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Compliance with international children's rights in the youth justice system

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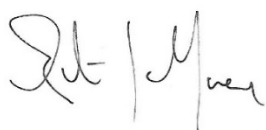
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Foreword

HM Inspectorate of Probation is committed to reviewing, developing and promoting the evidence base for high-quality probation and youth offending services. *Academic Insights* are aimed at all those with an interest in the evidence base. We commission leading academics to present their views on specific topics, assisting with informed debate and aiding understanding of what helps and what hinders probation and youth offending services.

This report was kindly produced by Dr Louise Forde, examining international children's rights and how they can be adequately realised for children who come into contact with the youth justice system. While there is no 'silver bullet' to developing a rights-compliant system, five key criteria are set out, encompassing children's reintegration, dignity and wellbeing, a prioritisation of diversion, the incorporation of legal safeguards, and a focus upon implementation and operation. A polarisation of considerations relating to welfare or justice is seen as unhelpful; to secure and uphold children's rights, there needs to be protection for both (i) children's legal and procedural rights and (ii) their wellbeing and developmental needs. More generally, explicit commitment to realising children's rights is required. Within the inspectorate, we will continue to review the alignment of our inspection frameworks to international standards and the latest evidence underpinning high-quality services.



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Dr Louise Forde is a Lecturer in Law at Brunel University London. Her research interests lie in the area of international children's rights law and youth justice. She is particularly interested in the ways in which international children's rights principles can be used to develop domestic law and policy. She has a keen interest in children's participation, including participatory methods with children which value the contribution that can be made by listening to children's voices and experiences. She has published in *Youth Justice*, the *International Journal of Children's Rights*, and the *Howard Journal of Crime and Justice*, and is co-author of an upcoming book entitled *Penal Responses to Serious Offending by Children: Principles, Practice and Global Perspectives* (Routledge, 2022). Louise has completed research for bodies such as the Department of Justice (Ireland), Save the Children, the Irish Penal Reform Trust and the UN Global Study on Children Deprived of their Liberty.

The views expressed in this publication do not necessarily reflect the policy position of HM Inspectorate of Probation.

1. Introduction

The *UN Convention on the Rights of the Child* (UNCRC) establishes minimum standards for the treatment of children in a wide range of areas, including setting out rights to which children in conflict with the law are entitled. Ensuring that children's rights are respected in the youth justice system has received significant attention at international level, by both the UN and the Council of Europe, and there are now a series of standards and guidelines setting out the rights to which children are entitled (Lynch and Liefwaard, 2020). In addition to Articles 37 and 40 of the UNCRC, the following are in place:

- the UN Committee on the Rights of the Child has produced two General Comments (General Comment No. 24 has recently replaced General Comment No. 10) on how children's UNCRC rights should be interpreted and applied in practice
- the Beijing Rules, the Havana Rules and the Riyadh Guidelines provide further guidance on the implementation of children's rights in the administration of youth justice, in situations where children are deprived of their liberty, and in relation to the prevention of offending by children
- the Council of Europe has developed standards and guidelines on child-friendly justice and on the implementation of sanctions and measures in the youth justice system
- the European Convention on Human Rights incorporates a number of rights which are relevant to children in contact with the justice system.

The United Kingdom has signed and ratified the UNCRC, and thus, under Article 4 of the UNCRC, it has a legal obligation to take 'all appropriate legislative, administrative, and other measures' to implement children's rights under the Convention. While Convention rights are not directly applicable in national law unless they are incorporated (see further Kilkelly, Lundy and Byrne, 2021; Lundy, Kilkelly and Byrne, 2013), in signing and ratifying the UNCRC, States Parties undertake binding legal obligations under international law. Furthermore, states' progress in implementing the UNCRC is subject to regular review by the UN Committee on the Rights of the Child.

However, ensuring compliance with the international standards is often not the core focus for states in designing and developing their youth justice systems. A range of other concerns, such as the protection of victims and society, ensuring accountability for wrongdoing, the prevention of further offending, and sometimes, a recognition that there may be a need to address the underlying causes of offending through a focus on children's needs, may take priority over considerations relating to children's rights.

Historically, youth justice systems have either been characterised as 'welfare'-based systems – because they focus on addressing any unmet needs children may have as a means of responding to offending – or 'justice'-based systems – which focus on ensuring accountability and punishing offenders through traditional criminal justice mechanisms (Smith, D.J., 2005; Smith, R., 2005). These distinct approaches can be said to represent different 'models' of youth justice, and have often been presented as being at opposite ends of the spectrum. In practice youth justice systems are much more complex than this welfare/justice dichotomy indicates (Case and Haines, 2018; see further Phoenix, 2016; Muncie, 2008), and tend to mix a range of priorities including 'welfare; justice; informalism; rights; responsibilities; restoration; prevention; remoralisation and retribution/punishment'

(Goldson and Muncie, 2006: 91). Equally, debates about the appropriate approach to adopt to youth justice can become politicised, and these political considerations can overshadow the search for a principled and coherent approach to responding to children in conflict with the law (Case and Hampson, 2019). The way that these priorities are balanced within a particular youth justice system can give rise to very different results; this has resulted, for example, in very different priorities being evident in each of the youth justice systems across the four jurisdictions of the United Kingdom (Muncie, 2011).

Given the complexity of these systems, and the range of ideological, practical and political priorities which are evident, the question becomes which of these models of youth justice is best suited to ensuring that a state is also fulfilling its obligations to respect and ensure children's rights as set out under the UNCRC? This *Academic Insights* paper discusses whether the international standards set out a preference for a 'welfare' or 'justice' approach to youth justice, and considers the elements which are necessary for states that are seeking to ensure that their approach to responding to children in conflict with the law meets with their international legal obligations as States Parties to the UNCRC (see further Forde, 2021). The paper will begin by considering what the international standards say about the approach to youth justice which should be preferred, suggesting five criteria for child rights-compliant youth justice systems. It will conclude by considering some of the challenges and opportunities for developing a youth justice system which respects and realises children's rights.

2. International children's rights

2.1 The rights of children in conflict with the law

Articles 37 and 40 of the UNCRC set out the key provisions relating to states' responses to children in conflict with the law. As discussed by Goldson in the earlier [Academic Insights paper 2019/04](#), these have been supplemented by the development of standards such as the Beijing Rules, the Havana Rules and the Riyadh Guidelines, which all provide further guidance on the development of rights-compliant youth justice systems. Most recently, General Comment No. 24, which replaces General Comment No. 10, has set out further guidance from the Committee on the Rights of the Child as to how children's rights under the Convention should be implemented in the context of youth justice. While the standards specific to children in conflict with the law have the most direct and obvious relevance, it is equally important that general UNCRC provisions apply to all children. These rights include:

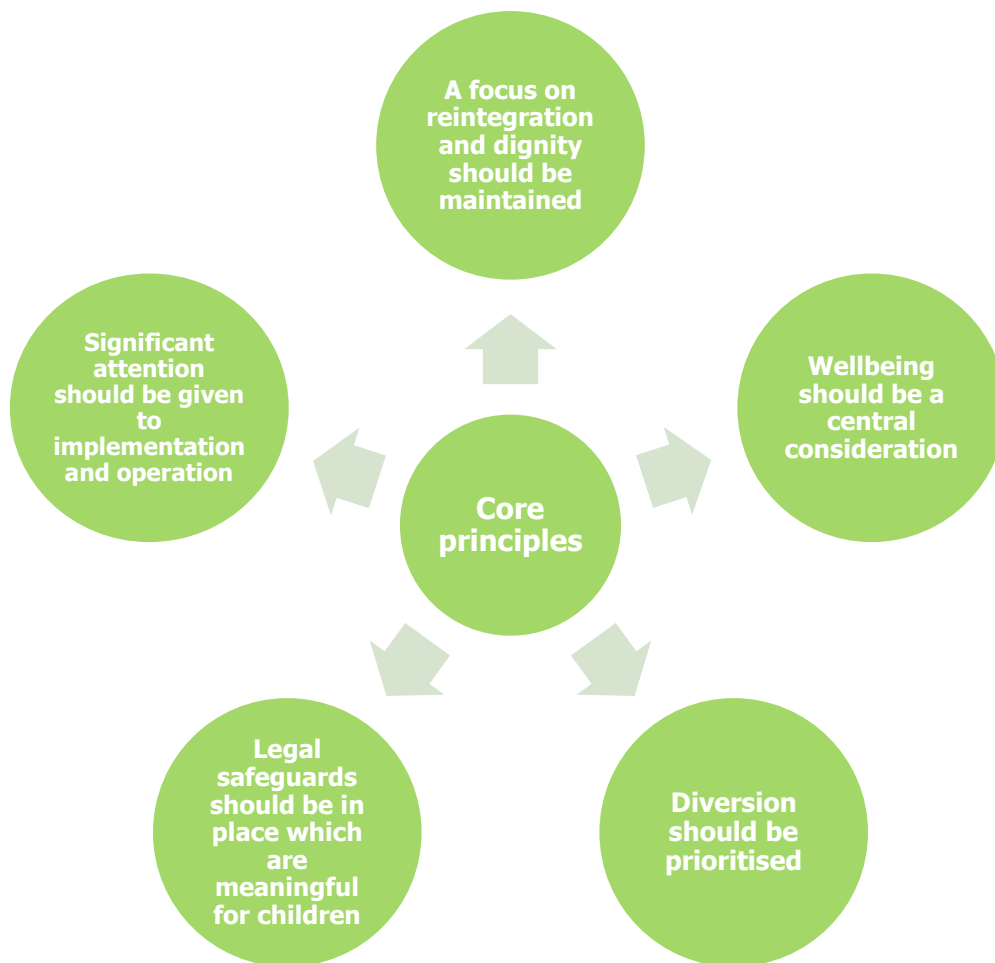
- to have their best interests considered
- to have their voices heard in matters relating to them
- general rights relating to education, health, and play and leisure.

Acknowledging that children in conflict with the law enjoy a full range of rights is essential to acknowledge their developmental needs (Abramson, 2009), to develop more effective and rights-compliant practice (Johns et al., 2017), and to avoid stigmatising children by defining them only as offenders (Case and Bateman, 2020).

While a significant amount of guidance for states seeking to develop rights-compliant systems of youth justice is now available within this body of standards and guidelines, it is notable that the UNCRC and the Committee on the Rights of the Child are silent on which overarching model or approach to youth justice best protects children's rights. In the drafting documents which detail the debates on the proposed wording of Articles 37 and 40 UNCRC, it is clear that both 'welfare' and 'justice' approaches were discussed (Doek et al., 1992). Instead of stating a clear preference for one approach over the other, the standards incorporate elements of both 'welfare' and 'justice' approaches. Rather than viewing these approaches as oppositional, the standards suggest that elements of both approaches will be necessary to ensure that children's rights are adequately realised when they come into contact with the justice system.

Further analysis of the provisions set out under the UNCRC and under the supporting standards and guidelines suggests that five core criteria are particularly important for the development of a child rights-complaint youth justice system. These core criteria are set out in the next section.

2.2 Core principles for children's-rights compliant youth justice systems



The first core principle which can be identified in the international standards is the need to maintain a **focus on reintegration and on dignity, rather than punitiveness**. Article 40(1) of the UNCRC is clear that the over-arching aim of the youth justice system must be focused on treating children in an age-appropriate way consistent with the promotion of their dignity, which reinforces respect for the rights and freedoms of others, and which is focused on reintegration and children's assumption of a positive role in society. The Committee on the Rights of the Child has stated clearly that 'a strictly punitive approach is not in accordance with the principles of child justice', and further, that weight should be given in all decisions both to the child's best interests as well as the need to promote their reintegration (General Comment No. 24, para.76).

This does not mean that there is no space for ensuring that children are held accountable for wrongdoing, but it does imply that accountability will not be the only, or even the paramount consideration (Trepanier, 2007: 527). Similarly, it does not provide a carte blanche for disproportionate or excessive interventions in a child's life justified on the basis that such measures are necessary to promote rehabilitation. The standards are clear that proportionality must play a role in determining an appropriate response; Rule 5 of the Beijing Rules provides that any response taken must be proportionate both to the offence and to the individual characteristics and circumstances of the child concerned. The importance both of reintegration and proportionality has been most recently emphasised by the UN Committee on the Rights of the Child in General Comment No. 24, which stresses that both proportionality and treatment that promotes the child's reintegration should be a

priority in all cases, including cases of serious offending (General Comment No. 24, para. 76).

The second criterion emerging from the international standards is that the **wellbeing of children in conflict of the law should be a central consideration**, regardless of whether a 'welfare' or 'justice' model of youth justice is adopted. The international standards make repeated references to the wellbeing of children. Alongside the focus on reintegration and the promotion of a positive role in society contained in Article 40(1) of the UNCRC, the strong preference for diversion and alternatives to judicial proceedings in Article 40(3) is grounded in an acknowledgement that contact with the formal justice system is likely to be detrimental for a child's interests (see further General Comment No. 24, para.15). Where a child is not diverted from the formal criminal justice system, Article 40(2) emphasises that children's legal and procedural rights must be fully respected, and importantly, links this to the aims related to dignity, humanity, the prioritisation of rehabilitation and age-appropriate treatment which are set out in Article 40(1). Finally, Article 40(4) states that a wide range of measures should be available within a youth justice system 'to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.'

The repeated references to children's wellbeing in the international standards emphasise the level of attention needed to this issue. This principle has relevance at all points of a child's contact with the criminal justice system, and is particularly important at the sentencing stage or where an appropriate disposition or response to the offending behaviour is being determined. Limiting the potential harm to children is a core objective of the limits placed on punishment, including the principle that detention should only be used as a last resort in Article 37 of the UNCRC. While it is acknowledged that a range of issues need to be balanced in determining an appropriate sentence for a child convicted of a criminal offence, the UNCRC Committee emphasises the continued need to give weight both to a child's best interests and the need to promote reintegration (General Comment No. 24, para. 76). It is clear that, while the wellbeing of a child may automatically be the central focus in 'welfare'-based approaches to youth justice, 'justice'-based models should also be adapted to allow space for the consideration of wellbeing.

The third requirement emerging from the international standards is the need for **diversion to be prioritised within the youth justice system**. Article 40(3) stipulates that measures which divert a child from the formal criminal justice system should be used 'whenever appropriate and desirable', subject to the proviso that children's legal rights are fully respected in so doing. In practice, this means that opportunities for diversion should be available at various points of the youth justice process (General Comment No. 24, para. 16), and that it should not be limited to cases where the offence concerned is minor (Commentary to Rule 11 of the Beijing Rules). The importance given to the need for ample diversionary opportunities is evident in statements of the UNCRC Committee that diversion should be the 'preferred manner of dealing with children in the majority of cases' (General Comment No. 24, para.16).

This prioritisation of diversion, must, however be balanced with respect for children's legal and procedural rights. Article 40(3)(b) requires states to ensure that 'human rights and legal safeguards are fully respected' where children are diverted. This requires a balance to be struck between ensuring that proceedings are kept as informal as possible on the one hand, while ensuring that children's legal and procedural rights are fully upheld (Van Bueren, 1995: 175). The Committee on the Rights of the Child has set out clear requirements for the

protection of children's legal rights in diversion in General Comment No. 24 (para. 18). This further emphasises the central message throughout the standards that elements of both 'welfare' approaches, which prioritise the needs and wellbeing of the child, and 'justice' approaches, which tend to prioritise strict procedural rights, are necessary if children's rights are to be adequately upheld.

As such, the fourth requirement emerging from the international standards is that **adequate legal safeguards, which are adapted so they can be meaningful for children in practice, must be in place at all stages of a child's contact with the youth justice system.** Article 40(2) sets out a detailed list of the minimum legal safeguards to which a child is entitled, and these legal safeguards apply both during the investigation and the trial of an offence (Rules 10 and 13 of the Beijing Rules; General Comment No. 24, para. 40). It is emphasised that these are minimum standards, and that higher standards should be established and observed (General Comment No. 24, para. 38). As noted above, Article 40(2) links respect for these safeguards with the achievement of the aims set out in Article 40(1). Article 12, which sets out the child's right to be heard in all matters affecting them, including any judicial or administrative proceedings, is also relevant in this regard. Importantly, a right to effective participation is now firmly established. The concept of the child's right to effective participation was established by the European Court of Human Rights, and was elaborated upon in the development of the Council of Europe's Guidelines on Child-friendly Justice (see further Liefwaard, 2016); General Comment No. 24 now outlines that Article 40(2) also encompasses a right to effective participation.

The right to effective participation recognises that if legal protections and safeguards are to be meaningful for children, systems and processes must be adapted so that children are able to exercise their legal rights within them. The Committee on the Rights of the Child has highlighted the necessity for adequate support from trained professionals within the youth justice system, and the need to adapt processes so that they are more suitable for children (General Comment No. 24, para. 46). The Council of Europe's Guidelines on Child-friendly Justice, in particular, provide a detailed description of the type of practical adaptations required. States should pay attention to children's age, stage of development, and particular needs in adapting procedures to make sure that legal and procedural rights are meaningful for children in practice and that their right to effective participation can be realised (see further Rap, 2016; Forde, 2018).

Finally, the fifth criterion which emerges from the international standards is that **significant attention needs to be given to the implementation and operation of the youth justice system in practice in order to uphold children's rights.** As set out in Article 4 of the UNCRC, this requires states to take a wide-ranging set of actions, encompassing 'all appropriate legislative, administrative and other measures' necessary for the implementation of all UNCRC rights (see further UNCRC Committee, General Comment No. 5). This emphasises that respect for children's rights in law and policy must be matched with appropriate steps to ensure that their rights are respected and realised to their greatest extent in practice.

As an initial step, specialised laws and procedures need to be established to govern the response to children in conflict with the law (Article 40(3) UNCRC). A series of other steps are then required to ensure that children's rights can be effective in practice, encompassing the following:

- an adequate infrastructure to facilitate implementation and co-operation (General Comment No. 24, para.105), and systems seeking the active involvement of non-governmental organisations where appropriate (para. 110)
- a high level of specialisation, including the development of specialised units 'within the police, the judiciary, the court system and the prosecutor's office' (para. 106), and a high level of systematic and multi-disciplinary training for all professionals working with children within youth justice systems (para. 112)
- the development of youth justice systems underpinned by rigorous data-collection, research and evaluation processes which involve children themselves (paras. 113-115).

2.3 Developing a children's rights respecting system: challenges and opportunities

The five criteria outlined in this paper represent core requirements for the development of youth justice systems which comply with states' international legal obligations under the UNCRC. Although the UNCRC and the other international standards do not clearly specify a particular 'model' or approach to youth justice overall, they are very clear on the elements which should be present in a children's rights respecting youth justice system.

Debates about whether systems which are fundamentally 'welfare'-oriented or 'justice'-oriented are preferable have persisted since the establishment of specialised youth justice systems in the late 19th and early 20th centuries (Tanenhaus, 2004; Smith, R., 2005). Some scholars have suggested that UNCRC implementation implies that a welfare approach should be adopted (Scruton and Haydon, 2009). However, a close examination of the UNCRC and supporting international instruments reveals that elements of both 'welfare' and 'justice' approaches are needed. Protection for children's legal and procedural rights on the one hand, and protection for children's wellbeing, age-appropriate treatment and acknowledgement of children's developmental needs on the other, are not oppositional in nature; they are, in fact, fundamentally intertwined and interdependent. This makes the polarisation of considerations relating to welfare and justice unhelpful and ultimately counter-productive. To secure and uphold children's rights, elements of both approaches are required.

This is not to say that certain systems or approaches to youth justice do not have inherent advantages, when considering how children's rights should be upheld. 'Welfare'-based approaches, such as the system underpinned by the Kilbrandon philosophy in Scotland, has an inherent advantage in that the needs of the child are placed front and centre. The approach is also largely supported by longitudinal studies such as the Edinburgh Youth Transitions Study (McAra and McVie, 2010). However, this does not mean that this is the only approach capable of meeting the requirements of the international standards.

In a 'justice'-based system, where 'justice' results in the prioritisation of punitive responses, it is clear that this will not comply with the requirements of the UNCRC (General Comment No. 24, para. 76). However, an approach which is grounded in criminal justice processes, but which is sufficiently adapted so that specialised processes, procedures and professionals are in place, and where the wellbeing of the child and the goal of reintegration is given significant weight, may be capable of meeting these requirements. There are examples of 'justice'-based systems which seek to make these types of adaptations. For example, New Zealand places significant emphasis on restorative and therapeutic approaches in preference to traditional adversarial approaches wherever possible (Lynch, 2010; Lynch and Liefwaard,

2020). Other countries, such as Ireland, emphasise both diversion and the promotion of children's wellbeing and the importance of reintegration at the sanctioning stage (Kilkelly, 2014; Kilkelly, 2006). While it seems that it is not, therefore, impossible to meet the obligations set out under the UNCRC in 'justice'-based systems, it is clear that significant adaptations will be required (see further Forde, 2021).

While both approaches may have inherent advantages, each also presents its own challenges. Within 'justice'-based systems, there is a risk that a traditional criminal justice approach will not give sufficient attention to the wellbeing and developmental needs of the child, and may result in excessive punitiveness. It is clear that criminal justice processes – whether in interactions with the police, other youth justice professionals, or in court – need significant adaptation in order for children's rights to be adequately upheld (Rap, 2016; Forde, 2018; Arthur, 2016). Welfare-based systems can be vulnerable to political pressures to adopt more punitive approaches which emphasise accountability, particularly in cases of serious or repeat offending, or in cases involving older children (McAra and McVie, 2010; Whyte, 2009; Christiaens and Nuytiens, 2009). These considerations can result in systems where older children or those who have committed more serious offences are transferred out of specialised, child-focused systems, to adult systems of justice, with serious implications for the realisation of their rights (Lightowler et al., 2014; Dyer, 2016; see also Cleland, 2016, for consideration of this issue in a 'justice'-based system).

Equally, there are certain persistent problems that all systems continue to grapple with, including the issue of how to respond to children who commit serious offences (Lynch and Liefwaard, 2020). The difficulties emerging in both systems re-emphasise that there is no 'silver bullet' approach to developing rights-compliant youth justice systems, and that sustained attention to the children's rights standards themselves is needed to ensure that all of the rights to which children are entitled are adequately upheld, regardless of the model of youth justice in place.

3. Conclusion

The question of which overall 'model' or approach to youth justice should be preferred is a persistent one for states seeking to respond in a coherent and principled way to children in conflict with the law. In recent years, many jurisdictions have sought to re-think their approach to youth justice policy, often with an increased focus on the children impacted by contact with the justice system. This can be seen in England and Wales through the adoption of the Child First approach to youth justice (see further Haines and Case, 2015), which is partly based on respect for the rights of children in conflict with the law and which seeks to promote positive outcomes.

While the UNCRC is silent on which overall model of youth justice should be adopted, it sets out a number of very clear criteria which must be met if states are to meet their obligations under international human rights law. These indicate that a combination of considerations, relating both to children's legal rights and safeguards, and to their wellbeing, should be given significant attention. These considerations should not be considered to be in conflict with each other, but as crucial elements of a fully rights-respecting youth justice system.

It is positive that a number of jurisdictions have now begun to give more explicit attention to children's rights principles. Alongside the development of Child First approaches and the increased focus on procedural justice and children's meaningful participation (see the earlier Academic Insights papers [2021/05](#) and [2021/10](#)) in England and Wales, Scotland is now in the process of working towards greater incorporation of the UNCRC through the *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill*. The main piece of legislation in New Zealand relating to youth justice, the *Oranga Tamariki Act 1989*, now contains an explicit reference to the UNCRC. In Ireland, the *Youth Justice Strategy 2021-2027* also makes explicit reference to the importance of respect for the principles set out under the UNCRC.

Together, this points to an increased focus on compliance with international children's rights obligations, and an increasing move towards embedding these principles in law and policy in many jurisdictions. While evaluation will be needed in the future, it may be that the best way to uphold children's rights principles within a youth justice system is through an explicit acknowledgement of the importance of these principles and a commitment to realising children's rights standards as set out under the UNCRC.

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