal obligation to ensure that UNCRC rights are fully vindicated in youth justice systems, States' responses to offending by children are often dictated by other concerns. The need to ensure accountability and the protection of society, and the need ensure children are treated as children and with respect for their needs – epitomised by the “welfare/justice debate” – are often seen as contradictory goals, meaning that identifying an overall ‘model’ of youth justice that will also ensure UNCRC-compliance can be difficult. Derived from a comparative study of child rights compliance in the youth justice systems of Scotland, Ireland and New Zealand, this article poses the question of whether the UNCRC mandate a particular approach to youth justice. It examines the balance between welfare and justice concerns found within the text of the UNCRC and reflects on what this means for the development of rights-compliant youth justice systems.

Funding: This article is based on research funded by an Irish Research Council Government of Ireland Postgraduate Scholarship.

Acknowledgements: This is the peer reviewed version of the following article: Forde, L. (2021). Welfare, Justice, and Diverse Models of Youth Justice: A Children's Rights Analysis. *The International Journal of Children's Rights* 29, 4, 920-945, Available From: Brill <https://doi.org/10.1163/15718182-29040005>. This article may be used for non-commercial purposes in accordance with Brill Terms and Conditions for Self-Archiving.

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1. Introduction

The process of developing and proliferating the children’s rights standards under the UN Convention on the Rights of the Child (UNCRC) at the international level has been particularly evident in the context of youth justice (Lynch and Liefwaard, 2020). Core provisions setting out the rights of children in conflict with the law are detailed in Articles 37 and 40 of the UNCRC, and a not insubstantial body of further standards and guidelines – both at the UN level¹ and the European level² – now exist. The publication in 2019 of General Comment No. 24, which updates the Committee on the Rights of the Child’s previous guidance on the implementation of children’s rights in youth justice is demonstrative of the continuing process of development in this area.³ These instruments add significantly to our understanding of the rights of children in this situation, and of how they should be applied in practice. As Article 4 makes clear, States parties have a legal obligation to take steps to ensure that UNCRC rights are fully implemented and respected within their jurisdiction.

¹ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (resolution adopted by the General Assembly 29th November 1985) A/RES/40/; UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency* (resolution adopted by the General Assembly, 14th December 1990) A/RES/45/112; UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (resolution adopted by the General Assembly 2nd April 1991) A/RES/45/113; UN Committee on the Rights of the Child, *General Comment No. 10: Children’s rights in juvenile justice* (2007) CRC/C/GC/10; UN Committee on the Rights of the Child, *General Comment No. 24: Children’s rights in juvenile justice* (2019) CRC/C/GC/24

² Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (4th November 1950) ETS 5; Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (adopted by the Committee of Ministers on 17th November 2010 at the 1098th meeting of the Ministers’ Deputies) CM/Del/Dec(2010)1098/10.2; Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures* (5th November 2008) CM/Rec(2008)11

³ A note on terminology: although the Committee on the Rights of the Child has recently indicated its preference for the terms “child justice” and “child justice system” in General Comment No. 24, the term “youth justice” is still commonly found within the literature in this area and used within states’ law and policy frameworks. Given the continued widespread usage of the term “youth justice”, this terminology has been retained and used throughout this article. The author considers that the term “youth justice” should be understood in the same way as the term “child justice”, as set out in General Comment No.24

1 At a practical level however, States' responses to offending by children is often dictated by
2 concerns other than the implementation of international children's rights obligations. These
3 include legitimate concerns relating to the protection of victims and society, ensuring
4 accountability for actions that cause harm, and a desire to prevent further offending; these
5 motivations frequently sit alongside a recognition that children in conflict with the law often
6 have complex unmet needs which are also relevant in determining the response to offending.
7 The need to ensure accountability and the protection of society, and the need ensure children
8 are treated as children and with respect for their needs are often seen as contradictory goals,
9 meaning that identifying the correct balance while ensuring that States meet their UNCRC
10 obligations can be difficult.
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24 Given the range of goals pursued within individual youth justice systems, a number of
25 different categorisations have been identified to aid understanding and analysis of different
26 models of youth justice (Goldson & Muncie, 2006; Case and Hampson, 2019). While in
27 practice the majority of youth justice systems represent a mixture of a variety of different
28 approaches, at its most basic and disparate, these "models" of youth justice have been
29 characterised as either "welfare"- or "justice"-based – prioritising responding to youthful
30 offending through addressing unmet needs, or through the apparatus of the traditional
31 criminal justice system, respectively (Fionda, 2005: 35-38; Smith, D.J., 2005; Smith, R.,
32 2005). Although most youth justice systems blend multiple approaches, the majority of
33 systems continue to grapple with core questions epitomised by the "welfare/justice
34 dichotomy" in that they must seek to find a balance between the developmental needs of the
35 child, the need to ensure accountability in order to protect victims and society, and to ensure
36 that due process rights are adequately protected. Significantly, decisions about the model of
37 youth justice adopted can become an issue of contention in political debate and this can
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1 sometimes overshadow concerns related to children’s needs and development (Case and
2 Hampson, 2019; Fergusson, 2007).
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4 In light of the difficult nature of choosing an appropriate balance between these interests, it
5 can present an additional challenge for States to identify an overall ‘model’ or approach to
6 youth justice that will also meet their obligations under the UNCRC. In discussions of the
7 models that may be adopted, welfare-based approaches have sometimes been characterised as
8 ‘utopian’ and justice-based approaches as ‘dystopian’ (Case & Haines, 2018); equally, some
9 commentators have suggested that ‘welfare’-based approaches are the only means of ensuring
10 that the rights of children can be adequately upheld (Scraton & Haydon, 2009). However,
11 there have been few in-depth analyses of the extent to which the UNCRC children’s rights
12 standards themselves mandate a specific approach to youth justice. Equally, while a
13 substantial body of scholarship exists examining how children’s rights principles are applied
14 in practice by individual states (see e.g. Goldson, 2019), in-depth comparative analyses of the
15 level of compliance of different models of youth justice with the UNCRC are less common.
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18 Derived from a comparative study of UNCRC compliance in youth justice in Scotland,
19 Ireland and New Zealand, this article poses the question of whether the children’s rights
20 principles as set out in the UNCRC mandate a particular approach to youth justice. In doing
21 so, it first sets out a brief overview of the diverse approaches underpinning the development
22 and operation of youth systems. It then moves on to examine the balance between welfare
23 and justice concerns found within the text of the UNCRC and seeks to identify core
24 requirements that should be present in any youth justice system seeking to meet these
25 obligations. Finally, it reflects on the extent to which the UNCRC standards mandate a
26 particular approach to youth justice, and in particular on how the balance between concerns
27 historically associated with ‘welfare’ and ‘justice’ approaches might be balanced in a rights-
28 compliant youth justice system.
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2. Diverse Discourses in Youth Justice Systems

2.1 Competing ideologies in youth justice?

A variety of goals, objectives, and ideologies underpin the operation of different youth justice systems globally, with different combinations of these concerns making up individual States' youth justice law and policy. In assessing these systems from a children's rights perspective, understanding how the overarching principles and ideologies driving the system as a whole translate into particular practices that may serve either to bolster or deny children's rights in a particular area is essential.

Individual youth justice systems often pursue a variety of goals, and can be driven by more than one ideology. Common discourses in youth justice policies have been identified, including 'welfare; justice; informalism; rights; responsibilities; restoration; prevention; remoralisation and retribution/punishment' (Goldson & Muncie, 2006: 91). The degree of emphasis placed on each approach results in a unique configuration in each individual youth justice system. Each approach has benefits and pitfalls from a children's rights perspective.

"Welfare"-based approaches have their roots in an ideology that viewed criminal behaviour as emerging from adverse social conditions and focused on meeting children's needs as a primary response (Smith, R., 2005, p.7; Fionda, 2005, p.35). The approach has found support in modern longitudinal studies of offending (McAra & McVie, 2010), and remains an important component of many youth justice systems, including, notably, Scotland (Lightowler et al., 2014). While welfare-based approaches have advantages from a children's rights perspective in that they centralise the well-being of children, these approaches have often proven susceptible to political pressure to adopt a more punitive ethos (Whyte, 2009; Piacentini & Walters, 2006; Christiaens & Nuytiens, 2009), and scholars have commented upon the inherent 'fragility of welfare-based systems' (McAra & McVie, 2010: 200).

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Particular issues can arise where children are transferred away from child-specific processes to adult systems of justice either because they are too old or have committed a serious offence (Dyer, 2016; Deuchar & Sapouna, 2016; Cleland, 2016).

Rather than focusing on the circumstances of individual offenders, ‘justice’ approaches tend to utilise criminal justice processes, and emphasise due process rights, legal safeguards, and proportionality (Muncie, 2015: 281-282). While this can act as an important safeguard against repressive forms of welfarism, a key criticism of ‘justice’-based approaches relates to the potential for more punitive and disproportionate responses to be taken to young people (Benekos & Merlo, 2008; Austin & Krisberg, 2009; Goldson, 2010).

Equally, other approaches that are important within youth justice systems – such as diversion, restorative justice, and risk-based approaches – also attract criticism from child rights perspectives, particularly in relation to flaws in the theoretical basis and implementation of specific strategies (See for example: Lynch, 2010; O’Mahony & Doak, 2017; Carr & McAlister, 2014; Swirak, 2016).

It is noteworthy that in recent years, approaches based on “positive youth justice” and “children first, offenders second” (CFOS), have increasingly become a part of this discussion, particularly in England & Wales and parts of the United States (Case & Haines, 2018). These new approaches explicitly reference the UNCRC standards as a foundational set of principles for an approach to youth justice that is child-friendly, strengths-based and centred on participatory practice with children (Case & Haines, 2015; Byrne & Case, 2016; Haines & Case, 2015).

2.2 Negotiating Youth Justice Ideologies in Theory and in Practice

States have a legitimate interest in finding effective responses to crime as a means of protecting victims and society. However, in some jurisdictions issues related to youth justice

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can become politicised, and scholars have argued that the most important drivers of change within the youth justice systems in some jurisdictions, such as England & Wales, have been fundamentally political, rather than being based on evidence or on a coherent, principled approach (Case and Hampson, 2019). While these political imperatives may have greater impact in some countries as compared to others, it is important to acknowledge that the overall approach actually adopted by a state to respond to youth crime will not necessarily be traceable to an underlying coherent logic or scientific basis, but may instead be driven by politics or be taken in response to a particular event or concern (Case and Hampson, 2019; Fergusson, 2007; Fionda, 2005: 29). In some jurisdictions it has been argued the political nature of the drivers of change has resulted in a marginalisation of children’s rights obligations within this context (Cunneen et al., 2018).

It is also important to highlight that a range of strategies are often incorporated into a single youth justice system, and the way that these ideologies interact with each other are capable of producing a variety of results. Practitioners’ approach to implementation can be particularly important and may have a transformative effect on the dominant conceptual discourse in legislation and policy (Field, 2007: 314). For instance, Kemshall has highlighted that practitioner attitudes in England & Wales have in the past, ‘presented something of a “firewall” to the complete implementation of a risk prevention paradigm’ in practice (Kemshall, 2008; see also Gray, 2013). It has been suggested that this work by practitioners can itself produce a set of “practice ‘models’” that sit alongside the models of youth justice promulgated through law and policy (Smith & Gray, 2019). Professional priorities therefore are capable of interacting with each other in a way that transforms and shapes youth justice policy in practice (Souhami, 2007).

Finally, an increasing and explicit focus on children’s rights, as set out in the international standards, is identifiable an important factor in the development and reform of youth justice

1 law and policy in a number of jurisdictions. While explicit reference is made to the
2 children’s rights framework as foundational principles within positive youth justice/CFOS
3 approaches, separately, increasing references are being made to the international children’s
4 rights standards and the UNCRC in the development and reform of youth justice law, policy
5 and practice documents in a number of jurisdictions, including in amendments made to s.5 of
6 the Oranga Tamariki Act in New Zealand, and in the recently published (though not yet
7 finalised) draft Youth Justice Strategy in Ireland.
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10 The drive to respond either to the complex needs of children or to ensure accountability for
11 offending, and as a result, the historical prioritisation of “welfare” and “justice” approaches,
12 have often been viewed as oppositional and irreconcilable forces (Fionda, 2005: 37;
13 Fergusson, 2007: 180-182; Muncie, 2006: 65). Taking the above discussion into account, it
14 is quite clear that the welfare/justice dichotomy is not nuanced enough to provide a full
15 explanation of the complexity, hybridity and diversity of policy or practice in contemporary
16 youth justice systems (Case & Haines, 2018: 211; see further Phoenix, 2016; Muncie, 2008).
17 This being said, despite the inadequacy of the concepts of “welfare” and “justice” when seen
18 as all-encompassing and totalising explanations of any single youth justice system, they
19 nonetheless represent fundamental tensions with which youth justice law and policy continue
20 to grapple. The push and pull between these two approaches seems inherent in the very
21 concept of youth justice itself, since its inception (Tanenhaus, 2004); children are in contact
22 with the state authorities as a direct result of their offending, yet a differential approach is
23 justified on the basis that they remain children with particular needs, vulnerabilities and
24 capacities. While the complexity and nuance of the overall picture can be lost in over-
25 simplified debates about the welfare-justice paradigm, it remains important to consider how
26 the balance between these approaches is struck, as it encapsulates a key dynamic in both the
27 lives of children concerned and the response of the law.
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1 “Welfare” and “justice” concerns can also be understood in terms of the structures and
2 mechanisms responsible for the governance and implementation of law and policy, as well as
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4 by reference to the goals of the system. There is a relationship between the organisational
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6 structures within youth justice systems and the type of services provided to children within
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8 that system (Haines & Case, 2018: 140). Therefore, it is important to consider the
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10 government departments and institutional structures in which responsibility is placed, both in
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12 relation to the development of law and policy, and in implementation.
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17 Given the continued relevance of these concerns within youth justice systems, the balance
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19 struck between “welfare” and “justice” forms much of the focus of the analysis in the
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21 remainder of this paper. While all youth justice systems are faced with a series of choices
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23 about their overarching goals and aims, a question remains about how approaches based on
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25 these ideologies can also meet the requirements of international children’s rights law.
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31 **3. Children’s Rights**

32 **3.1. Welfare, justice, and the need for a holistic approach in the UNCRC**

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34 Children’s rights principles and standards applicable to children in conflict with the law are
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36 ‘firmly embedded in international human and children’s rights’ (Lynch & Liefwaard, 2020).
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38 While the UNCRC does not explicitly prefer either a “welfare” or a “justice” response, it sets
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40 out important criteria that must be adhered to if States parties to meet their international legal
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42 obligations. Kilkelly has commented on the standards’ ‘remarkable’ consistency in relation
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44 to their ‘commitment to age-appropriate treatment, the importance of diversion and the
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46 imperative of rehabilitation’ (Kilkelly, 2008b: 188). The focus of the children’s rights
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48 instruments on age-appropriate treatment and a recognition of the different capacities of
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50 children as compared to adults – both in relation to their lesser capacity for self-regulation
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52 and greater capacity for change – has now been affirmed by research in developmental
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psychology (Lynch and Liefgaard, 2020: 93). Particularly clear guidance also exists in relation to ‘the concept of proportionality to offset the likelihood of over-zealous intervention and concomitant forms of injustice’, and in relation to the use of detention as a sanction (Goldson & Muncie, 2006: 97).

These central themes emerging from the children’s rights standards provide an attractively consistent message, particularly when compared with the state of complexity often evident in youth justice systems. However, the international standards themselves continue to develop. The publication in 2019 of General Comment No. 24, replacing General Comment No. 10, is testament to the continued development thinking in this area internationally. While the focus in this article is on the rights and principles set out in the UNCRC and supporting guidelines at the UN level, it should also be noted that significant developments have occurred at the regional level to develop these standards further (Liefgaard 2016; Liefgaard & Kilkelly, 2019; Lynch & Liefgaard, 2020). These regional standards have been particularly important in adding depth and meaning to the core rights standards, and represent additional resources for States seeking to develop a rights-compliant approach.

Articles 37 and 40 UNCRC are the core provisions setting out the rights of children in conflict with the law. However, it is important to remember that their concerns are not limited to the issues covered by these provisions. It has been suggested that a tendency to focus only on Articles 37 and 40 ‘fails to see young people as having a full range of needs, and rights, at every moment they are within the justice system’ (Abramson, 2009: 165-166). Remembering that children in the youth justice system continue to enjoy other UNCRC rights is important to avoid seeing them only as offenders (Case & Bateman, 2020; Johns et al., 2017; Hollingsworth, 2008) and to develop more effective and rights-compliant forms of practice (Johns et al., 2017).

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Despite clear core principles for youth justice emerging from the UNCRC, the standards are less clear about identifying an over-arching model for the development of a rights-compliant youth justice system. Although the model of youth justice adopted in a jurisdiction has significant implications for protection of children’s rights (Trépanier, 2007: 513), the text of the UNCRC itself sets out the individual rights children are entitled to without reference to whether an approach based on “welfare” or a “justice” approach is preferable. Instead of presenting the principles enshrined in these provisions as opposing or antithetical, “welfare” and “justice” concerns sit side by side in the UNCRC. Here, these approaches are not presented as conflicting, but as important elements that must be present in rights-compliant youth justice systems.

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It is clear that elements of both approaches are required. Article 40(1) stresses that any response should take into account both the desirability of promoting the child’s reintegration, and of the child’s assuming a constructive role in society. However, issues of accountability and of due process are also present. While minimising recourse to judicial proceedings is a clear focus (Art 40(3) UNCRC), this does not mean that children have no responsibility for their actions (Hammarberg, 2008). Equally, the need to ensure that children have access to adequate legal safeguards is apparent within the UNCRC (see Article 40(2)).

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It seems therefore that the text of the UNCRC itself does not present a vision of two opposing and irreconcilable approaches to youth justice. Instead, it makes clear that elements of both “welfare” and “justice” approaches must be present in a rights-compliant youth justice system. The remainder of this section identifies five key criteria for a rights-compliant youth justice system emerging from the UNCRC that can be used to guide national practice. These criteria are then developed in the final section to reflect on the implications for the overall model of youth justice chosen by a State.

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3 **3.2. Developing a rights-compliant youth justice system: core principles**

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5 3.2.1. Focus on reintegration and dignity rather than punitiveness

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7 While the UNCRC does not explicitly endorse any one model of youth justice, important
8 principles emerge. These principles, rather than emphasising a polarisation of “welfare”- and
9 “justice”-based approaches, navigate a middle course between the two.
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13 The first key criterion identified relates to the overall aims of the youth justice system.
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15 There is a requirement not only that overly-punitive approaches are avoided, but that the
16 children’s reintegration and assumption of a positive role in society are key underlying goals
17 (Art. 40(1) UNCRC). Article 40 further emphasises the importance of treating children in an
18 age- appropriate manner consistent with the promotion of their dignity, and which reinforces
19 their respect for the rights and freedoms of others. This highlights the need to ensure that
20 children continue to be treated as children, in line with their developmental needs.
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24 The importance of ensuring that overly-punitive reactions to children in conflict with the
25 law are avoided is equally clear. The Committee on the Rights of the Child has stated that:
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29 “A strictly punitive approach is not in accordance with the principles of child justice
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31 ...Weight should be given to the child’s best interests as a primary consideration as
32 well as to the need to promote the child’s reintegration into society.” (General
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34 Comment No.24 at para.76)
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38 This is further emphasised within the Beijing Rules, which unambiguously states that
39 reactions based on just deserts or retribution ‘should always be outweighed by the interest of
40 safeguarding the well-being and the future of the young person.’ (Commentary to Rule 17 of
41 the Beijing Rules).
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45 It is important, however, that approaches emphasising reintegration must also be subject to
46 the principle of proportionality. Rule 5 of the Beijing Rules stipulates that the proportionality
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1 of responses must be judged with reference to children’s individual characteristics as well as
2 to the offence. Trépanier has commented:
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4 “...it is clear that the underpinning model is one that leaves considerable space for the
5 welfare of the youth, and where the offender’s accountability for his or her act(s) is
6 not the paramount consideration. Here, we have a hybrid model that retains essential
7 elements of the welfare model while granting the offence a weight that the same
8 welfare model used to reject.” (Trépanier, 2007, p.527).
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10 Limiting the potential for both excessively punitive and excessive welfare interventions are
11 therefore important aspects of the international standards.
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13 Significant priority is also given to the goal of re-integration in sanctioning (Article 40(1)
14 UNCRC). As well as emphasising proportionality, the Committee clearly states that all
15 children in conflict with the law, including those who commit serious offences, should be
16 treated in a way that promotes the child’s reintegration (General Comment No.24, para.76).
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18 While this does not mandate a specific approach, it does imply that whatever approach is
19 taken, adequate supports for reintegration should be provided and that the sanction should
20 serve a positive function in the child’s life. In line with this focus on reintegration, the
21 standards set a number of limits on the types of sanctions that can be imposed. As well as
22 emphasising that sanctions with a purely retributive or deterrent effect should be avoided,
23 important limits are set on sanctions that restrict the liberty of children, and requiring
24 treatment consistent with humanity and dignity and adequate procedural safeguards (Article
25 37 UNCRC; Rule 17, Beijing Rules).
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27 A key choice for States remains, however, of whether responses to offending focused on
28 reintegration are best located within a child-focused “welfare” framework, or within an
29 adapted criminal justice framework. While the standards do not provide a direct answer to
30 this question, it is notable that Rule 3 of the Beijing Rule provides that the standards extend
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1 to “all juveniles dealt with in welfare and care proceedings”. This highlights the need to
2 closely examine the actual effect of “welfare” and “justice” models of youth justice, as well
3 as their outward forms. It seems that the Rules contain an implicit acknowledgement that
4 even within systems perceived as benevolent, there is a need to ensure that children have
5 adequate legal protections. Similarly, it is clear that Article 37 applies to all detained
6 children, including those deprived of their liberty outside of the youth justice system (Part II
7 of the Havana Rules; Liefaard, 2008, pp.95-96). This appears to acknowledge the often
8 overlapping nature of systems of justice and welfare in practice, and recognises the need for
9 protections to be extended to all children in this situation.
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24 3.2.2. The well-being of children in conflict with the law

25 The second key criterion emerging from the international standards is that regardless of
26 whether a “welfare” or “justice” approach is adopted, significant attention should be given to
27 the well-being of children. This emerges from the focus on reintegration and the promotion
28 of a constructive role in society (Art.40(1) UNCRC), the variety of measures that must be
29 available to respond in a manner appropriate to the well-being of the child (Art.40(4)
30 UNCRC), and the preference for alternatives to judicial proceedings (Art(40)(3)(b) UNCRC).
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41 Further, the Committee on the Rights of the Child explicitly recommends the reaction to an
42 offence should have the child’s best interests at its heart, alongside the interests of society at
43 large (General Comment No. 24, para.76). Explicit reference to the centrality of the well-
44 being of the child within the overall aims of a youth justice system can be found in Rule 5 of
45 the Beijing Rules. In examining the rights children are entitled to at each stage of the youth
46 justice process, it is clear that well-being is a central focus at all stages, from prevention
47 (Rule 4, Riyadh Guidelines), through the investigation stage (Article 40(2) UNCRC, Rule 11,
48 Beijing Rules) and into the determination and implementation of sanctions. Article 40(2) of
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1 the UNCRC links respect for the due process rights of the child with the aims related to
2 dignity, humanity, and age-appropriate treatment pursued in Art.40(1).
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4 There is a particularly strong focus on the well-being and education of children in
5 sanctioning (Article 40(4)). Throughout General Comment No.10, and subsequently in
6 General Comment No. 24, there is a clear concern with the ‘pedagogical character of the
7 juvenile justice system’ required by the UNCRC standards (Liefwaard, 2007: 568). In relation
8 to sentencing, the Committee acknowledges the complicated nature of the balancing act, in
9 taking into account the offence, the circumstances and needs of the offender, as well as the
10 need for public safety and sanctions. Ultimately, however, the Committee seems to
11 emphasise the longer-term interests in promoting the child’s reintegration (General Comment
12 No.24, para.76). Similarly, particularly strong emphasis is placed on ensuring the well-being
13 and education of children deprived of liberty (Art.37 UNCRC; Rule 26 of the Beijing Rules),
14 with detailed provisions in the Havana Rules setting out the type and nature of care that must
15 be provided.
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33 The emphasis on children’s well-being throughout these instruments reflects the central
34 importance of this principle. Therefore, in considering the overall approach adopted by a
35 State to youth justice, a key criteria for assessing the level of rights-compliance must be how
36 space is created for consideration of the needs and well-being of the child. Where the
37 balance of a State’s approach to youth justice lies on the ‘justice’ side of the spectrum,
38 significant adaptations are likely to be needed to meet this requirement.
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51 3.2.3. Diversion

52 The third key requirement identified is that diversion must play a central role within a state’s
53 youth justice system. Article 40(3) of the UNCRC requires States to promote the use of
54 measures for responding to children without resorting to judicial proceedings. There is an
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evident and unambiguous focus on diversion within the international standards. Diversion from formal judicial processes is encouraged “whenever appropriate and desirable”, and as long as the child’s rights and legal safeguards are respected in the alternative process (Art.40(3)(b) UNCRC). The Committee on the Rights of the Child has highlighted that diversion should be ‘an integral part’ of youth justice systems, recommending that diversion ‘should be the preferred manner of dealing with children in the majority of cases’ (General Comment No.24, para.16;). It is clear that efforts should be made to maximise the use of diversion, and that it should not be reserved only for minor offences (Commentary to Rule 11 of the Beijing Rules; General Comment No.24, para.16).

Despite this, Article 40(3) of the UNCRC nonetheless requires that children’s human rights and legal safeguards are fully respected within diversion processes. There is a clear obligation to ensure that children’s rights are not denied through the use of less formal procedures. While there is a desire to minimise children’s contact with the more formal and potentially harmful aspects of the criminal justice system (Commentary to Rule 11 of the Beijing Rules, Liefwaard, 2015: 263), there is also an imperative to ‘maintain a balance between the informality of proceedings and the protection of the fundamental rights of the child’ (Van Bueren, 1995: 175). As a result, due process rights must be fully safeguarded, and must include opportunities to seek legal advice, the requirement for a firm evidentiary basis, and written consent (General Comment No. 24, para.18).

Although restorative processes have wider application than within diversion, the Committee on the Rights of the Child have endorsed the use of restorative justice in this context (General Comment No. 24, para.17). However, concerns have been raised about whether restorative justice always represents a rights-compliant practice; Lynch has noted the potential for the denial of procedural guarantees and the imbalance of power in some restorative justice settings (Lynch, 2010). It seems that much depends on how these

1 measures are implemented in practice. While rights-compliant models of restorative justice
2 have been proposed (Moore & Mitchell, 2011; Moore & Mitchell, 2009), it is clear that
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4 significant attention should be paid to the implementation of these approaches if they are to
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6 be truly rights-compliant.
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9 Both in relation to diversion and to restorative justice, then, while there is a clear
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11 acknowledgement of the potential benefits for children, it is equally clear that this cannot be
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13 done without attention to children’s due process rights and processes of implementation.
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18 19 3.2.4. Procedural rights 20

21 The fourth key criterion that must be met in a rights-compliant youth justice system is the
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23 provision of adequate legal safeguards, adapted so that they can be meaningful for children in
24
25 practice. The entitlement to due process and adequate legal safeguards is set out in detail in
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27 Article 40(2), and Article 12 – which guarantees children’s right to participate – is also
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29 extremely significant. These legal safeguards must be seen as an essential aspect of any
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31 rights-compliant youth justice system, regardless of whether it is based in ‘welfare’ or
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33 ‘justice’ structures; they apply to ‘every child alleged as or accused of having infringed the
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35 penal law’ (Art.40(2) UNCRC). These rights guarantee minimum due process rights, and
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37 apply at the investigation stage as well as the trial stage (Rules 10 and 13 of the Beijing
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39 Rules).
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45 It is of note that the legal safeguards set out in Article 40(2) are explicitly linked with the
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47 goals set out in Article 40(1) relating to the right of the child to be treated with dignity and to
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49 the desirability of promoting their reintegration. It is clear that children’s legal safeguards
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51 should be seen in light of these overarching goals and principles, and further, that the child’s
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53 age must be taken into account in understanding what these mean in practice.
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Therefore, it is evident that due process rights have to implemented in a way that is meaningful for children. The Committee on the Rights of the Child strongly recommends specific processes and procedural adaptations for child defendants, including ‘child-friendly language at all stages, child-friendly layouts of interviewing spaces and courts, support by appropriate adults, removal of intimidating legal attire and adaptation of proceedings’, and emphasises active and meaningful participation on the part of the child (General Comment No. 24, para.46).

The concept of effective participation, derived from principles established through European Court of Human Rights jurisprudence (See *T. v. the United Kingdom*; *V. v. the United Kingdom* (1999) 30 EHRR121; *S.C. v. the United Kingdom* Case No. 60958/00 (Fourth Section) 15th June 2004; [2004] ECHR 263; *Salduz v. Turkey* (2000) 49 EHRR 19) and developed through regional standards (see Liefwaard & Kilkelly, 2019; Liefwaard, 2016) have, until recently, received relatively little attention by the Committee on the Rights of the Child (see further Parkes, 2013: 178). However, in General Comment No. 24, the Committee on the Rights of the Child makes explicit reference to the concept of effective participation, and highlights that this requires the child to be supported by practitioners, and active efforts to adapt language, environments, and procedures (General Comment No. 24, para. 46)

3.2.5. Implementation

Finally, the fifth criterion identified from analysis of the international standards is that significant attention needs to be given to the implementation and operation of youth justice in practice. It is clear that significant efforts must be extended by States to ensure that youth justice law and policy is not only in place but is implemented effectively in practice. States’ obligations relating to implementation of UNCRC provisions, as set out in Article 4 and further elaborated in General Comment No. 5, are wide-ranging in nature. The need for

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‘comprehensive and multisectoral national strategies rooted in the Convention’ has been stressed (General Comment No.20, para.37). Comprehensive youth justice policies are necessary to ‘guide States towards a holistic implementation of child justice systems that promote and protect children’s rights’ (General Comment No.24, para.6 & para.110).

Ensuring that adequate infrastructure is in place to facilitate effective implementation is also essential. This includes ‘the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels’ (General Comment No.5, para.1). The need for specialisation and an infrastructure that supports co-ordination and co-operation has been particularly emphasised as a vital component for rights-compliant youth justice systems. A comprehensive youth justice system requires specialisation within the ‘police, the judiciary, the court system, the prosecutor’s office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child’, and specialised juvenile courts (General Comment No.24, paras.106-108). ‘[C]ross-sectoral co-ordination’ between different levels of government is essential to achieve adequate implementation (General Comment No.5, paras. 27 & 37).

Finally, the importance of training for all professionals working with and for children has been emphasised (General Comment No.5, para.53), and is considered particularly important in order to prevent discrimination and other breaches of children’s rights (General Comment No. 24, para.112). Training of all professionals in the youth justice system should be ‘systematic and ongoing’, and should contain comprehensive information on the developmental needs of children, the causes of youthful offending, information on marginalised groups and discrimination and on available measures (General Comment No.24, para.112).

This final criteria, while not representing any particular blend of welfare and justice considerations, emphasises that whatever approach is taken, significant care should be taken

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in ensuring that adequate law and policy frameworks, adequate systems of governance, including effective systems of co-ordination and co-operation, adequate infrastructure and the training of professionals are key. Given the diverse range of needs, rights and interests that must be balanced, whatever approach a State chooses, these practical matters impacting implementation of youth justice policy, and therefore the realisation of children’s rights in practice, cannot be easily understated.

3.3 Developing a rights-based model of juvenile justice and the harmonisation of diverse discourses

Considering the heavily negotiated nature of the UNCRC (Doek et al, 1992), it is unsurprising that no one distinct model of youth justice is explicitly advocated. Instead, the UNCRC occupies a middle ground, and seeks to reach an accommodation between approaches based on the welfare of the child, and those based on justice. While it remains silent as to whether a youth justice system should be ideally located within a child-centred welfare framework or a more traditional criminal justice framework, key principles can be identified that suggest that a number of ways forward may be possible. The five key principles identified in this analysis of the relevant standards indicate that elements of both approaches are necessary in any rights-compliant approach to youth justice.

Some scholars in this area have suggested that ‘UNCRC implementation should be grounded in a welfare approach (Scraton & Haydon, 2009: 198), arguing that to apply ‘a justice approach to children, whatever the ‘welfare’ interventions built into the process, denies the status of childhood embodied in all internationally agreed conventions and guidelines’ (Scraton & Haydon, 2009: 302). While a “welfare”-based system, adapted to ensure that sufficient procedural rights are in place, may be one means of ensuring that the

1 rights of children in conflict with the law are upheld, it is submitted that it is not necessarily
2 the only option.
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4 Where responses to children in conflict with the law are based within a “justice”
5 framework, and the police, the courts and traditional criminal justice actors play a more
6 prominent role, it seems clear that the international standards require steps to be taken so that
7 that the well-being and needs of children will be taken seriously. Therefore, if a “justice”-
8 based model is adopted, there needs to be a shift away from an approach that focuses on a
9 simplistic understanding of punishment, towards one that considers child-specific
10 accountability (Hammarberg, 2008). This is, however, much easier said than done, and the
11 particular challenges of developing child-specific systems of accountability for children who
12 commit more serious offences have been highlighted by Lynch (Lynch, 2018).
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26 Equally, while some approaches to youth justice may have inherent advantages, all face
27 continuing challenges in fully meeting their obligations under the UNCRC. Liefwaard has
28 noted that there continues to be a ‘significant gap between international and national human
29 rights standards applicable to children (allegedly) in conflict with the law and the
30 administration of juvenile justice in practice’ (Liefwaard, 2015: 234-235), and it is clear that
31 significant attention needs to be given on a continuous basis to the implementation of law and
32 policy in practice as well as the development of the over-arching framework.
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43 One of the persistent issues in coming to an understanding of how to ensure that a youth
44 justice system is truly rights-compliant, it is submitted, has been the polarisation of “welfare”
45 and “justice” approaches. From a children’s rights perspective such polarisation this not just
46 unhelpful, it is ultimately counter-productive. The international standards make clear that
47 elements of both approaches are needed. Comments by the Committee on the Rights of the
48 Child make it clear that, far from rights and well-being being antithetical, they are
49 fundamentally intertwined and interdependent. Strong protection for children’s rights is
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1 essential to secure well-being. Conversely, ensuring that children’s needs are met may be an
2 essential pre-requisite for ensuring that their procedural rights are meaningful. Equally,
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4 whatever approach is taken, concerns about how to ensure children are accountable for
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6 wrongdoing, particularly serious wrongdoing, are likely to persist. The final section of this
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8 paper contains some reflections on some of the challenges encountered within different
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10 approaches to youth justice from a child rights perspective.
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17 3.3.1 Challenges in meeting the children’s rights standards in diverse systems of 18 19 youth justice 20

21 Adopting a “welfare”-based approach to youthful offending is often seen as the most
22 straightforward method of ensuring that the needs of children are prioritised in a youth justice
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24 system, as required by the international standards. In modern youth justice, this is the
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26 approach epitomised in the Kilbrandon philosophy (Kilbrandon, 1964), and which still
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28 substantially underpins the operation of Scottish youth justice, particularly the Children’s
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30 Hearings System. The findings of the longitudinal Edinburgh Youth Transitions Study are
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32 broadly supportive of this approach (McAra & McVie, 2010). The advantages of this
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34 approach are evident; it places the needs of vulnerable children front and centre as the main
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36 priority for decision-makers, and avoids unnecessary criminalisation of children in conflict
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38 with the law. This approach has much to recommend it, particularly when a child-centred
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40 focus is taken which prioritises learning from children’s experiences in developing and
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42 reforming process and procedure (see e.g. Children’s Hearings Scotland, 2020). This
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44 approach has many of the hallmarks of a system with clear potential to realise the promise of
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46 the UNCRC and other international instruments. However, this is not necessarily the only
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48 means of securing a rights-based approach.
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1 The question of how the needs of children can be adequately met within a “justice”-based
2 system is an interesting one. It is clear that where an approach based on “justice” is equated
3 with “punitiveness” this will be incompatible with the requirements of the UNCRC (General
4 Comment No. 24, para.76), and risks causing further harm to children (Edwards, 2018).
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9 However, this does not necessarily mean that a sufficiently adapted “justice”-based approach
10 could not be capable of realising the international standards.
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14 A number of countries have sought to adapt traditional criminal justice processes to make
15 them more child-friendly, with varying degrees of success. Adaptations can take the form of
16 shifts from adversarial processes towards more restorative and therapeutic approaches and the
17 establishment of alternative courts, as, for example, countries such as New Zealand and
18 Australia have done (Lynch & Liefwaard, 2020; Richards et al., 2017; Baidawi & Sheehan,
19 2019). It can also take the form of prioritising the well-being and care of children within the
20 traditional youth justice system, particularly in diversion processes and within the sanctioning
21 processes. For example, in Ireland, s.158 of the Children Act 2001 explicitly states that the
22 aims of detention include the promotion of the child’s reintegration and assumption of a
23 positive role in society, through the provision of education, care, and services directed to
24 promote their health and well-being (see further Oberstown Children Detention Campus,
25 2019: 10-13).
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43 If a “justice”-based approach is chosen, however, it means that significant space needs to be
44 created wherein the needs of children can be adequately addressed, and this can pose
45 challenges. For example, it has been noted that while Irish legislation provides for more
46 child-friendly procedures to be used at various points in the system, there appears to be low
47 levels of implementation of these in practice (Author, 2018; Kilkelly, 2014). In light of this,
48 it is imperative in this type of system to carefully consider the structures and mechanisms that
49 support effective co-operation, co-ordination, and service delivery, so that children in conflict
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with the law can have access to the range of supports and services needed in relation to their well-being and development.

This currently presents significant challenges for States seeking to ensure a rights-compliant approach, as service delivery – particularly where adequate structures are not in place – can present particular difficulties. Lack of co-ordination between structures and mechanisms designed to look after children’s welfare, including child protection services, and youth justice systems has been noted as a particular problem for “crossover” children, who have experience of both State care and youth justice systems (Carr & Mayock, 2019; Baidawi & Sheehan, 2019: 29). While this particular group of children is particularly affected, all children involved in the youth justice system are impacted by a lack of sufficient co-ordination between youth justice services and the range of other necessary children’s services, including child protection, education, and health. The desirability of integrating youth justice services with other children’s services in an effective way has been highlighted (Haines and Case, 2018) and it is essential if States are to meet their international obligations in this area. Without a focus on co-ordination between agencies responsible for justice and for broader children’s services at the level of law and policy, and in the co-ordination and delivery of services, it is extremely difficult for States to effectively implement their international obligations.

Whichever model of youth justice that is chosen, challenges remain for states seeking to meet their obligations under the international standards in this area. Within more traditional “justice”-based systems, the risk of a slip into excessive punitiveness through lack of sufficient notice on the needs of the child and responses that do not focus on the reintegration and development of the child remains present. Even within adapted “justice”-based systems, it is necessary to be particularly aware of stages within the system where the needs and welfare of children are not sufficiently prioritised in law, policy, practice, or the available

1 institutional frameworks. Similarly, where criminal justice procedures are not adapted
2 properly for children, it can have a negative impact on the realisation of their rights to
3 participate under the UNCRC (Arthur, 2018, Parry, 2006; Rap, 2016; Weijers, 2004;).

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7 Where law and policy does make provisions for adaptations, but these provisions are partially
8 implemented or not implemented at all, this can also create barriers to the realisation of
9 children's rights (Kilkelly, 2014).

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14 A particular difficulty arises where processes exist that transfer children out of child-
15 specific, or explicitly welfare-based processes; this is often done either because the child is
16 considered too old, or the offence is considered too serious. This is an issue both for systems
17 that are 'welfare'-oriented, and those that are 'justice' oriented'. Even in jurisdictions that
18 prioritise a welfare approach, such as Scotland, there remains a cohort of children who cannot
19 access these more child-centred systems. Children who are above the age threshold for
20 access to these procedures, or whose offences are considered too serious to be dealt with in a
21 welfare-focused system, often end up in an adult court poorly adapted to their needs (Dyer,
22 2016; Deuchar & Sapouna, 2016; Cleland, 2016; Christiaens & Nuytiens, 2009). This can
23 result in a bifurcated system, where older children and those who commit serious offences are
24 routinely being dealt with in adult systems of justice. This can have extremely significant
25 consequences for the realisation of the rights of this cohort of children, including weakened
26 protections for their rights, and insufficient attention given to their needs and well-being
27 (Lightowler et al., 2014; Dyer, 2016; Deuchar & Sapouna, 2016).

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48 The difficulties encountered by all systems of youth justice, including those which take
49 non-traditional and welfare-based approaches, to deal in an age-appropriate and rights-
50 compliant way with older children and those who commit serious offences must be given
51 serious consideration. This question appears to be one of political acceptability and public
52 tolerance for using these types of approaches to children in conflict with the law, particularly
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1 those who commit more serious offences. However, where bifurcated systems exist – and
2 particularly where significant numbers of children are dealt with by the adult justice system –
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4 it raises a question about the overall capacity of that system to meet the requirements of the
5 international standards. These issues highlight both the political pressure which can be
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7 brought to bear on a system, even one with a firm commitment to “welfare”-based principles,
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9 to respond in a punitive way to particularly demonised children (Convery et al., 2008: 260),
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11 and the inherent vulnerability of “welfare”-based systems to external pressure (McAra &
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13 McAra & McVie, 2010: 200). While welfare-based systems have clear importance for children who
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15 avoid criminalisation, there remain significant questions around the exclusion of certain
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17 groups from these systems, and the consequences for the realisation of their rights. This
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19 underscores the need for issues of accountability to be taken seriously *within* and not outside
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21 of a rights-based framework, and the need for significant efforts to be put into developing
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23 principled approaches to responding to children who commit serious offences (Lynch, 2018;
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25 Lynch & Liefwaard, 2020). This is an issue that has not adequately been addressed either at
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27 national level or in the international standards, and which needs consideration going forward.
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39 **4 Conclusion**

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41 This article has considered the question of whether the international children’s rights
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43 standards mandate a specific approach to youth justice, with reference to concerns related to
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45 “welfare” and “justice” approaches. The international standards relating to children in
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47 conflict with the law emphasise the need to treat children as children, and not simply as law-
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49 breakers. This is the key unifying message that runs through all of the various protections
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51 outlined for children in conflict with the law. Building on this foundational principle, it is
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53 equally clear that ensuring adequate procedural rights, and concerns related to children’s
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55 well-being are fundamentally inter-dependent. Any youth justice system must take both of
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1 these concerns into account in seeking to develop a UNCRC-compliant system to ensure that
2 children’s rights are not merely respected, but are fully realised.
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4 Systems that prioritise the welfare of children are well-placed to ensure that the
5 requirements relating to the well-being of children are given adequate consideration;
6 however, they are not a panacea, particularly where groups of children are excluded from
7 child-specific processes. What is clear, however, is that where a justice-based approach is
8 adopted, a high level of consideration needs to be given to ensure that the needs of children in
9 conflict with the law are also met. Therefore, a system which prioritises ‘justice’-based
10 concerns, and employs traditional criminal justice mechanisms in implementing law and
11 policy will require adaptation in a number of ways to create effective means for the needs and
12 well-being of children to be properly considered. In both cases, it is essential to ensure that
13 effective structures for co-operative governance and implementation are in place to facilitate
14 proper co-ordination between the bodies and agencies responsible for justice, education,
15 health, and other children’s services.
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33 A particularly positive trend in many jurisdictions is, however, to be found in an increasing
34 level of explicit focus on the UNCRC within law and policy. Approaches based on “positive
35 youth justice”, such as the Children First, Offenders Second model which has begun to be
36 developed and implemented in England & Wales (Case & Haines, 2018; Haines and Case,
37 2018), offer the potential for new ways to secure a more rights-compliant future for youth
38 justice systems. In addition, the increase in the explicit inclusion of references to the
39 UNCRC in law and policy in recent years in a number of jurisdictions also represent positive
40 signs that some countries are actively seeking ways to ensure they are more rights-compliant.
41 Whether this commitment is expressed at the statutory level, the policy level, or by individual
42 sectors of the youth justice system, the increasing embeddedness of children’s rights
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1 principles must be seen as a positive step for countries seeking to meet their obligations under
2 the UNCRC.
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4 While the method by which this is done, and the results of these policies will need to be
5 assessed into the future, it may be that the best way of ensuring that children's rights are
6 upheld is not through making a choice between a prioritisation of accountability or of
7 welfare, but instead may be found through an explicit and focused commitment to the
8 children's rights standards themselves.
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