



RULES OF ENGAGEMENT

Changing the heart of youth justice

Executive summary

This is the *Executive Summary of Rules of Engagement: Changing the heart of youth justice*. To download the full report and complete list of recommendations, visit www.centreforsocialjustice.org.uk

I. Introduction

The link between social breakdown and crime is well established. In the CSJ's seminal report *Breakthrough Britain*, we identified five common drivers of poverty and social breakdown – educational failure, family breakdown, addiction, worklessness and economic dependency, and debt. Addressing these pathways must be a priority if offending is to be tackled successfully. Of equal importance is the successful rehabilitation of those who fall within the auspices of the youth justice system. Thus, in February 2010 the CSJ launched a review of the youth justice system to identify how it might be reformed to improve outcomes for young people, victims and society.

We have spoken with over 200 professionals from the youth justice field, conducted many visits and convened over 70 hours of evidence hearings, ensuring that our findings and recommendations are robust and grounded in the experiences of those who work in youth justice on a daily basis. It is clear that there have been a number of improvements in recent years, yet there is still further work required to build on this progress and some glaring inadequacies remain. We have identified four key shortcomings, which must be addressed if outcomes are to be improved:

- The youth justice system continues to function as a backstop: sweeping up the problem cases that other services have failed, or been unable, to address;
- The system is often operating in a way which promotes rather than reduces offending;
- There continues to be too much focus on functional process at the expense of life-changing outcomes; and
- The importance of relationships to preventing offending and facilitating rehabilitation, emphasised to us consistently in our evidence hearings, continues to be overlooked.

Here we summarise the key messages and recommendations that have emerged from our evidence gathering across eight major aspects of the youth justice system:

- Prevention;
- Out-of-court activity;
- Court procedure;
- Community sentencing;
- Custodial sentences and the juvenile secure estate;
- Resettlement;
- Delivery; and
- The minimum age of criminal responsibility (MACR).

2. Polling

Our polling, in conjunction with YouGov, found that:

- Six in ten people think that addressing the causes of a young person's offending and/or antisocial behaviour is more effective than punishment alone;¹
- 74 per cent said that better supervision of young people by their parents would be the most effective way to address antisocial behaviour;
- Two-fifths said that the age of criminal responsibility should be higher than ten;
- Three-quarters think that making amends to the victim and confronting the offender with the consequences of their actions is an effective method with which to prevent reoffending by young people;
- Nearly six in ten believe that young people reoffend following custody because they return to the same negative circumstances and/or because they are inadequately supported on release;²
- 61 per cent of people would support the abolition of custodial sentences below six months and replacing them with tougher non-custodial sentences;
- Almost seven in ten think that minor convictions received as a juvenile should be removed from people's record when they reach adulthood, providing they have not reoffended in the meantime;
- 84 per cent said that work aimed at preventing young people from offending should target both young people involved and their families; and
- 85 per cent believe that young people in custody should be provided with 'mentors' who will help them access local services when they leave and give support.³

3. The youth justice system: picking up the pieces

There is a consistent failure by many local services to provide support to prevent offending and reoffending. The youth justice system is subsequently operating as a dumping ground, sweeping up the problem cases that other local authority services have failed to address. A large number of Youth Offending Teams (YOTs) have informed us of the difficulties they experience

1 CSJ/YouGov polling of 2,234 British adults, May 2011

2 CSJ/YouGov polling of 1,948 British adults, May 2010

3 CSJ/YouGov polling of 2,084 British adults, September 2011

in obtaining the necessary input from children's social services; children in trouble with the law are not seen as a priority and do not reach the thresholds required to access support. This is in spite of the high levels of welfare need experienced by children involved with YOTs. Practitioners have similarly raised concerns to our review about the prevalence of school exclusion, questioning why greater efforts are not being made to prevent it given the strong links between exclusion and later offending. In addition, the youth justice system is often failing to provide a holistic, family-based approach to youth offending; opportunities are missed to work with families when parents or siblings are involved in the justice system; and there is significant variation in the extent to which YOTs are working with both young people and their families.

'We need to adopt a holistic approach and invest differently than we do. We do not yet have the systems in place to wrap around young people who are not at offending stage but need help. As a result, they end up being pushed into youth justice system.'

Director of Children's Services, in evidence to the CSJ

We have seen how the creation of YOTs and their transition into the delivery of prevention has often let other services off the hook, making it less rather than more likely that children who offend receive the support they need from such services. In too many cases YOTs are a team that other services will hand their 'problem' child over to as opposed to working with. This is encouraged by the funding arrangements and structure of YOTs: local agencies, particularly children's services, contribute a significant proportion of YOT budgets and are also expected to second their specialist staff (although this often does not happen). These arrangements are often assumed to indicate, perhaps understandably, that the YOT can and should exclusively address the problems of offenders and children at risk, but they were not designed for this purpose.

YOTs cannot and should not prevent offending on their own. Preventative interventions delivered by the criminal justice system in isolation can be both stigmatising (leading to difficulties with engagement) and increase the likelihood of offending.⁴ Moreover, the risk factors for offending are common to a wide range of adverse outcomes, such as mental ill-health and child maltreatment, which require comprehensive intervention from a range of services. The solutions to preventing youth offending lie outside of the youth justice system.

3.1 Our recommendations on prevention include:

- **Introducing a statutory duty on local authorities and their statutory partners to secure the sufficient provision of local early support services for children and their families who are engaged in or are likely to engage in criminal or antisocial behaviour.**

⁴ See for example McAra L and McVie S, 'Youth justice? The impact of system contact on patterns of desistance from offending', *European Journal of Criminology*, 4:3, 2007, pp315-45; Farrington D, 'The effects of public labelling', *British Journal of Criminology*, 17:2, 1977

- Removing from YOTs the responsibility for the *delivery* of preventative services in the *immediate term*; and control of the budget they allocate for youth crime prevention in the *medium term*. Instead, the local authority, in consultation with the forthcoming Police and Crime Commissioner and local voluntary sector organisations, should commission youth crime prevention services on the basis of the best available evidence of what works. Attention should be paid to commissioning services that provide help to both young people and their families. This would help ensure that prevention is understood as a multi-agency responsibility.
- Appointing a local independent entity to scrutinise the services provided by local agencies to prevent young people from offending and reoffending. We consider Local Safeguarding Children's Boards (LSCB) to be best placed to assume this responsibility. Given the significant demands on LSCBs we suggest that this duty is undertaken in the *medium term*.
- Including inspection of secondment practice from Children's Services and other partners to YOTs within the remit of the Children's Services Inspectorate (*immediate term*).
- Reviewing the structure and remit of YOTs to clarify their roles as well as the responsibilities of local partners to children at risk of or involved with offending (*immediate term*).

4. Promoting or preventing?

In some areas, criminal justice services operate in such a way that they contravene their stated purpose: they promote rather than prevent offending.

4.1 Out-of-court activity

'We recently had a case where a child had thrown a bowl of sugar puffs at his residential care worker; jumped out of the window and then re-entered through the window. This happened after a care worker had brought the child the cereal of his own preference, instead of what the child had asked for. The child was arrested for assault and burglary. Although the Crown Prosecution Service threw the case out, he was still kept in police custody for the entire weekend.'

Eddie Isles, Manager, Swansea YOS, in evidence to the CSJ

Despite increasing acknowledgement at a strategic level of the value of diversion – responding to minor youth offending through robust methods outside of criminal measures and the court system – we have received numerous examples of where this is not translating into practice on the frontline. This is resulting in unnecessary criminalisation of children. Unsuitable cases,

such as family disputes, residential care home incidents and minor playground altercations, are continuing to reach prosecution, leading sentencers to report that courts are being used to parent children. Further, although the police 'offences brought to justice targets' (OBTJ) targets, which incentivised the criminalisation of children, were abolished in 2010, police sanction-detection measures continue to act as a strong incentive to proceed formally against misbehaviour. This can mean that limited use is made of informal measures such as restorative justice (RJ), which has high victim-satisfaction rates and is more effective.

Our evidence gathering has revealed that this action is largely a result of the 'common sense deficit' that is too often apparent in the way the system responds to the misbehaviour of challenging young people: practitioners robotically follow processes without consideration of whether their actions are improving outcomes for young people and society.

4.1.1 Our recommendations on out-of-court activity include:

- **Placing a common sense approach at the heart of responses to youth misbehaviour.** The professional judgement and expertise of practitioners should be encouraged and supported to ensure that decisions are made in the best interests of young people and society.
- **Counting the new RJ disposal for juveniles as a sanction-detection to remove the disincentive to responding to misbehaviour by means of RJ.**
- **Developing youth-led police youth engagement training in partnership with the voluntary sector at a local level.** This should be refreshed by means of regular workshops with young people and police officers. We recognise that there is a cost here both in money and time but our view is that these are costs worth meeting.

55 per cent of those polled support making local services (such as schools and mental health services) accountable to a local independent body for the services they provide to stop children from becoming offenders.⁵

CSJ/YouGov polling, September 2011

4.2 Court

Children and young people are sentenced differently depending on where they offend in England and Wales. In 2008/09 the custody rate for those aged ten-17 in Newcastle was 1.6 per cent compared to 11.6 per cent in Liverpool, a matched area with a similar demographic.⁶ These discrepancies are not explained by differences in offence patterns but variation in local practice, such as inadequate community services, a lack of communication

⁵ CSJ/YouGov polling of 1948 adults in England and Wales, May 2010

⁶ Ministry of Justice, *Making it count in court Toolkit: Sentencing data toolkit 2010* [accessed via: <http://www.justice.gov.uk/guidance/youth-justice/courts-and-orders/making-it-count-in-court/toolkit.htm> (07/11/11)]

between courts and YOTs, and poor pre-sentence reports (PSRs).⁷ These problems are by no means new revelations, yet they remain unaddressed.

Further, youth-specialised training and expertise is minimal amongst sentencers and defence practitioners who participate in youth proceedings. Whilst magistrates and district judges must undertake specialist youth training to practice in the youth court it includes little or no content on issues such as child development, welfare, and speech, language and learning needs. The majority of Crown Court judges and legal practitioners representing child defendants remain untrained to deal with youth cases. Without such youth-specific expertise young people are less likely to receive the services and sentences appropriate to address their offending.

4.2.1 Our recommendations with respect to court procedure include:

- Introducing mandatory specialist youth training in the *immediate term* for all defence lawyers and Crown Court judges appearing in youth proceedings. Training for magistrates and district judges should be developed to include comprehensive understanding of the distinct vulnerabilities of children and young people. Youth specialised training for court practitioners should be based on the excellent youth-led approach of the charity Just for Kids Law.
- Bringing back offenders before the court at intervals during the sentence (to be implemented in the *medium term*). At least one of the sentencers who imposed the original sentence should be present at the review. Reviews could be piloted for high-risk offenders, such as those subject to alternatives to custody, and if successful could be rolled out to all those on other orders. This would boost sentencer confidence in community sentences as well as likely increasing compliance and reducing offending.
- Removing the requirement, in the *medium term*, for youth court magistrates (once selected) to continue sitting in the adult magistrates' court. This would ensure they had a high-level of youth-specific experience.
- Introducing obligatory twice yearly sentencer visits to youth custodial institutions and community services in the *medium term* to ensure that their understanding of the content of sentences is kept up to date.

In our polling 65 per cent of people said that defence practitioners should have specialist youth justice training before being allowed to appear in youth proceedings.

78 per cent of people we polled support bringing young people back before the court at intervals during their sentence to ensure that it is proving effective.

CSJ/YouGov polling, September 2011

⁷ PSRs make a sentence proposal to the court and are a vital source of information on the young person

4.3 Community sentences

'He turned up on the wrong day and she breached him. He went straight back into custody. She will have followed every procedure and hit every national standard, but she hadn't got the point of what it is was she was meant to be doing, which was getting alongside him, and focussing on his optimism and his strengths and helping him to stop offending.'

Dr Di Hart, National Children's Bureau, in evidence to the CSJ

We have concluded that in a number of areas, community sentences and the provision supporting them are inadequate – they are insufficiently well resourced and lack credibility, which increase the likelihood of inappropriate use of custody. In particular, sentencers informed us of their continued lack of confidence in referral orders. There remains limited victim involvement in the referral order panels due to insufficient time and effort invested in contacting and preparing victims. Intensive fostering, one of the two alternatives to custody, is rarely available due to lack of funding. YOT practitioners reported that the use of the Scaled Approach process to indicate the appropriate level of intervention for community sentencers has stifled practitioner thinking by encouraging a passive mindset in which practitioners are required to follow processes and guidelines, instead of using their judgement and building relationships with young people and their families. An inflexible 'three strikes and you're out' rule in response to young people who fail to comply with their orders, combined with a lack of support to achieve compliance, has been counterproductive for the many young people who genuinely struggle to do so: approximately one in ten youth custodial places are taken up by children whose primary offence is breach.⁸

'It's like they don't give you the time of day. They don't want to speak to you. My YOT worker, he didn't really make the effort. He'd talk for ten minutes, then go. I didn't really see the point – how did that make a difference?'

Ryan, age 16, in evidence to the CSJ

An overwhelming number of our witnesses emphasised that the presence of a positive and stable relationship between a young person and an adult is fundamental to successful rehabilitation. Yet in many areas the importance of supporting young people to engage, comply and succeed on community sentences through positive relationships with their YOT worker has become entirely neglected. Workers spend the vast majority of their time completing

⁸ Ministry of Justice, *Youth Justice Statistics 2009/10, England and Wales*, 2011, p4 [accessed via: <http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/yjb-annual-workload-data-0910.pdf> (26/11/11)]

paperwork as opposed to building relationships with the young people and families they seek to help. Youth offending will not be properly addressed until this shortfall is rectified.

4.3.1 Our recommendations on community sentences include:

- Reforming the referral order to be a more robust, restorative disposal. In the long term a restorative conferencing model, akin to that of Northern Ireland, should be adopted. Steps towards this aspiration should be taken in the *immediate* and *medium term*, including making greater efforts to involve victims; renaming it a 'restorative order'; and returning plans agreed to in panels to sentencers for ratification (so as to increase confidence).
- Ensuring that revised national standards afford YOT workers greater discretion to judge what comprises a breach and determine the intensity of community intervention. Workers' judgement should be supported and informed by regular supervision.
- Bolstering the Youth Rehabilitation Order in the *immediate term* to comprise a comprehensive programme focussing on supporting and building relationships with the young person and their family as well as monitoring and compliance. The voluntary sector is best placed to deliver this.

4.4 Custody

Too often custody operates as a 'backstop' for the non-violent and repeat offending children who arguably do not need to be there. Short sentences are widespread and were reported by many of our witnesses to be ineffective. Three-fifths of all children sentenced to custody in the latter half of 2008 were convicted for offences that usually result in non-custodial sentences.⁹ Their incarceration is a reflection of the inadequacy of services in the community, which have failed to address the root causes of their misbehaviour. Whilst punishment and justice for victims remain central rationales for custody, we consider there to be proportionate penalties for wrongdoing in the community that are both more demanding and effective. The CSJ believes that youth custody should be reserved only for the 'critical few': the most serious or violent young offenders, and those who are so prolific that custody is the place that can best safeguard potential victims and meet these young people's needs.

'They put me in segregation for a week after getting into a fight. It felt like months. It was the loneliest place; it was my hardest time in prison. All you have is a bed and a toilet; there is nothing to do. If you're good you're allowed out of the cell for an hour to eat with the prison officer; otherwise you're just locked up for 24 hours a day. You sleep to pass the time...it makes you feel kind of broken mentally.'

15 year-old boy recently released from a Young Offender Institution, in evidence to the CSJ

⁹ Jacobson J et al, *Punishing disadvantage: a profile of children in custody*, London: Prison Reform Trust, 2010, p20

The past ten years have witnessed improvements in practice and provision in the juvenile secure estate (JSE). However, shortcomings remain and many establishments are not fulfilling their rehabilitative potential. Too often custody operates as an interruption rather than a unique opportunity to transform lives. This is due to inadequate information sharing, varied service provision in custody, and an imbalance of support between custody and the community. There continues to be wide variation in the culture and standards of care between the three types of secure facility.¹⁰ This is considered to be particularly pronounced between Young Offender Institutions (YOIs), which are widely felt to offer the least scope for rehabilitation, and the rest of the secure estate. However, our visits demonstrated that there is both excellence and mediocrity in all three types of institution. In particular, numerous witnesses to our review expressed concern that prison officers in juvenile YOIs are not specially selected to work in such institutions and receive only seven days of training to do so (which a third of staff has not completed).¹¹ This inevitably results in some officers who neither want to work with children nor understand their distinct needs. Given the importance of relationships to successful rehabilitation, this is a significant failing. There is also a wider issue about variation in the type and level of training required of staff across the three types of secure facility.

4.4.1 To improve custody and ensure it is only used for the 'critical few' our recommendations include:

- Raising both the custody threshold and the minimum period in custody to six months in the *immediate term*. This would prevent the imposition of very short and unproductive custodial sentences and ensure that only the very serious and most prolific young offenders are sentenced to custody.
- Reforming the detention and training order so as to be a genuinely seamless sentence. It should comprise three stages: a period in full security (minimum of six months); a period in a halfway house; and a final community supervision element on release from the latter. This should be implemented in the *long term* when the configuration of the secure estate better allows it.
- Maximising the potential for rehabilitation in custody by ensuring that: juvenile secure facilities have access to a range of effective therapeutic provision; expanding and embedding restorative practices in the JSE; and allowing a greater number of children out on day release to enable them to make a successful transition to a law-abiding life in the community.
- Introducing judicial review of youth custodial sentences in the *long term* to ensure the sentence is fulfilling its full rehabilitative potential.
- Implementing a minimum standard of training for staff working in the JSE in the *immediate term*, and rolling out an application and selection recruitment procedure in juvenile YOIs as soon as is feasible. This should be extended to all juvenile secure facilities in the *long term*.
- Taking YOIs out of prison service management in the medium term to be run by a separate agency. In the *long term* there should be a single JSE with single standards and regulations based on Children Act principles. The estate should be commissioned by a single agency from the voluntary, private or public sectors. We would like to see a greater number of smaller local custody facilities, with local authorities playing a strong role in commissioning.

¹⁰ Secure children's homes (SCHs), secure training centres (STCs) and Young Offender Institutions (YOIs)

¹¹ Puffett, 2011, cited in Phoenix J, 'In search of a youth justice pedagogy? A commentary', *Journal of Children's Services*, Volume 6, 2011, p132

4.5 Resettlement

Despite many initiatives during the past ten years, resettlement provision remains woefully inadequate. Almost three in every four young people are reconvicted following a custodial sentence.¹² Yet nine in ten young people in custody do not want to reoffend.¹³ Resettlement is one of the most under-resourced aspects of the youth justice system and too often fails to meet the basic needs of young people leaving custody: a trusting relationship, a safe and stable place to live, and something meaningful to do. This serves only to lead children back into criminality. Greater efforts need to be made to ensure that young people's aspiration to change their lives is a reality in more cases.

'My experience is that sometimes our system is almost the antithesis of one that prevents offending. If you were to think about what we would need to do to ensure future offending on release, you would find that we are doing a lot of it already.'

Tom Jefford, Manager, Cambridge YOT in evidence to the CSJ

In particular, our visits and evidence hearings revealed a striking lack of effort to maintain relationships and resolve difficulties between young prisoners and their families. This is largely due to the fact that many young people are detained considerable distances from home. Without such support, many young people are returning to the same negative circumstances from which their offending flows. We have found that this instability is often reinforced by inconsistent relationships with youth justice practitioners: there is often inadequate 'in-reach' into custody by YOT workers and limited capacity for 'outreach' in the community by secure staff.

80 per cent of those we polled support the introduction of family workers into youth custodial institutions to help prepare young people's families for their release.

CSJ/YouGov polling, September 2011

¹² Ministry of Justice, *Reoffending of juveniles: results from the 2008 cohort, England and Wales*, Ministry of Justice, Statistics bulletin, Ministry of Justice, 2010 [accessed via: <http://www.justice.gov.uk/publications/reoffendingjuveniles.htm> (04/11/10)]

¹³ A survey of 1,110 15-18 year-olds in prison custody found that 90 per cent wanted to stop offending, Summerfield A, HM Inspectorate of Prisons, Youth Justice Board: *Children and Young People in Custody 2008-2009: An analysis of the experiences of 15-18 year-olds in prison*. London: HM Inspectorate of Prisons, 2010, pp71-72

4.5.1 Our recommendations to improve resettlement and put relationships at the heart of rehabilitation include:

- Introducing payment by results dedicated ‘family link worker’ posts in juvenile secure facilities in the *immediate term*. Workers would help to maintain links, aid reconciliation and liaise with the home local authority to ensure that families receive the required support in the community. In the *long term* or when the configuration of the JSE allows it, we recommend that workers adopt a family outreach role.
- Providing payment by results one-to-one support workers to young people in custody in the *immediate term*. Workers would provide practical and relational support to prepare young people for release and further assistance thereafter. There should be a particular focus on helping young people to engage in education, training and employment.
- Placing a statutory duty, akin to the Children (Leaving Care) Act 2000, on all local services (for example, schools, colleges, Child Adolescent Mental Health Services (CAMHS), housing, police and children’s services) in the *medium term* to support the rehabilitation of young people leaving custody.

4.6 Delivery

‘The one thing I took back was that the inspection process is cold. There is not actually any point talking to inspectors about relationships with young people, about distance travelled or outcomes, it’s about ticking boxes: did you do an Asset in time? Did you do a Risk Office Serious Harm assessment? Did you screen properly? Yes, no, yes, no. It’s just a quantitative assessment. They even asked me if I had put the right date in. There is no skill involved, anyone could have done it.’

YOT Manager, in evidence to the CSJ

Throughout this review YOT workers have consistently criticised the youth justice system’s preoccupation with keeping records, meeting targets and complying with prescribed national guidance. This has stifled the judgement and expertise of YOT, staff and incentivised workers to mechanistically tick boxes, as opposed to ensuring that the needs of young people are being met and their behaviour improved. It is apparent from our evidence gathering that training has often not given YOT practitioners the opportunity to develop the expertise and confidence to exercise good judgement. Many of our witnesses were also highly critical of the methodology of YOT inspections undertaken by HM Inspectorate of Probation (HMI Probation) since 2002, considering it to be a tick-box orientated assessment of process: checking to ensure that the correct details have been recorded and the right procedures undertaken, rather than observing practice and interactions between young people and their workers. Moreover, YOTs told us that the lengthy forewarning of inspections they receive

does not produce a genuine reflection of practice. As a result of these shortcomings, where there is excellent work it is often taking place in spite of the system, rather than because of it. We believe that many of the lessons from *The Munro Review of Child Protection* translate across to the management and practice of youth justice.

4.6.1 *Our recommendations on delivery include:*

- Ensuring training of YOT workers is skills based rather process driven, to reflect the fact that the relationship between the YOT worker and young person is central to successful rehabilitation. There also needs to be a much stronger emphasis on developing skills to work with the context and circumstances of individual children, including families, other professionals and communities.
- Introducing unannounced YOT inspections and increasing the focus on YOT workers' practice in the *immediate term*. Determining whether or not young people and their families, and thus society, are being effectively helped should be the central concern. This would ensure that inspections produce a more accurate reflection of practice and are more focussed on outcomes.
- Developing the inspection framework, in the *medium term*, to examine the effectiveness of contributions of all other local services to the prevention of youth offending and reoffending, including education, children's services, health, police, and probation. This would reflect the recommendation, accepted by the Government, made in the Munro Review with respect to child protection.

5. The minimum age of criminal responsibility

The CSJ's judgement is that at ten years the current minimum age of criminal responsibility (MACR) is too low and does not deliver the best outcomes for either society or children who offend. It is counterproductive and unjust. We believe it should be raised to 12 in reflection of the evidence. Robust responses to the offending of ten and 11 year-old children delivered outside of the youth justice system would better serve justice and be a more effective means of addressing criminality.

The MACR was raised from eight to ten years in 1963. By all accounts, that decision was reached on a somewhat arbitrary basis. There is no evidence, for example, to indicate that a ten year-old is substantially more developmentally mature than a nine year-old.¹⁴ Since 1963 the arbitrary foundation of the current MACR has, arguably, become increasingly questionable as our neuropsychological understanding of child development has advanced considerably.

5.1 Raising the MACR

First, children may be less responsible for their behaviour in early to mid-adolescence, particularly if they have been maltreated.¹⁵ This is because during this period children have

¹⁴ See for example, Vizard E, *Presentation on how do we know if young defendants are developmentally fit to plead to criminal charges – the evidence base*, Report on the Young Defendants Conference 2009, London: Michael Sieff Foundation, 2009 [accessed via <http://www.michaelsieffoundation.org.uk/content/Report%204%20-%20Eileen%20Vizard%27s%20presentation.pdf> (23/09/11)]; and Downes D and Morgan R, 'Waiting for Ingleby: the minimum age of criminal responsibility – a red line issue?', forthcoming, p5

¹⁵ Farmer E, 'The age of criminal responsibility: developmental science and human rights perspectives', *Journal of Children's Services*, Vol 6:2, 2011, p87

a propensity towards impulsivity, risk-taking and sensation-seeking behaviour.¹⁶ Capacity to accurately gauge the consequences of their actions¹⁷ and empathy is also still developing.¹⁸ These deficits are exaggerated in children who have been abused and/or neglected.¹⁹ Moreover, whilst most children can broadly differentiate between right and wrong from a very young age, their capacity to judge the magnitude of right and wrong is limited: that is, what is criminal and what is not. This is likely to be particularly true of children who have grown up in highly dysfunctional and/or abusive family circumstances and hence not learned law-abiding behaviour or conversely, learned to emulate violence. Second, children and adolescents are significantly less competent to participate (for example, to decide how to plead, instruct lawyers and respond to cross-examination) in criminal justice proceedings. They are more likely to make false confessions,²⁰ and have limited capacity to understand and follow court processes as well as the significance of questions asked and answers given.²¹ Without competence, the likelihood of determining the truth and achieving justice is decreased.

Third, the youth justice system can be both ineffective and harmful: it has been shown to increase the likelihood of offending.²² Robust welfare-based responses to the offending of less culpable children are therefore likely to be a more effective alternative to criminalisation, particularly as this cohort tends to have high welfare needs. The current low MACR makes it less likely that this will happen because it is possible for hard-pressed children's care teams to look to YOTs to intervene instead.²³

Fourth, the assumption that children, at age ten, are sufficiently responsible and competent to participate in the youth justice system is seriously inconsistent with other aspects of the law in England and Wales, the median MACR worldwide and the consensus of international human rights bodies. For example, a child is not deemed sufficiently competent to buy a pet until the age of 12, but can be tried in a court of law at the age of ten. The MACR in England and Wales is low compared with the rest of the world (it is 12 or above in many countries) and is contrary to the guidance of international human rights bodies (the principles of which we have signed up to), that an MACR below 12 is unacceptable.²⁴

5.2 Retaining the MACR

There is a strong desire amongst victims and wider society to see justice being done, an end that is often mistakenly presumed to be unachievable outside the criminal justice system.

16 Van Leijenhorst et al, 2010, cited in Farmer E, 2011, op. cit., p87

17 Steinberg et al, 2009, cited in Farmer E, 2011, op. cit., p87

18 Davis M H and Franzoi S L, 'Stability and change in adolescent self-consciousness and empathy', *Journal of Research in Personality*, 25, 1991, pp70-87

19 Vizard E, op. cit.

20 Drizin S A and Leo, R A, 'The problem of false confessions in the post-DNA world', *North Carolina Law Review*, 82, 2004, pp891-1008

21 Farmer E, 2011, op. cit., p88

22 McCara L and McVie S, op. cit., pp315-345

23 Downes D and Morgan R, op. cit., p10

24 UN, *General comment no. 10: children's rights in juvenile justice*, Committee on the Rights of the Child, 44th session, 2007, pp6-11 [accessed via: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> (30/09/11)]; UN, *Consideration of reports submitted by states parties under Article 44 of the Convention, Concluding observations: United Kingdom of Great Britain and Northern Ireland*, Committee on the Rights of the Child, 49th session, 2008, p19, paragraph 78 [accessed via: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf> (30/09/11)]

There is a related concern that crime would increase if the MACR was raised, however there is no evidence to support this.²⁵ The appalling murder of James Bulger by two ten year-old boys in Liverpool in 1993 remains fresh in the public consciousness. As a result there appears to be little appetite amongst the general public for changing the law such that equivalent offenders would not be held criminally liable.

Any MACR is to some extent arbitrary; there is no perfect alliance between the science of child development and jurisprudential theory. Children vary greatly in their development. For example, practitioners have told us that they deal with some 15 year-olds who cannot gauge the consequences of their actions and some 11 year-olds who have greater capacity to do so. Some countries overcome this challenge by assessing competence and culpability on a case by case basis but there are many problems with this solution.

Even were the MACR raised, to 12 for example, this reform alone would not achieve the radical transformation in the system's response to the offending of ten and 11 year-olds that is desired. Whatever the MACR, the police must respond to the crimes of those above and below it. Furthermore, children below the MACR whose behaviour results in grave harm are likely to be incarcerated in the same accommodation (secure children's homes), alongside child offenders above the MACR.

5.3 Related issues

The criminal court tends to respond to the offending of children in isolation from the family problems from which criminality so often flows. For example, cases cannot be referred to the family proceedings court, even where there are serious child welfare concerns. This is partly a consequence of the adversarial nature of criminal proceedings in England and Wales, where the finding of guilt or innocence is prioritised rather than the truth. Children's offending is unlikely to be properly addressed until this disconnect is rectified.

5.4 Our recommendations on the MACR include:

- Raising the MACR to 12 for all offences in the *long term*. Alongside this reform, the youth and family court should be integrated to achieve a whole-family approach to offending. Implicit in this recommendation is that an inquisitorial approach be adopted. However, such a reform is currently implausible as the capacity of welfare services to provide support needs to be developed and public opinion remains uncertain on the issue. Therefore we recommend:
- Raising the MACR to 12 in the *immediate term* for all but the most grave offences (murder, attempted murder, rape, manslaughter and aggravated sexual assault). This reform should be implemented alongside the other proposals of this review which aim to address the weaknesses in the system, such as investment in early intervention services and development of custodial facilities to become more rehabilitative environments.

25 Department for Justice, Republic of Ireland in evidence to Barnardo's, op. cit., p8

We are conscious that in continuing to hold children who have committed the most heinous crimes responsible for their behaviour one likely criminalises those most in need of help. However, we think this solution offers the best prospect of improving outcomes for children in the *immediate term*.

- Developing a connection between the youth and family court in the *medium term* to allow young people's offending to be responded to in the context of their families. We recommend that this be achieved by affording to the youth court the power (under s.37 Children Act 1989)²⁶ to order the local authority children's service to investigate whether a child is at risk of suffering significant harm, and whether the local authority should intervene to safeguard and promote the child's welfare (s.47 investigation under the Children Act). This power would be available in cases where there were welfare concerns.²⁷

With a MACR of 12, children committing crimes below this threshold would continue to be held to account for their behaviour, but in a more effective manner. Responses available for less serious offending would include support from local services, restorative and family group conferencing and intensive wrap-around family interventions. For more serious offending, coercive welfare interventions could be imposed, such as supervision, care orders and detention in secure accommodation for the most serious offenders from whom the public require protection.²⁸

²⁶ At present this power only available to the family proceedings court

²⁷ That is, concern that the child was or was likely to suffer significant harm, attributable to the standard of care given to the child at home or because the child is beyond parental control

²⁸ Under s.25 of the Children Act 1989, available to children who have a history of absconding; if absconding is likely to cause them serious harm; and who would injure themselves or other persons if they were kept in any other description of accommodation



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About the Centre for Social Justice

The Centre for Social Justice (CSJ) aims to put social justice at the heart of British society.

Our policy development is rooted in the wisdom of those working to tackle Britain's deepest social problems and the experience of those whose lives have been affected by poverty. Our Working Groups are non-partisan, comprising prominent academics, practitioners and policy makers who have expertise in the relevant fields. We consult nationally and internationally, especially with charities and social enterprises, who are the champions of the welfare society.

In addition to policy development, the CSJ has built an alliance of poverty fighting organisations that reverse social breakdown and transform communities.

We believe that the surest way the Government can reverse social breakdown and poverty is to enable such individuals, communities and voluntary groups to help themselves.

The CSJ was founded by Iain Duncan Smith in 2004, as the fulfilment of a promise made to Janice Dobbie, whose son had recently died from a drug overdose just after he was released from prison.

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