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INTRODUCTION

AT A GLANCE THIS CHAPTER COVERS:

- the policy context
- structure of the youth justice system
- Youth Offending Teams
- the welfare principle
- children's rights
- safeguarding and child welfare
- developments under the Coalition government

Working with young people in the youth justice system is a challenging area of practice that requires a particular depth of knowledge and skill. It is an increasingly politicized area of social work, with politicians and successive governments seeking to make a visible impact (Johns, 2011), resulting in a rapidly developing body of legislation and national standards for practice. Practitioners are expected to uphold the sometimes conflicting values of both social work and youth justice and also have to balance the potential ethical and moral dilemmas within their work with young people who are involved in offending behaviour. Many of these children and young people will have caused considerable emotional, physical, financial and social harm to others, yet they demonstrate the same needs and are entitled to the same rights as all children.

There is no single piece of legislation guiding the youth justice system, but a wide range of law, both civil and criminal, that has developed in a sporadic, non-systematic manner. It is neither possible nor beneficial to attempt to cover all of the legislation, sentencing guidance and practice standards relating to specific aspects of youth justice. Rather, this book aims to provide an overview of the youth justice system, combining an explanation of the stages of the youth justice process with a focus on select key pieces of legislation, within a framework of children's rights. In this way, it aims to support students and practitioners in understanding how youth justice legislation may affect children and their families, and in achieving positive outcomes with young people at the borders of and involved in the youth justice system. Further readings are suggested at the end of each chapter should the reader wish to explore particular aspects of the system in more depth.

The policy context

Youth justice policy and practice operates within a complex framework of legal, moral, ethical and professional standards, academic research, criminological theories and philosophies of childhood, within a wider context of political, social and economic pressures, and is thus constantly in flux. Responses to young people involved in offending behaviour are situated within perpetual arguments about the nature of childhood and contrary conceptualizations of children – as 'devils or angels' (Fionda, 2005), innocent or knowing; these contrasting notions have challenged scholars and policy-makers for centuries, being influenced by religion, philanthropy, science and social development (see, for example,

Cunningham, 2006). The dominant concepts of childhood have varied across time and thereby affected the construction and implementation of legal (and moral) standards regarding children's behaviour since the development of a distinct youth justice system in the early twentieth century. The most persistent themes apparent within literature on the evolution of youth justice legislation surround taxonomies of 'welfare' or 'justice', or 'need' versus 'risk' (Crawford and Newburn, 2003; Pickford and Dugmore, 2012; Fox and Arnull, 2013) – the welfare and needs of the young offender versus the risk to society and the desire for justice for victims. However, these dichotomies over-simplify the complexity of both historical and current responses to offending behaviour by young people and the construction of the youth justice system is significantly more convoluted.

At its heart, the youth justice system highlights the tensions between the competing aims of legislative sanctioning for offending or antisocial behaviour – whether the justice system aims to provide deterrence, incapacitation, retribution, or rehabilitation (Fionda, 2005), or some combination of these goals. The lack of a single, clear objective is similarly apparent within the adult justice system but the issue is further complicated within youth justice due to the perception of children and young people as less culpable than adults, while also being more malleable and open to rehabilitation. The **Youth Justice Board** for England and Wales (YJB) states that the primary purpose of the youth justice system is to 'prevent offending' (Crime and Disorder Act (CDA) 1998; discussed below), but does not specify whether this should be through deterrence, incapacitation, retribution, rehabilitation or some other measure. This uncertainty of purpose is exacerbated by political ambitions that have, both concurrently and cyclically:

- imposed a managerialist drive for cost-efficiency (**managerialism**) through systems-management and actuarialism, through a focus on evidence-based practice, the systematic measurement and monitoring of processes and practice, and the development of key performance indicators;
- sought to assuage public concern about perceived levels of youth crime through popular punitivism and harsh sentencing practices;
- responded to practitioners' and academics' concerns by diverting young people from the potentially **criminogenic** influence of the youth justice process itself through a twin-track system of bifurcation;

- tried to eliminate discrepancies in sentencing responses by introducing just deserts measures and proportionality;
- extended the focus of youth justice to include preventionism, remoralization and responsibilization;
- more recently, introduced a **scaled approach** to sentencing, with increasing levels of intervention for successive offences.

The means of achieving, and measuring, each of these outcomes may differ widely and, in some instances, directly conflict, resulting in a complex and contradictory range of responses to youth offending.

The youth justice system

The youth justice system is thus comprised of elements of this 'meze' (Fionda, 2005), or 'smorgasbord' (Pickford and Dugmore, 2012) of different approaches to youth offending, reflecting the constantly shifting agenda of youth justice legislation (Muncie and Hughes, 2002). The New Labour government significantly reformed the structure of the youth justice system, guided by five key (but not necessarily complementary) principles:

- the primacy of offending prevention;
- the responsibilization of children and their parents;
- the use of reparation as a tangible manifestation of an offender's willingness to take responsibility for an offence and also as evidence of a commitment to prioritize the needs of victims;
- early, effective and progressive intervention; and
- efficiency – speeding up the system to reduce delays for victims and offenders and to reduce costs.

These principles were reflected in six key themes within the CDA 1998, explored throughout this book:

- the primary aim of the youth justice system is to prevent offending (s. 37; see Chapter 1);
- partnership and multi-agency working (s. 39; see below);
- tackling offending behaviour and providing early intervention (s. 11, s. 14, s. 65, s. 69; see Chapter 1);
- a focus on reparation (s. 67; see Chapter 4);
- a focus on parenting (s. 8; see Chapter 1);
- more effective custodial sentences (s. 73; see Chapter 5).

The CDA 1998 established multi-agency **Youth Offending Teams** (YOTs) to work with children and young people aged 10–17. Local authorities have significant responsibilities relating to crime prevention and developing annual youth justice plans but the primary operational responsibility for delivering services was assigned to YOTs under the CDA 1998 (as amended by the Offender Management Act 2007 and Criminal Justice and Immigration Act (CJIA) 2008; see also Johns, 2011). Section 41 CDA 1998 also created the YJB, whose role is to: advise the Justice Secretary on how to effectively pursue the principal aim of preventing offending; encourage and monitor nationwide consistency through a National Framework for youth justice, national standards and the promotion of good practice; oversee the provision of services; and commission and manage the juvenile secure estate.

Youth Offending Teams

The constituent membership of YOTs varies but, as Fox and Arnull (2013) detail, YOT staff may include:

- police officers – most likely to be involved in administering cautions and pre-court diversionary activities, but may also supervise young people serving community sentences;
- probation officers – usually aim to work with 16–18-year-olds, although in practice may have a broader remit (roles include conducting assessments, writing **pre-sentence reports** (PSRs) and supervising community sentences);
- youth workers – were expected to be included in all YOTs but many do not have them, partly due to financial constraints, but also due to the professional view that some youth services have taken in recognition of the voluntary nature of their engagement with young people;
- health professionals – were expected to play a major role within YOTs but this has varied; in some areas specialist treatment such as substance misuse or mental health treatment is provided, others provide a referral route to specialist support such as educational psychology, Child and Adolescent Mental Health Services, or speech and language therapy. Health professionals also have a more generic role undertaking health assessments;
- education, training and employment advisors – were provided by Connexions but are now provided in different forms;

- housing – some areas have dedicated housing support and advice either within the YOT or via a nominated person within the local housing service;
- specialists in identified areas from either the statutory or voluntary sectors, for example, mental health or substance abuse support. The specialist advice and support that each team has varies, as each is a product of its own local services and is 'owned' by those services.

YOTs vary in size, from less than 20 members of staff (including volunteers, part-time and temporary staff) to over 500 (Ministry of Justice (MoJ), 2013a). The variation is a reflection of local need and political priorities and the effectiveness of senior strategic relationships (Fox and Arnull, 2013). Initially, members of the YOT were to be seconded in from their organization for a specified period of time, but in practice they often remained part of the YOT rather than returning to their original position (Souhami, 2008).

YOT staff may be involved in completing assessments, writing pre-sentence or sentence-specific reports, attending court, supervising young people on orders, running interventions to prevent offending, working with families, liaising with victims, chairing **referral order** panels, supporting young people on release from custody and so on. In some YOTs, staff will have designated roles (report writer, court officer, supervising officer), while in others individuals may be involved in some or all of these activities; practitioners therefore may develop a range of generic and specialist skills, requiring an understanding of all areas of youth justice legislation.

The welfare principle

The 'welfare principle' underpins all legal responses to youth offending, enacted in the Children and Young Persons Act (CYPA) 1933:

s. 44

(1) Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.

CYPA 1933

The welfare principle clearly establishes a legal standard that all youth justice interventions should adhere to, based on the recognition that all children, including those who offend, may be vulnerable and are still developing, and that the state, as the guardian of its citizens, has a paternalistic duty towards children (Pickford and Dugmore, 2012). This welfare-based approach underpinned much subsequent legislation (including the Children Act 1948, Children and Young Persons (Amendment) Act 1952, Children and Young Persons Act 1963 and the Children and Young Persons Act 1969), but became less prominent in youth justice legislation towards the end of the twentieth century. However, it was re-emphasized in the Children Act 1989 (s. 1: 'The child's welfare shall be the court's paramount consideration.') and the Children Act 2004, which stipulates that YOTs have a statutory duty to make arrangements for ensuring that 'their functions are discharged having regard to the need to safeguard and promote the welfare of children'.

How the welfare of the child is balanced with the requirements of the youth justice system is far from clear-cut. Case law has reinforced the need to adhere to the welfare principle in relation to children in the youth justice system (Howard League for Penal Reform, 2013), for example, in *R (M) v Chief Magistrate* [2010], it was stated that: 'The welfare of the child is an important and indeed fundamental consideration in determining how a child who has committed offences should be dealt with.' However, this still has to be interpreted in conjunction with the relevant criminal justice statutes and guidance, such as that issued by the Sentencing Council.

Children's rights

The United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child 1989 (UNCRC) and associated guidance attempt to protect the rights of children and young people involved in offending behaviour. Article 2 UNCRC provides that all of the rights guaranteed by the Convention must be available to all children without discrimination of any kind. Article 40(3) states that children in conflict with the law have the right to be treated:

> … in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which

> takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. (Article 2 UNCRC)

In addition to the UNCRC, the operation of the youth justice system should abide by the wide range of international instruments that have either general or specific reference to children in conflict with the law. These include agreements that are binding on states and non-binding statements of best practice encompassing the whole of the youth justice system, from early intervention and diversion, fair trial and justice issues, through to detention and the re-integration of the young person into society, and include:

- United Nations (UN) Standard Minimum Rules for the Protection of Juvenile Justice 1985 (Beijing Rules);
- UN Rules for Protection of Juveniles Deprived of their Liberty 1990 (Havana Rules);
- UN Guidelines for the Administration of Juvenile Delinquency 1990 (Riyadh Guidelines);
- European Convention on Human Rights 1953 (ECHR);
- European Rules for Juvenile Offenders Subject to Sanctions or Measures (Council of Europe 2009);
- Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (Council of Europe 2010).

Some, but crucially not all, of the rights within these treaties are enacted within domestic legislation in the guise of the Children Act 1989 and the Human Rights Act 1998. However, aspects of the youth justice system – such as the low minimum age of criminal responsibility (MACR) and the abolition of ***doli incapax*** (see key case analysis), some interventions to 'prevent' offending, the abolition of the right to silence, the trial of children as adults within the Crown Court, and the detention of children (all discussed later in this book) – breach the rights granted to children under the UNCRC and associated guidance. The failure to fully incorporate the UNCRC into domestic legislation has generated wide-spread condemnation, not only from the UN Committee on the Rights of the Child, which is tasked with monitoring compliance with the provisions and protocols of the UNCRC, but also from academics, criminal justice organizations and children's rights groups (see, for example, Children's Rights Alliance for England (CRAE), 2013).

KEY CASE ANALYSIS

_R v T_ [2008]: The abolition of doli incapax and the age of criminal responsibility

The MACR in England and Wales is 10; this is significantly lower than the average MACR across Western Europe and contradicts the granting of autonomy within civil statute (the age of sexual consent, voting, smoking, drinking alcohol, marriage, driving and so on). Until 1998, the low MACR was perhaps mitigated by the doctrine of *doli incapax* – the rebuttable principle that provided a legal safeguard for children aged 10 to 14 by requiring the prosecution to prove that the child fully understood the legal, moral and social implications of their offending behaviour. However, strongly influenced by popular punitivism, concerns about 'feral' youth and the desire to make children accountable for their behaviour, the principle of *doli incapax* was abolished by s. 34 CDA 1998, perhaps one of the biggest indicators of the new responsibilization agenda. The abolition of *doli incapax* was questioned by Smith LJ in *Director of Public Prosecutions v P* [2007] (a case involving a 13-year-old child with attention deficit hyperactivity disorder (ADHD) and a low intelligence quotient (IQ)), but was confirmed by the Court of Appeal in *R v T* [2008], when a 12-year-old boy was charged with 12 counts of causing or inciting a child under 13 to engage in sexual activity. The Court of Appeal was convinced that s. 34 CDA 1998 abolished not only the presumption of *doli incapax* but the whole doctrine, such that from the age of 10 a child is fully responsible for his or her actions (Crofts, 2009). Although age may be used to mitigate the sentence passed, it is no longer considered a factor in culpability.

The MACR has remained unchanged since 1963, despite considerable developments in the understanding of children's psychological maturation and children's rights (see further reading, below). Both the UNCRC 1989 and the Beijing Rules 1985 recognize the fundamental importance of the age-appropriate treatment of children, including establishing an age of criminal responsibility below which children will be presumed not to have the capacity to infringe the criminal law – taking into account their likely emotional, mental and intellectual maturity. The UN Committee on the Rights of the Child (2007) strongly recommends that the age of criminal responsibility should be at least 12 years, and ideally 14–16 years. However, despite widespread consensus that the MACR should be raised, there is no legal venue in which the legitimacy of the MACR can be challenged; the only possibility of change lies with successive governments, none of which have so far been prepared to consider progressive reform.

On-the-spot questions

1. Why may it be difficult to ensure that a child's welfare remains paramount when a court is deciding on sentencing?
2. How does the MACR compare with other legal age limits for children and young people?

The Human Rights Act 1998

The Human Rights Act 1998, incorporating the ECHR, perhaps provides more legal recourse for children and young people than the UNCRC; ultimately breaches of these rights can be appealed within the court system – although there are concerns about the ability of children and young people to seek independent legal redress, particularly in light of reforms to legal aid (Coram Children's Legal Centre, 2013). Courts have also held that the rights set out in the ECHR can be read in light of the rights in the UNCRC and other equivalent, non-binding international law. For instance, if a child's application for early release from custody is impossible because of a lack of resettlement plans, the interference with that child's right to liberty under Article 5 ECHR is especially serious as there is a duty under Article 37 UNCRC to make sure that children are detained for the shortest appropriate period of time (Howard League for Penal Reform, 2013). Such breaches will be discussed throughout this book, highlighting the challenges for professionals working with children and young people involved in offending behaviour.

Safeguarding and child welfare

In addition to children's rights legislation, youth justice practitioners also need an understanding of child welfare legislation and safeguarding procedures; YOTs are required to be part of Local Safeguarding Children Boards (LSCBs), both strategically and operationally (see Department for Education, 2013; Ball, 2014). Of particular relevance to those working in multi-agency YOTs are *Every Child Matters* (Department for Children Schools and Families (DCSF), 2003) and the Children Act 2004, which established Children's Trusts, creating a multi-agency forum to coordinate the activities of children's social services departments, community and acute health services and local education authorities. As with YOTs, these multi-agency teams were developed to provide a more holistic response to children, allowing for joint training, better information-sharing and the

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