8: CHILDREN IN CONFLICT WITH THE LAW AND THE ADMINISTRATION OF JUVENILE JUSTICE

8.1 Introduction

This chapter commences with an outline of the key elements of a rights-based approach to dealing with children in conflict with the law, with consideration given to both the principles contained within the UNCRC and other accompanying rules and guidelines. This overview provides the framework against which the current situation in Northern Ireland is subsequently assessed. The review of the current situation in NI begins with a brief overview of the youth justice system and the recent developments within it. It proceeds with consideration of the different stages/ elements of the system, presented in procedural order, starting with the prevention of offending and ending with deprivation of liberty. The chapter concludes with a brief summary and identification of priority areas for action.

8.2 A Rights-based Approach to Juvenile Justice

Articles 37 and 40 of the UNCRC, when viewed in light of both the rest of the Convention and additional commentary by the Committee, together provide a comprehensive set of minimum standards that all States should adhere to with regard to the exercise of juvenile justice systems within their jurisdiction.

Article 40 outlines the rights of all children 'alleged as, accused of or recognised as having infringed penal law', establishing a set of minimum standards that States must adhere to in the administration of juvenile justice from the moment an allegation is made, through investigation, arrest, charge, any pre-trial period, trial and sentence. The provisions contained within article 40 place an obligation on the government to ensure that all children in contact with the juvenile justice system are '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'. Key to this is the establishment of a specific juvenile justice system that includes the establishment of a minimum age of criminal responsibility, the provision of non-judicial mechanisms for dealing with children who may have infringed the penal law and the development of appropriate alternatives to institutional care.

Article 37 states that neither capital punishment nor life imprisonment without the possibility of release should be imposed for offences committed by children under 18. This article also offers a set of governing principles for the deprivation of liberty, stating that the arrest, detention or imprisonment of the child should be used only as a measure of last resort and for the shortest possible time. Should a child be deprived of liberty under these conditions, article 37 states that they should:

- be treated with humanity and respect, in a manner which takes into account the needs of persons of his/her age

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- be separated from adults, unless it is considered in the child's best interest not to do so
- have the right to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances
- have the right to prompt access to legal and other appropriate assistance
- have the right to challenge the legality of the deprivation of their liberty before a court or other relevant authority and the right to a prompt decision on such action.

The Committee is unambiguous in its position that the provisions of articles 37 and 40 of the UNCRC should not be viewed in isolation when seeking to determine the required features of a rights-based juvenile justice system. First and foremost, they should be viewed in light of both the general principles and other relevant provisions of the UNCRC:

"The CRC requires States Parties to develop and implement a comprehensive juvenile justice policy. This comprehensive approach should not be limited to the implementation of the specific provisions contained in articles 37 and 40 CRC, but should also take into account the general principles enshrined in articles 2, 3, 6 and 12 CRC, and all other relevant articles of the CRC, such as article 39" (CRC 2007b:para 3).

Moving beyond the Convention, they should also be read in conjunction with, and interpreted in light of, a series of other rules and guidelines adopted through resolutions of the UN General Assembly, primarily:

- General Comment Number 10 on 'Children's Rights in Juvenile Justice'
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)
- the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules)
- the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)
- the United Nations Minimum Rules for Non-custodial Measures (the Tokyo Rules).

These documents together provide further commentary on the spirit behind, and desired implementation of, a child rights-based approach to juvenile justice. Commenting on the commonalities within them, Mr Justice Gillen (2006:133) concludes:

"The theme coursing through the veins of these international instruments is the protection of the personality of those under 18 years of age and the need to assemble and utilise community based responses to their needs. These are instruments of international law and they advocate the requirement of youth crime policies and interventions 'to avoid a narrow focus on the crime and to take into account the social and contextual factors that are frequently associated with youth offending'. Decriminalisation and diversion are twin themes that emerge time and time again. Imprisonment of young people should be a measure of last resort. If we are to comply with these instruments then the United Kingdom should aspire to a system of diverting young people from imprisonment and the youth

courts and promote the fulfilment of each young person's potential."

8.3 Overview of the Youth Justice System in Northern Ireland

Responsibility for policy and practice in the field of youth justice is currently the domain of two separate agencies. The Youth Justice Agency (YJA) has held responsibility for the delivery of youth justice services from its launch as an Executive Agency in April 2003, while responsibility for policy has remained with the Youth Justice Policy Unit within the Criminal Justice Directorate of the Northern Ireland Office (NIO).

The operation of the current youth justice system in NI is further complicated by the legacy of 30 years of conflict and it would be naïve to consider the issues facing children in conflict with the law and those relating to the administration of juvenile justice in NI without acknowledging this. As previously explored in chapter 3, children's interactions with the police and other elements of the criminal justice system are frequently influenced by those of their friends, relations and wider community, as well as their own attitudes and experiences. Though recent years have witnessed progress in terms of community relations, accountability and transparency across certain elements of the system, the administration of the law still remains a highly contentious matter within NI, as signified in the failure to agree appropriate mechanisms for the transfer of policing and justice matters to the NI Assembly.

Until policing and justice matters are devolved to the NI Assembly, overall responsibility for these matters remains the responsibility of the UK Government and Parliament at Westminster. The fact that policing and justice are not yet devolved limits the potential for local influence on these matters and can result in a disjuncture between Westminster legislation and locally administered policy and practice.

The key pieces of legislation currently governing the provision of youth justice within NI are the Criminal Justice (Children) (NI) Order 1998 and the Justice (NI) Act 2002. These two pieces of legislation cannot be viewed in isolation from one another, as the latter modifies and expands the former, through implementation of many of the recommendations of the 2000 Criminal Justice Review. The key changes introduced under the 2002 Act were:

- the extension of the definition of child within the field of criminal justice to include 17 year olds
- the introduction of Custody Care Orders for 10–13 year olds
- the introduction of additional non-custodial disposals for juveniles.

Each of these developments will be considered in further detail below, however, it is suffice to note at this stage that while these new developments are not without shortcomings or difficulties, their introduction (in principle at least) represents some form of progression in terms of the effective realisation of a rights-based approach to youth justice within NI.

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As highlighted previously, the specific provisions within the Convention and accompanying guidelines on the treatment of children in conflict with the law are designed to be implemented in conjunction with the general principles of the Convention – namely those of non-discrimination, the right to life, participation and the best interests of the child.

With reference to the latter, Section 53(3) of the 2002 Justice (NI) Act states that 'all persons and bodies must also have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development'. While the explicit reference within the Act to the need to pay due regard to the welfare of the child within the youth justice system is certainly welcome, its positioning as a subsidiary, rather than a principal aim, falls short of the effective realisation of a rights-based approach. A similar criticism can be levelled at the guidelines governing the operation of the YJA. Mirroring the legislative position, child welfare (care for children – 'children's rights will be protected and they will be treated with fairness, justice and respect') appears only as a subsidiary aim; in this case one of the seven values underpinning the overriding mission statement as opposed to a primary aim or value.

As it currently stands, the principal aim of the youth justice system is defined in legislation as that of 'protect[ing] the public by preventing offending by children' (Justice (NI) Act 2002, Section 53(1)). The overriding mission statement of the YJA is similarly defined as that of *"reduc[ing] youth crime and build[ing] confidence in the youth justice system"*.[87] A genuinely rights-based juvenile justice system would ensure that the protection and promotion of the best interests of the child were explicitly integrated in the principal aims of the system, on an equal basis with the current elements of prevention of offending and protection of the public.

A further limitation of the 2002 Act is the failure to explicitly incorporate children's article 12 right within the new structures it introduces. As highlighted by NIHRC (2008:19), *"this is a concern in any event, but made all the more serious by the fact that the new diversionary and youth conferencing provisions rely heavily on restorative principles, which in turn depend on the principles of informed consent and voluntary participation"*. This point is further elaborated within the NI NGO Alternative Report to the CRC which states:

"Informed consent is an essential element of participation in proceedings under Article 12 and the child's right to a fair trial…NGOs are aware of cases where children have admitted guilt and agreed to receive a caution, without being fully aware of the consequences of their actions. Anecdotal evidence also suggests that children are not always aware that their agreement to a Youth Conference Plan involves admission of guilt and a criminal record. These issues are further exacerbated when children have a learning difficulty and/or mental health problems, a disability, or English is not their first language" (SC/CLC 2008:46).

87. www.youthjusticeagencyni.gov.uk/about_us/ [accessed May 2008].

These difficulties are exacerbated by the fact that the same language is used when cautioning both children and adults; anecdotal evidence raised with NICCY suggests that many children do not understand the caution and the potential implications of their actions at this time. There is also serious concern as to the degree to which children understand the longer-term implications of their choices and actions, including receipt of a criminal record and how long an offence will remain on a record. It is imperative that children's understanding of, and consent to, processes and disposals be integrated into, and protected within, legislation and guidelines governing the operation of youth justice within NI. It is equally imperative that this be done on the basis of non-discrimination, addressing the potentially greater needs of certain groups of children and young people.

General Comment Number 10, issued by the Committee in 2007, clearly outlines the key elements that must be addressed by State parties in order to effectively realise children's rights within the field of juvenile justice:

"A comprehensive policy for juvenile justice must deal with the core elements: the prevention of juvenile delinquency; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings; the minimum age of criminal responsibility and the upper age limits for juvenile justice; the guarantees for a fair trial; and deprivation of liberty including pre-trial detention and post-trial incarceration" (CRC 2007b:para 15).

Though, as highlighted previously and throughout the remainder of this chapter, there are many areas where improvements are both possible and indeed very necessary within it, the current juvenile justice system in NI does at least consider each of the core elements cited above. There is a distinct justice system for juveniles aged 10 to 17 years, incorporating a number of preventative and diversionary services, youth-specific court procedures and a discrete juvenile detention facility.

The introduction and development of these initiatives in recent years, while still a long way from comprehensively realising children's rights, provide a strong platform for their future realisation, should the shortcomings and recommendations contained herein be addressed. Particular issues to be addressed include:

- the need for adequate investment in, and support of, children and young people 'in need' or 'at risk' prior to them coming into contact with criminal justice services
- the need for primacy of the 'best interests' principle
- raising the unacceptably low minimum age of criminal responsibility
- trial of young people in adult courts
- the continued use of detention, when other viable options exist
- the continued incarceration of under 14s
- the continued detention of juveniles with adults
- the disproportionate numbers of looked after children within the criminal justice system
- the experiences of children and young people deprived of their liberty.

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Should these issues fail to be adequately addressed, the current critique of the system in the 2008 NGO report to the CRC – that *"youth justice legislation, policy and practice in Northern Ireland do not currently comply with relevant international standards"* (SC/CLC 2008:46) – will regrettably continue to be the case.

8.4 Minimum Age of Criminal Responsibility

The current age of criminal responsibility in NI remains set at 10 years of age, despite the Committee's explicit recommendations for increasing this, as noted within both the 2002 and 2008 Concluding Observations on the UK and the 2007 General Comment on Juvenile Justice:

"The Committee is particularly concerned that the age at which children enter the criminal justice system is low…the Committee recommends that the State party considerably raise the minimum age of criminal responsibility" (CRC 2002:para 59–62).

"The Committee is concerned that the age of criminal responsibility is set at…10 years… [and] recommends that the State party raise the minimum age of criminal responsibility in accordance with the Committee's General Comment No. 10 and notably its paragraphs 32 and 33" (CRC 2008:para 77/78).

"A minimum age of criminal responsibility (MACR) below the age of 12 years is considered by the Committee not to be internationally responsible. State parties are recommended to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level" (CRC 2007b:para 16).

It is alarming to note that the position of children aged 10 to 13 years has actually become more, rather than less, vulnerable in recent years within the NI juvenile justice system. Article 3 of the Criminal Justice (NI) Order 1998 removed the centuries old safeguard of doli incapax from children of this age, thereby ending the prosecutorial duty to prove beyond reasonable doubt that the child understood the significance of what they were doing and were therefore capable of criminal intent. The same Order also removed the right to silence *"and so children as young as ten now risk adverse inferences being drawn if they do not give evidence in court or answer questions during cross-examination"* (Gillen 2006:131).

Attributing full criminal responsibility to children as young as 10 sits in clear contrast and, indeed, tension with the attribution of other rights and responsibilities to children and young people within NI. As Mr Justice Gillen (2006:135) further observes:

"Arguably, at 10 years of age, the age of criminal responsibility is seriously out of line with the other responsibilities and rights in society. The age of marriage is 16 (with parental consent; 18 without parental consent), the age of sexual consent in Northern Ireland is 17, the age of majority voting rights is 18, the age for a driving licence is 17, the age for leaving

school is 16, the age for living unsupported is 16, the age for buying cigarettes is 16 and jury service is 18. The law therefore bestows varying degrees of criminal responsibility on to a young person between 16 and 18…there is no other legal or social arena where we give children complete responsibility at 10."

NI's minimum age of criminal responsibility, though not as low as Scotland's, is also significantly lower than that of many other European countries. Greece and the Netherlands have set their MACR at 12 years of age. France has a MACR of 13 years, while Austria, Germany and Italy have all set their MACR at 14 years. All Scandinavian countries have an older MACR of 15 years, while Portugal and Spain have a MACR of 16 years and Belgium and Luxemburg have a MACR of 18 years. Commenting on this, a professional participant in this review stated:

"The age of criminal responsibility should be raised. At present the position in England and Wales, and Northern Ireland, constitutes the 'worst of both worlds' in that the age of criminal responsibility at 10 is extremely low by European standards, and the dominant approach of the State to children who offend is to provide a criminal justice rather than a welfare approach."

The Final Report of the Bill of Rights Forum (2008) also notes that NI has a particularly low age of criminal responsibility, recommending that the age of criminal responsibility should be raised in line with international human rights standards and best practice. Despite these ambiguities and critical commentaries on the current situation, and in spite of its continued breach of UNCRC standards in this field, the government is very clear in its intent to retain the age of MACR at 10:

"We regard the present age of criminal responsibility of 10 as appropriate and have no plans to raise it. The comprehensive review of the criminal justice system in Northern Ireland which flowed from the Belfast Agreement, considered the matter and did not recommend that the age should be increased" (OFMDFM 2007b:64).

Further consideration needs to be given as to how best to progress the raising of the MACR in NI in line with a rights-based perspective. While there has been various commentary on this issue, no consensus currently exists as to what age a revised MACR should be set at. The Bill of Rights Children's Working Group Final Report, for example, recommended that the age of criminal responsibility be increased to 16 years (and progressively increased to 18 years). The Bill of Rights Forum's Final Report did not, however, include a specific recommendation as to a revised MACR, noting that although all agreed it should be raised it was not possible for the working groups to agree a revised level for this. It is imperative that further consideration be given to determining a specific recommendation with regard to increasing the MACR within NI, paying due regard to the commentary of the Committee on the Rights of the Child on this issue. It is hoped that the NIHRC's forthcoming advice on the possible content for a Bill of Rights for Northern Ireland will provide a concrete recommendation in this regard.

8.5 Addressing the Root Causes of Offending Behaviour

"The behaviours and actions of children in Northern Ireland are increasingly criminalised. Greater emphasis needs to be placed on early intervention, family support and community-based diversion from the criminal justice system using alternatives based on the child's best interests" (SC/CLC 2008:46).

It is widely recognised that offending behaviour does not occur in a vacuum. Many of the young people who come into contact with the juvenile justice system in NI have experienced significant disadvantage or difficulty in their lives and preventative strategies and programmes must seek to address these. The multiple disadvantage and difficulty experienced by many young people in conflict with the law is starkly illustrated by the fact that, of the 30 children held in the JJC on 30 November 2007, 20 had a diagnosed mental health disorder. A total of 17 had a history of self harm, 8 had at least 1 suicide attempt on record, 8 were on the child protection register and 14 had a statement of educational needs (CJI 2008a).

The UNCRC and the accompanying guidelines and commentaries are very clear in their intent that State parties should develop and adequately invest in preventative services that divert those young people potentially at risk of offending away from the justice system. A children's rights perspective on offending behaviour prioritises decriminalisation and diversion over retribution, advocating the development of interventions that avoid a narrow focus on crime and take into account the social and contextual factors that are frequently associated with youth offending. As the following reflections from Mr Justice Gillen (2006:238) illustrate:

"Children in trouble are also children in need. There is no shortage of research linking criminal behaviour of young people with poverty, fractured families, problems in schooling and learning and behavioural difficulties… The real fear is that criminalisation of children tends to lead towards a criminal career. Does it stigmatise the child and alienate them from society, creating problems of self-esteem, encouraging the child to mix with other young people who have offended and creating barriers in the way of return to education or future employment? What we have to ask ourselves as a society is whether or not, despite the importance of anti-social behaviour being dealt with, it is equally important that children should not be criminalised. Are not many of the children convicted of crimes also victims themselves, and can failure to recognise this dual aspect of their criminality not end up denying them their right to childhood? Do we as a society treat children as offenders first and children second?" (Gillen 2006:136).

"In the majority of offences, the State's position is to redress harm caused to an individual or the wider community by another individual. Herein lies the problem of applying this philosophy to children. A child's experiences from birth are controlled by others who have responsibility towards them. Social factors such as poverty, bad housing, high crime environment, low

educational provision and poor parenting are all contributors to offending behaviour for which the child is not directly responsible and from which the child needs protection…there appears to be no overarching system that brings together all the problems and services necessary for children who require protection and who may be in conflict with the law. A family-criminal interface is a concept whose time has come" (Gillen 2006:138).

The 'victim' status of many children and young people in conflict with the law, and the influence of external contributory factors on their offending behaviour, was also reiterated by participants in this review:

"Young people in the justice system are there due to a failure by the system such as social services or parents. By the time they reach the criminal justice system there has been a failure in delivering the rights of these children" (professional).

"I work as a volunteer with young people who have already committed an offence or are at risk of doing so. These young people have no positive parental influence, are excluded from education, too old to be fostered and there are no care home places for them. Committing an offence gets them into the Juvenile Justice Centre at Rathgael where they are fed three good meals a day, clothes are washed and ironed, have their own rooms and access to TV, playstation etc and receive encouragement from the youth workers and have to attend lessons – it is therefore a better option than living at home. However sooner or later they will become of age and gain criminal records which can affect the rest of their lives. Schools need to do more to prepare children and young people for the challenges they face in their communities – it shouldn't be about gaining qualifications" (parent).

As aptly illustrated by these quotes, a children's rights perspective traces the roots of offending behaviour far beyond the point at which such behaviour manifests and, as such, emphasises the role of both the government and society at large in the development of 'non-criminogenic attitudes' within children and young people and the consequent prevention of offending behaviour.

The United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), for example, note the need for *"efforts on the part of the entire society to ensure the harmonious development of adolescents"* (UNGA 1990b:para 2), the effective realisation of which will divert them from potentially offending behaviour. Particular attention is given to the importance of family life, educational experience, the provision of community based services and programmes and the role of the mass media in portraying *"the positive contribution of young persons to society"* (UNGA 1990b:para 41). Particular attention is also given to the need for government to prioritise plans and programmes for children and young people and to adequately resource their delivery (UNGA 1990b). As illustrated time and time again throughout this report, this is currently far from the reality for children and young people in NI.

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The Riyadh Guidelines further state that *"delinquency prevention policies [should] avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others"*, focusing instead on:

- the prevention of offending through appropriate provision of educational and other opportunities
- reducing the motivation, need and opportunity for, or conditions giving rise to, the commission of infractions
- promoting the best interests of the child or young person, through fair and equitable interventions
- safeguarding the wellbeing, development, rights and best interests of all young persons
- the natural maturation and growth process and the 'non-conforming' behaviours often associated with this for a time
- avoidance of labelling a young person, on the basis that such labelling often contributes to the development of a consistent pattern of undesirable behaviour (UNGA 1990b:para 5).

The Committee is very clear in its position that *"a juvenile justice policy without a set of measures aimed at preventing juvenile delinquency suffers from serious shortcomings"* (CRC 2007b:para 17). It is on this basis that it stipulates State parties should fully integrate the Riyadh Guidelines referred to above (CRC 2007b; CRC 2008).

There are, in essence, two distinct but interrelated elements to a rights-based approach to the prevention of delinquency in juveniles – ensuring universal access to all that is needed for the holistic development of a child (material wellbeing, health, education, love, support etc) and the provision of more targeted services for those individuals who, whether through lack of access to these basic building blocks or other reasons, have become more at risk of engaging in offending behaviour.

As illustrated throughout this report, many children and young people in NI continue to grow up without one, or more, of the basic building blocks required for their holistic development. In this respect, the State clearly fails to provide the preventative structures required to address the risk factors frequently associated with potential for, or involvement in, offending behaviour:

"When we come across young people in the justice system it is, generally speaking, as a result of failures – failures, be it by parents [or] social services – and the young people end up getting handled within the criminal justice system…in a sense, there's a failure to respect their rights before they enter the justice system… the very fact they're in the justice system, suggests to me there has been a failure in delivering the rights of children" (professional).

Ironically, once a child has offended, or exhibited particular behaviours deemed to indicate risk of offending, and receives a referral to the PSNI Youth Diversion Scheme (YDS) or YJA Community Services, their access to services and support increases significantly. While the provision of support and diversionary services

for children in conflict with the law and those at risk of becoming so is to be welcomed, it is a matter of grave concern that services for both groups are delivered under the auspices of the same scheme, as is currently the case with regard to both YDS and Community Services provision. The inclusion of 'non-offending' youth in the same scheme as 'offending' youth may potentially be seen to criminalise the former; the impact of which is in direct conflict with the principles of the UNCRC.

It is an alarming indictment on government that the best way to access services, for many 'at risk' children and young people, is through contact with the criminal justice system. It is imperative that the government further invest in the provision of both universal and targeted services and support for children and young people prior to contact with the criminal justice system, if it is to adequately fulfil its obligations under the UNCRC. It is also imperative that preventative services for those 'at risk' of offending are delivered separately from those aimed at individuals already engaged in offending behaviour. Early intervention, accessible through other routes that avoid the potential criminalisation of children and young people, is fundamental if the government is to prevent offending in line with the Riyadh Guidelines.

8.6 Community Based Restorative Justice Schemes

A unique element of the system of responding to offending, by both juveniles and adults, within NI is the existence of community based restorative justice (CBRJ) schemes:

"CBRJ schemes are designed to provide restorative solutions to problems of neighbour disputes and low-level criminality, to save people having to have recourse to the police and to the courts, which can take far longer and often offers no greater certainty of obtaining a satisfactory outcome. The schemes aim to bring victims and offenders into contact with each other with the aim of achieving a degree of understanding, apology and if possible restitution between them, rather than criminal sanctions" (CJI 2007b:3).

CBRJ initiatives have been operating in NI, in various forms and guises, since 1998/99 when Atlantic Philanthropies financed the establishment of the first two initiatives in the form of the loyalist 'Alternatives' project and Republican 'Community Restorative Justice Ireland', both of which were established with the aim of reducing anti-social crime and providing a peaceful alternative to punishment violence (Gormally, 2006). Commenting in 2002, the Committee *"welcome[d] the State party's initiatives to introduce restorative justice and other constructive community-based disposals for juvenile offenders"* (CRC 2002:para 59).

Though such schemes have been in existence for over a decade now, they have only recently been subject to regulated statutory governance with the publication of the Protocol for Community Based Restorative Justice Schemes in February 2007. The 2007 Protocol *"recognises the finding of the Review of Criminal Justice that community-based restorative justice schemes can have a role to play in dealing with the types of low-level crime that most commonly*

concern local communities" and *"seeks to establish a framework for relations between the criminal justice system and the community-based schemes by setting in place a Protocol for the operation of the schemes in line with the Review's recommendations. That framework is based on schemes' compliance with the rule of law and full cooperation with statutory agencies, including the police, in implementing this Protocol"* (NIO 2007:para 1).

The Protocol applies to all cases where a CBRJ scheme seeks to deal with a criminal offence. The Protocol determines that schemes should refer all such offences to the PPS (via the police) in order for the PPS to determine which low level offences are suitable for referral back to the scheme, to be dealt with in accordance with the 2007 Protocol. Under the Protocol, schemes may not deal with any offence that has not been referred to them from the PPS.

The Protocol clearly differentiates between cases that are suitable for consideration for CBRJ schemes and those that are not, stipulating that schemes may not deal with 'more serious offences' (including sexual offences or cases of domestic violence), 'non-criminal matters' or 'anti-social behaviour which does not reach the criminal level' (NIO 2007). Schemes may also only deal with offences where there is an admission of guilt, confirmed by a police investigation and informed consent to participate in a CBRJ disposal. Should the offender wish to deny the offence at any point, the case must be referred back to the PSNI.

In determining whether it is in the public interest to refer an offender to a scheme, the PPS will consider whether there is an admission of guilt (confirmed by a police investigation); previous offending history; the gravity of the offence; the views of the victim and any other relevant information (NIO 2007). The PPS will also decide whether referrals should include an informed warning or a restorative caution from the PSNI and, should this be the case, this should form part of the plan for dealing with the offender.

As highlighted previously, CBRJ schemes are not exclusively focused on youth offending, but any offender aged 10 or above is eligible for referral to the schemes.

Paragraphs 5 and 6 of the CBRJ Protocol clearly outline the rights-based approach that is required of all schemes, stating that *"schemes will operate in full accordance with the Human Rights Act 1998, the UN Convention on the Rights of the Child and all current equality legislation"*. The Protocol also places a clear duty on all schemes to *"adhere to the relevant sections of the UN Basic Principles on the use of Restorative Justice Programmes in Criminal Matters"*, in particular those outlining the need for:

- the free and voluntary consent of the parties
- proportionate, and voluntarily agreed, disposals
- recognition of potential power disparities and the safety of parties
- appropriate legal advice for parties
- informed consent – based on understanding of one's rights, the nature of the process and the possible consequences of (non) participation
- freedom from coercion with regard to

participation or acceptance of outcomes (NIO 2007:para 5/6).

In accordance with the recommendations of the Criminal Justice Review, the Protocol stipulates that all schemes should *"be accredited by, and subject to, standards laid down by the Government in respect of how they deal with criminal activity, covering such issues as training of staff, human rights protections, other due process and proportionality issues, and complaints mechanisms for both victims and offenders"* (NIO 2007: para14). Further considerations of relevance to this include POCVA clearance of those involved in the schemes and non-involvement in 'paramilitary activity or criminality' (NIO 2007). Scheme-based accreditation decisions will be made, and kept under regular review, by the Criminal Justice Inspection Northern Ireland (CJINI), with decisions on individual suitability determined by an independent panel of statutory representatives.

Accreditation is a fundamental requirement for any CBRJ scheme as the Protocol stipulates that the PPS can only refer cases to accredited schemes. Further protections for participants are provided for in paragraphs 21 and 22 of the Protocol which establish regular, unannounced, independent inspections by CJINI and *"an independent, external, complaints mechanism, provided by the Probation Board…available to every offender and every victim who comes into contact with the schemes"* (NIO 2007:para 21/22).

As of 6 February 2008, five schemes had obtained accreditation under the 2007 Protocol, in accordance with the provisions of Section 43 of the Justice and Security (Northern Ireland) Act 2007 (NIO 2008d). Ten further schemes gained accreditation in August 2008.[88]

The development and subsequent mainstreaming of CBRJ schemes in NI has not been, nor does it continue to be, without difficulty. The politicised nature of their origins together with the present political climate combine to create a myriad of responses to, and opinions on, their operation.

The Criminal Justice Inspection (2007b), in contextualising its pre-inspection of schemes seeking accreditation, summarises some of the key criticisms and concerns that have been levelled at CBRJ schemes in NI to date, namely:

- They are a front for paramilitary organisations, which they help to maintain control over their communities.
- They rely on coercion (actual or implied) to take part in restorative justice.
- They infringe the rights of the client by denying him or her due process.
- They expose the client to double jeopardy, since the state may still be obliged to take the offender to court.
- Some of the people who work in them are, because of their past paramilitary involvement, unsuitable for any role in relation to criminal justice.

Commenting on the last of these concerns, the report notes that *"the Government's policy is that there should be no discrimination against former paramilitaries for employment purposes unless they are still or have recently been engaged*

88. www.nio.gov.uk/register_of_accredited_community_based_restorative_justice_schemes.pdf [accessed May and October 2008].

in criminal activity, or unless the nature of their offence disqualifies them from the particular sort of employment proposed. It was recognised by the Northern Ireland Affairs Select Committee that many former paramilitaries have distanced themselves from unlawful activity and are motivated to undertake work which will benefit their communities" (CJI 2007b:4).

Attempting to address some of the concerns surrounding the mainstreaming of CBRJ schemes, the NIO press release accompanying the initial accreditation of schemes highlighted what they believe to be *"a number of important safeguards"* within the Protocol, that include:

- The Protocol requires that schemes engage, and have a direct relationship, with police on all matters governed by the Protocol. The centrality of the police to the way in which schemes operate is non-negotiable.
- All individuals working on activities governed by the Protocol must have a determination of suitability from a Suitability Panel working in accordance with published criteria set out in the Protocol. The Suitability Panel is chaired by a representative of the Community Relations Council with other members drawn from the Probation Board for Northern Ireland and the YJA.
- The Probation Board for Northern Ireland will operate an independent complaints mechanism for victims and offenders who may have cause to raise concerns about how a scheme has handled their case.
- The Protocol sets exacting standards which schemes must meet to achieve accreditation, with continued compliance tested by a rigorous, regular and unannounced inspection regime undertaken by the Criminal Justice Inspectorate who publish their inspection reports.
- The Protocol establishes the relationship between schemes and the criminal justice system in dealing with low-level criminal offences and offenders and, by definition, governs cases which have both achieved the criminal threshold and been deemed suitable by the PPS for referral for a restorative disposal.[89]

While the introduction of these 'safeguards' is certainly a welcome development from the initial proposals, there is still some way to go in terms of addressing public concerns in relation to the official footing now accorded to accredited CBRJ schemes. Other issues that require further clarification with regard to the operation of the Protocol, as it embeds and develops, include:

- the referral process from CBRJ schemes to the PSNI and the criteria applied in relation to this
- the relationship between CBRJ schemes and the statutory Youth Conference Service (YCS)
- PPS assessment criteria for both schemes
- comparability of outcomes across both schemes
- decision making processes within the Suitability Panel
- assessment criteria in relation to the ongoing monitoring and reviewing of accredited schemes
- the powers, 'independence' and visibility/ accessibility of the PBNI operated complaints mechanism

89. www.nio.gov.uk/accreditation-for-community-based-restorative-justice-schemes/media-detail.htm?newsID=14578 [accessed May 2008].

- the degree to which processes and materials will be appropriately pitched for young people.

Mika (2006:37) in his evaluation of CBRJ initiatives in NI noted that, in the current climate of rising crime and anti-social behaviour and a continued desire for *"quick and rough justice in some local areas…there is little debate amongst the broad spectrum of individuals consulted over the course of this evaluation, that what is desperately needed in all working class areas of Northern Ireland is cooperation and collaboration between Government, statutory organisations, and properly resourced community counterparts…The community-based restorative justice initiatives are attempting, under often difficult circumstances, to make headway against the tide of such challenges, by building local institutions, encouraging the local exercise of human rights, providing community safety, confronting the legacies of violence, and encouraging civic participation".*

It is, as yet, too early to determine the effectiveness of the newly regulated CBRJ schemes in addressing offending behaviour in a rights respecting manner. It is imperative that the schemes be closely monitored and independently evaluated from an explicit rights basis in order to determine their appropriateness for use with children and young people engaged in offending behaviour in the local community.

8.7 Children Alleged of Infringing the Penal Law

"Article 40 covers the rights of all children alleged as, accused of or recognized as having infringed the penal law. Thus it covers treatment from the moment an allegation is made, through investigation, arrest, charge, and pre-trial period, trial and sentence. The article requires States to promote a distinctive system of juvenile justice for children…and to provide measures for dealing with children who may have infringed the penal law without resorting to judicial proceedings and to provide a variety of alternative dispositions to institutional care" (UNICEF 2007:602).

The legal framework concerning the arrest and custody of young persons in NI is governed mainly by the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE), with additional rules relating to the arrest and detention of young persons introduced under Part III of the Criminal Justice (Children) (NI) Order 1998 (Quinn and Jackson 2003).

PACE affords children and young people a series of additional rights and protections beyond those afforded their adult counterparts. Unfortunately, however, as the Children's Law Centre (CLC) (2008:11) highlights, 17 year olds do not currently enjoy these protections as *"they do not fall within the definition of an 'arrested juvenile' for the purposes of the operation of PACE. This means they are not entitled to a series of additional rights for children and young people with regard to informing a person responsible for the child or young person about the arrest and reasons for arrest nor are they entitled to further additional rights with regard to the provision of an appropriate adult for juveniles".*

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Though Article 18 of the PACE (Amendment) (NI) Order 2007 amends the 1989 legislation to include 17 year olds in the definition of 'arrested juvenile', at the time of writing this provision has not yet been commenced. Nor indeed does its introduction look imminent according to a recent report issued by the CLC which states *"in conversations with the Children's Law Centre the NIO has stated that they do not intend to commence this provision in the near future"* (CLC 2008:12).

The continued failure to treat 17 year olds as 'juveniles' under PACE is disparate with their status under the YDS, the PPS and other aspects of the criminal justice scheme. It *"does not reflect the European Court of Human Rights case law in that the exclusion of 17 year olds from the additional protections afforded to those under 17 means that they may not have the ability to participate in and understand the PACE procedures properly"* (CLC 2008:12). It is also in direct conflict with the recommended position of the Committee on the Rights of the Child that protection for juveniles within the justice system be universally applicable to all under 18 year olds and, as such, must be urgently redressed through the immediate commencement of Article 18 of the 2007 PACE Amendment Order.

8.8 Pre-prosecution Diversionary Responses to Offending

"State Parties should make measures for dealing with children in conflict with the law without resorting to judicial proceedings an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected" (CRC 2007b:para 12).

A series of safeguards are outlined in General Comment Number 10 with regard to the use of such alternative disposals:

- Diversion should only be used when there is convincing evidence that the child committed the alleged offence and freely and voluntarily accepts responsibility for this.
- Acknowledgment of an offence for the purposes of diversion should not be used against the individual in any subsequent legal proceeding.
- The child must freely and voluntarily consent in writing to the diversion, on the basis of a clear understanding of the process. Parental consent may also be advisable in the case of under 16 year olds.
- There should be clear guidelines for police and prosecutors in terms of when to pursue diversion and decisions to 'divert' should be regulated and reviewed.
- The child must be given the opportunity to avail of legal advice in relation to the desirability of the diversion.
- The completion of the diversion should result in a definite and final closure of the case. A child who has been previously diverted must not be seen as having a previous conviction (CRC 2007b).

As highlighted previously in this chapter, a number of different diversionary options have been introduced with regard to youth offending in recent years, which together provide a series

of points along the youth justice continuum at which young people can be diverted away from the judicial system. These include the YDS operated by the PSNI, diversionary disposals available to the PPS and, should a case proceed this far, the courts. These diversionary options will be explored in procedural order within the remainder of this chapter, together with the outcomes pursued at each stage of the process should diversionary options not be deemed appropriate.

8.8.1 Youth Diversion Scheme

All young people that come to the attention of the police are now dealt with under the PSNI operated YDS. The scheme came into effect on 1 September 2003, replacing the former Juvenile Liaison Scheme and providing the new *"framework within which the police service will respond to all children and young people below the age of seventeen years [now eighteen], who come into contact with police for non-offence behaviour, or who have offended or are potentially at risk of offending or becoming involved in anti-social behaviour"* (PSNI 2003:2).

Commenting on the implementation of this scheme, O'Mahoney and Campbell (2004:3) observe that *"diverting young people away from the courts is seen as a more positive response than formally prosecuting them and the police have been operating a progressive policy in terms of diverting young people away from formal criminal processing…The Youth Diversion Scheme only resorts to prosecuting a relatively small proportion of the young people that are referred to it…The remainder are dealt with informally through 'advice and warning' or no further police action is taken…There has been a general increase in the use of informal measures when dealing with young people who come to the attention of the police and the proportion of cases given 'advice and warning' or no further police action has steadily increased over the past ten years".*

In line with UNCRC recommendations, the YDS draws on the philosophy and principles of restorative justice, recognising the risk factors that can contribute to offending behaviour[90] and the need for an inter-agency response to comprehensively address these (PSNI 2003).

According to the PSNI (2003:15), *"both informed warnings and restorative cautions are designed to clearly indicate that the police service will seriously support any child or young person who seeks to take responsibility for their actions and displays commitment to make changes to alter their behaviour in the future. The YDS offers a consistent, credible, equitable and effective response to children and young people who offend or, are at risk of offending".*

The stated aims of the scheme include those of:

- preventing children and young people becoming involved in offending or anti-social behaviour
- providing an effective, equitable and restorative response to children who have

90. These are cited in the PSNI report as poor parenting; family conflict; low income and poor housing; being in care; low achievement, truancy or exclusion from school; living in a disadvantaged neighbourhood and having friends condoning or involved in risky behaviour (PSNI 2003:19).

offended or are at risk of offending or becoming involved in anti-social behaviour
- diverting, wherever possible, children and young people who have offended away from becoming further involved in the criminal justice system
- reducing the likelihood of reoffending (PSNI 2003).

Non-offence Referrals

A distinct feature of the YDS is that both offending and 'non-offence' behaviour can be referred to the scheme. As highlighted previously, while the diversionary nature of the scheme is very much in line with a children's rights approach to dealing with offending behaviour, the inclusion of both offending and non-offending youth within the one scheme could potentially be seen to criminalise the latter, which would be in direct conflict with a rights-based approach to preventing offending.

There are two key groups who may be referred for non-offence behaviour. The first is children and young people who come to the attention of the police for non-offence behaviour (ie behaviour which is not an offence contrary to any statute/regulation) who may be deemed susceptible to becoming involved in offending behaviour. The second is children under the age of 10 who are engaged in offending behaviour but cannot legally commit an offence as they are under the age of criminal responsibility. Their details may be recorded as a non-offence referral *"on the basis that they may be at risk of becoming involved in further offending"* once they reach the age of criminal responsibility (PSNI 2003:4). Children and young people who are victims of crime or the subject of action in respect to child protection issues can also be referred under the category of non-offending behaviour (PSNI 2003). There is no limit as to the number of non-offence referrals a child may receive.

The Final Report of the Equality Impact Assessment of the YDS observed that *"where no offence has been committed, it is generally the case that no further action is undertaken by the police"*. The primary exception to this is when a Youth Diversion Officer (YDO) receives three non-offence referrals for a particular child within a rolling 12 month period, in which case *"they should automatically consider referral of the child or young person to a relevant agency/ multi-agency forum"*, subject to the informed consent of the parent/guardian (Howarth Consulting Ireland 2006:6). It is interesting to note that while a parent/guardian's consent is required pre-referral, no reference is made to obtaining the consent of the young person concerned.

Records of non-offence referrals are, according to the PSNI, 'weeded' after 12 months so long as there has been no further relevant contact – *"they should not, as a general rule, be made available to decision makers in subsequent offence based referrals or included in any investigation file unless exceptional circumstances exist"* (PSNI 2003:5).

Offence Based Referrals

When a referral is made for offending behaviour, the process to be followed by specialist YDOs is:

- step 1: receipt of referral
- step 2: YDO gathers supplementary evidence from a range of partner organisations who may have come into contact with the young person
- step 3: YDO considers referral in terms of gravity of offence(s); supplementary information provided by other agencies; public interest factors and number and nature of previous offences and/or diversionary disposals
- step 4: YDO makes recommendation for informed warning, restorative caution or prosecution
- step 5: recommendation referred to the PPS for final direction and approval
- step 6: outcome administered – young person informed of decision and decision implemented (Horwath 2006).

The intended outcomes for young people with offending behaviour who participate in the scheme are: acceptance of responsibility for their actions; greater understanding of the circumstances leading to their offending behaviour and the impact of this behaviour on both themselves and others; an opportunity for reparation/restitution (where relevant) and learning how to avoid such behaviour in the future (PSNI 2003).

Three possible recommendations for disposal exist with respect to offence based referrals: an informed warning, a restorative caution or prosecution. There are also occasions when no further action may be considered, due to lack of evidence and/or the triviality of an offence. Though diversionary disposals will normally be pursued prior to referral for prosecution, their existence does not preclude immediate referral for prosecution if deemed appropriate due to the seriousness of the offence, even if it is a first offence. Referrals for prosecution are considered in section 8.9.

In order for a recommendation for a diversionary disposal (informed warning or restorative caution) to be viable, a number of criteria must be satisfied. There must be both an informed 'clear and reliable' admission of guilt (recorded by way of a signature from the offender and their parent/guardian) and sufficient evidence that the child or young person committed an offence (evidence that would provide a realistic prospect of conviction if taken to court).[91] The decision not to prosecute must also be shown to be in the public interest and the offender must not have exceeded the maximum combination of relevant (unweeded) disposals (PSNI 2003). The maximum combination of relevant disposals for 14–17 year olds is 2 restorative cautions or a restorative caution and an informed warning. The threshold for 10–13 year olds is set somewhat higher, due to their 'particular vulnerability', with this age group allowed the possibility of a third diversionary disposal prior to referral for prosecution (PSNI 2003).

Decisions regarding disposal options must be based on PPS considerations and PSNI guidelines. An informed warning is generally *"recommended if the offence is deemed to*

91. If a young person denies their guilt or there is a refusal to give informed consent to proceed with either disposal, the diversionary process is void and the matter must be referred for prosecution. Similarly, if a young person makes a formal complaint, the process must be ended (PSNI 2003:10).

be of a less serious nature or there are other mitigating circumstances…A restorative caution is recommended where it is required to send a strong signal to the young person that their offending behaviour is deemed to be more serious" (PSNI 2003:7/8).

Both disposals are based on restorative justice principles, involve the young person and their parent/guardian and are delivered by a facilitator trained in restorative conferencing techniques. Informed warnings are delivered by trained police facilitators in a police station setting and, though the victim's perspective will ideally be incorporated, this will not be through victim attendance. Restorative cautions may be administered by a range of trained facilitators and are delivered by means of a restorative conferencing process that ideally includes victim attendance, except in the case of a sexual offence where this is deemed inappropriate. However, victim attendance is not a necessary requirement of a restorative caution and should either the victim or the offender object to this, the process can proceed without victim involvement.

Neither of these offence-based diversionary disposals is a conviction, but both are recorded on a young person's criminal record. Unless further offending occurs during the period of their application,[92] an informed warning remains on record for 12 months and a restorative caution for 2 and a half years. Both can also be cited in court and in some cases can be made available to employers (PSNI 2003), a fact that could potentially impact upon a young person's future prospects.

92. However, if further offending takes place within this period, the earlier offence disposal remains on the criminal record for at least the duration of the more recent offence disposal (PSNI 2003).

Though the fact that neither disposal results in a conviction is in line with the Committee's recommendations, the fact that the disposals are recorded on an individual's criminal record for between 12 and 30 months sits in contradiction with the Committee's recommendation that *"although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as 'criminal records'"* (CRC 2007b:para 13).

A total of 22,740 referrals were made to the YDS between September 2003 and March 2005: 44% of these were for 'non-offence behaviour' and 56% were for children and young people who had committed offences. An informed warning was administered by the scheme in 9% (2,054) of these cases. A restorative caution was administered in a further 6% (1,444) of cases, with victims being present in approximately 1 in 4 (27%) of these cases (Horwath 2006).

Internal analysis of these referrals reveals that both males and older young people (15–16 year olds) were more likely to be prosecuted rather than given a diversionary disposal, though subsequent analysis reveals that this is *"a true reflection of the offending behaviour"* of these individuals rather than inconsistent application of the scheme (Horwath 2006:12/13). Differences between Protestant and Catholic youths were also noted in the EQIA of the YDS, but again it was noted that *"this is not as a result of any judgemental bias on behalf of the PSNI or PPS"* but *"a result of these individuals having committed more offences, and more serious offences attracting higher tariffs, and as a*

result of the greater tendency amongst Catholic juveniles to deny their offences. This points to wider societal issues…which may merit further investigation" (Horwath 2006:31).

Other key issues of concern noted with respect to the operation of the YDS in the 2006 EQIA carried out by Horwath Consulting Ireland include:

- low rates of referral to other agencies, despite the intention that this be a central aspect of the scheme
- significant variation in the use of diversionary disposals across District Command Units (DCUs) which may result in people receiving different treatment between police districts
- the fact that although turnaround times from PSNI referral to PPS direction have reduced between 2003 and 2005, the average timescale in 2005 was still 56.1 working days
- differential levels of training across YDOs with some having received minimal or no training in relation to the scheme and their role
- the fact that although YDOs are intended to be dedicated to the YDS on a full-time basis, resourcing issues are preventing this, with some YDOs not available for youth diversion work for 'extended periods' (Horwath 2006).

Offering comment on these continued inconsistencies and differences, Horwath Consulting (2006:34) concludes, *"as youth diversion is seen internationally to represent an effective set of interventions, the Youth Diversion Scheme in NI is worthy of continuation and should be retained. Although empirical evidence does not currently exist to prove definitively that the YDS is producing better societal outcomes than would be the case if it did not exist, our overall conclusion is that the YDS is meeting most of its objectives and is proving to be beneficial, albeit in the context that more work needs to be done to effect necessary improvements… the YDS is a considerable improvement on the JLS, although there is clearly much still to be done to achieve the full implementation of common standards and protocols",* including:

- revision of the YDS General Order in light of operational experience
- development of more standardised operational protocols
- development of better inter-agency protocols
- better training for YDS staff
- better engagement with victims
- improved turnaround time for diversionary disposals
- a designated YDS budget 'to underpin the PSNI's commitment to youth diversion'
- more comprehensive data collection systems (Horwath 2006).

It is to be welcomed that the PSNI has signed up to implementation of these operational reforms in its March 2007 summary report of the EQIA process, but it is, as yet, too early to tell how the implementation will proceed and what the outcomes will be for the children and young people who come into contact with the scheme. Implementation of these, and other, reforms would serve to greatly enhance the contribution the scheme currently offers to the juvenile justice system within NI.

8.8.2 Community Services

Recognising the complex causes of offending behaviour, YJA Community Services deliver a range of diversionary programmes across NI, through partnership with other statutory and voluntary bodies. According to the organisation's website, these programmes are *"tailored to the individual needs of young people and their families…address the reasons behind the young person's problem behaviour such as low achievement in school, family difficulties, substance misuse, etc…aim to engage young people's interests and, by enhancing their knowledge, life-skills and experience, contribute to giving young people the best chances of leading a crime-free life"*.[93]

The service can accept two different categories of children and young people. The first category, statutory referrals, includes those who have in some way 'offended' against the laws of the State and received a disposal in the form of a Community Responsibility Order (CRO), Reparation Order (RpO), Attendance Centre Order (ACO), Youth Conference Order (YCO) or Diversionary Youth Conference Plan. The second category, voluntary referrals, includes those who are deemed to be in danger of offending, who are known to the police or identified as at risk by either social services or the education welfare service. Those referred via this latter route can only be referred with their consent and will only be accepted after a preliminary assessment of risk and a decision as to the appropriateness of the referral.

Individualised programmes of work are developed for each young person accepted to the service, drawing on a range of services and programmes including counselling, family work, self-help groups, education support and preparation for employment. An NIO funded evaluation of the service in 2004, though identifying areas of improvement, found the service to be *"making a very substantial contribution to dealing with the many real problems faced by young people in NI"* (NIO 2004:viii). User satisfaction was also found to be high amongst young people and their parents and personnel from other agencies. While these initial results are encouraging, there is, as recognised by the authors of the report, a need for follow-up and longitudinal studies to assess the longer-term impact of the service (NIO 2004).

The recognition of the complex nature of offending behaviour and the restorative principles underpinning Community Services provision, reflect the concerns of a child rights-based approach to dealing with children and young people within, and on the periphery of, the criminal justice system. However, like the YDS, the potential referral of both offending and non-offending behaviour to the scheme could potentially be seen to criminalise young people who have not actually been engaged in any illegal activity.

8.9 Public Prosecution Service

As highlighted previously, not all referrals to the YDS are deemed appropriate for a diversionary disposal. Some cases are referred for

93. www.youthjusticeagencyni.gov.uk/youth_justice_system/preventing_offending/ [accessed May 2008].

prosecution due to the seriousness of the offence and/or the previous offending behaviour of the individual. Responsibility for the prosecution of all such cases lies with PPS; established in June 2005 by the commencement of the Justice (NI) Act 2002, as the body responsible for direction on 'every case where there is a known suspect', whether juvenile or adult (CJI 2007c). The primary role of the PPS is to reach decisions on whether to prosecute a case and, where relevant, to have responsibility for the conduct of criminal proceedings. The PPS may also provide prosecutorial and pre-charge advice to police.

The PPS is regionally based, operating across four defined regions – Belfast, western and southern, eastern and northern. According to the CJI 2007 Inspection of the PPS, there is a dedicated team with responsibility for decision making and case progression in all youth cases within the Belfast region and although no such dedicated teams exist in other regions there is *"at least consistency in terms of prosecutors dealing with youth cases"* (CJI 2007c:56). Youth champions have also been appointed in each region, as contacts for the Court Service and other stakeholders on youth matters. According to CJI's 2007 Inspection, it is the stated intention of the PPS to *"convene periodic meetings of these youth champions…to encourage consistency in decision making and to provide a forum for the identification of best practice, although no date has been set for the launch of this initiative"* (CJI 2007c:56/57).

In terms of whether or not youth cases are being processed with due expediency in the current system, the CJI 2007 Inspection noted evidence that youth cases are now being progressed more quickly by the PPS, but highlighted that *"the efficiency and effectiveness of youth cases would benefit further from the development of fast track systems within the PSNI"* and stricter targets around time limits for the allocation of cases post receipt (CJI 2007c:56/57).

8.9.1 Alternatives to Prosecution Available to the PPS

Even when a case is referred to the PPS for prosecution, this does not inevitably mean that the young person will end up in court. The diversionary options currently available to the PPS for use in juvenile cases are referral back to the police for an informed warning, caution administered under the YDS or referral for diversionary youth conferencing:

- **Informed warning:** administered by the police under the instruction of the PPS, this is a formal reprimand that, though not a conviction, is recorded on a person's criminal record for 12 months.

- **Caution:** administered by the police under the instruction of the PPS, this is a formal reprimand that, though not a conviction, is recorded on a juvenile's criminal record for 30 months (5 years for an adult).

- **Youth conference:** a diversionary restorative justice initiative, the outcome of which must be approved by the Prosecutor. This is a formal process that, though not a conviction, is recorded on a juvenile's criminal record for 30 months (PPS 2007:48).

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These alternatives to prosecution are, as recommended by the Committee (CRC 2007b), only available to prosecutors if the defendant admits that they committed the offence and gives informed consent to participate in the diversionary option. As highlighted above, although the fact that these diversionary options do not result in a conviction is in line with the Committee's recommendations, the recording of the disposals on an individual's criminal record for between 12 and 30 months is not (CRC 2007b).

8.9.2 Prosecution of Offences

Northern Ireland Court Service (NICS) statistics[94] for October 2007 to March 2008 reveal that 1,531 youth defendants were 'received in magistrates' courts' across NI via a PSNI/PPS prosecution during this 6 month period (NICS 2008, 2007). Prosecutions against juveniles may only be initiated when the prosecutor is satisfied that the 'Test for Prosecution' is met both in terms of 'the Evidential Test' (is evidence sufficient to provide a reasonable prospect of conviction?) and 'the Public Interest Test' (is a prosecution in the public interest?) (PPS 2007).

The primary offences for which juveniles were brought to court in October to December 2007 were: a combination of charges (27.3% of cases); motoring offences (13.9%); offences against the person (13.3%); criminal damage (12.1%) and theft (11.6%) (NICS 2007).

Most youth cases to be prosecuted will be dealt with in the youth court, but *"when a juvenile is charged jointly with an adult [their] trial may be held in the [adult] magistrates' court or for more serious offences such as murder, in the Crown Court"*.[95] NICS statistics for October 2007 to March 2008 reveal that 31 young people were committed to the Crown Court during this 6 month period.

While the existence of a distinct youth court and the progression of most youth prosecutions through it are in line with international children's rights standards, the continued potential to prosecute juveniles through an adult court is not. This was an issue raised by the Committee in its 2008 Concluding Observations, in which it expressed concern that *"there are still cases where children, notably those aged between 16 and 18, can be tried in an adult court"*. The Committee has consequently called upon the government to ensure that *"children in conflict with the law are always dealt with within the juvenile justice system and never tried as adults in ordinary cases, irrespective of the gravity of the crime they are charged with"* (CRC 2008: para 77/78).

General Comment Number 10 states that *"for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible. The longer the period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized"* (CRC 2007b:para 23).

94. Only provisional figures are available for post October–December 2005.

95. www. cjsni.gov.uk/index.cfm/area/information/page/youth_going_to_court [accessed May 2008].

Though regional differences are observable, average waiting times[96] across NI in the youth magistrates' courts during the period October to December 2007 were 7.18 weeks from summons to first hearing, 9.92 weeks from hearing to finding and 3.98 weeks from finding to disposal, totalling 21.08 weeks (approx 5 months) from summons to finding.

Considering these figures against targets set in the agency's corporate plan; 72% of cases were being processed on target, with the remaining 28% coming in over target. While this is an improvement on the 68% 'on target' figure from the same period in 2005, or that of 69% for January to March 2007, there is still a lot of room for improvement, with more than 1 in 4 cases still not being processed on target. Furthermore, if provisional figures for 2007 turn out to be accurate, the average waiting times in the youth magistrates' courts has increased from 19.4 weeks in October to December 2005 to 21.8 weeks for the same period in 2007 (NICS 2007).

It is questionable whether these timescales adequately address the requirement of article 40(2) 'to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law'. Furthermore the fact that almost one quarter (23.6%) of PSNI/PPS youth prosecutions subsequently had all charges withdrawn at court raises serious questions with regard to the appropriateness of instigating prosecution in the first place (NICS 2007).

96. Bench warrants, adjourned generally, deferred sentences and diversionary youth conference orders excluded.

8.10 Youth Court

As stated above, most youth cases to be prosecuted will be heard at a specialised youth court. There are 19 such courts across NI, introduced to provide an alternative, less formal setting for the prosecution of juvenile cases within NI.

The youth court is a special magistrates' court constituted to deal with proceedings against juveniles between the ages of 10 and 17. It operates along broadly similar lines to the adult court but with some differences:

- Three people sit on the bench – one resident magistrate, who is the chairperson, and two lay magistrates (one of whom must be a woman).
- Proceedings are held in private, with only people connected with the case and court officials present.
- Proceedings are less formal than in an adult court.
- The court can deal summarily with any indictable offence other than murder, if the court thinks that such a course is expedient and if the prosecution and the juvenile or their parent consents.
- The court hears both criminal proceedings and those relating to the care, protection and control of juveniles (NIO 2005b).

In line with UNCRC standards, every child coming before the youth court (or indeed any court) is presumed innocent until proven guilty according to the law. Also in line with UNCRC standards,

all young people appearing in the youth court are entitled to have their parent/guardian and legal representation at their hearing.

Measures are also taken to protect the privacy of young people appearing before the court, though further efforts to privatise proceedings would be welcome. Although Article 22(2) of the Criminal Justice (Children) (NI) Order 1998 restricts press and media reporting of proceedings in youth courts, it does not restrict their attendance at youth court. *"Journalists can come and listen to the youth court cases however, they cannot, without permission, report on anything or publish a picture which will reveal the identity, address or school of the young person involved in the case…The victim of the crime may [also], on request to the court, attend the hearing if they want to do so"*, though members of the public may not.[97]

NICS operational guidelines for youth courts further clarify that only parties involved in the case should be permitted access to the courtroom – *"anyone involved in other cases such as legal representatives, children and their parents/guardians should wait in the designated area outside the courtroom until their case is called"* (NICS 2005:17/18) – though anecdotal evidence shared by some professionals who participated in this review suggests this is rarely enforced. To facilitate the privacy of youth proceedings and the protection of those young people involved, youth courts usually take place on days when other courts are not in operation or in other parts of the courthouse.

97. www.youthjusticeagencyni.gov.uk/youth_justice_system/going_to_court/ [accessed May 2008].

NICS guidelines states that *"court managers should, wherever possible, make sure that those attending the youth court do not come into contact with people attending other courts and that children are not exposed to intimidation, offensive language or abuse"* (NICS 2005:11).

Both young people and their families are encouraged to attend the youth court when a young person's case is before it. However, recognising that 'coming to court can be a stressful experience for anyone, and especially for children' the NICS has implemented a number of measures to help ease the process – the possibility of pre-court visits and both written and online information packs about the court process – but the degree to which these are advertised or promoted was raised as a matter of concern by professional participants in this review. Furthermore, the language used in the court guides is not always pitched at an appropriate level for the intended audience, and thus of limited benefit.

The importance of clear and appropriate communication with children and young people is a continued theme in the guidelines for hearing a child's case in court. When a child or young person appears before the court, NICS guidelines place a clear onus on the courts to take 'all possible steps…to help the child understand and take part in proceedings'. The guidelines state that the court should:

- ask the child to identify himself/herself
- explain the course of proceedings of the child in terms he or she can understand

- remind legal representatives of their continuing duty to explain each step of the case and court proceedings to the child
- make sure that, as far as possible, the hearing is carried out in language the child can understand
- with the consent of his or her legal representatives, provide the child or their parent or guardian with an opportunity to speak directly to the court if they so wish
- ensure that the child understands the outcome of the hearing
- use plain language, avoiding legal and technical words and phrases and taking into account the child's education, maturity and understanding
- take regular breaks if required due to a child's inability to concentrate for long periods (NICS 2005).

While the principles contained within these guidelines are congruent with a child rights approach, the degree to which they are effectively implemented in practice is highly questionable:

"A young person coming before court, or coming before a youth conference, would hear what their rights are, but whether the young person actually registers them…you can only imagine the trauma of being in this sort of situation, where a load of adults are talking about you, quite intimidating. You're never quite sure what level of knowledge they will have, it's almost as if conversations go on above their head between legal representatives, judges, magistrates, [and] prosecutors, and the young person is probably the last person [to be consulted]…they will on occasion try to make a real effort…some of the magistrates are saying now that the most important person to hear from is the young person, but that's something that's developing and in its very early days yet" (professional participant).

Beyond being asked to confirm their identify and enter their plea, young people are not usually required, nor given the opportunity, to speak in court, with their legal representation speaking on their behalf. This is in contrast to the standards recommended within the Committee's General Comment Number 10 that states:

"It is obvious that for a child alleged as, accused of or recognized as having infringed the penal law, the right to be heard is fundamental for a fair trial. It is equally obvious that the child has the right to be heard directly and not only through a representative or an appropriate body if it is in her/his best interests…Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law…to treat the child as a passive object does not recognize his/her rights or contribute to an effective response to his/her behaviour" (CRC 2007b:para 23c).

Frustration with the opportunities afforded them to engage in the legal process within court was an issue raised by the young people who participated in this review who had personal experience of the court process:

CHILDREN IN CONFLICT WITH THE LAW AND THE ADMINISTRATION OF JUVENILE JUSTICE

"[Didn't like] not having a chance to speak for myself in court before being sentenced to jail."

"You're not allowed to talk in court – you should be allowed to say something, talk to the judge, instead of just standing there and only talking when you're told to. When I was in court they were getting it wrong, what they were saying about what happened, but I wasn't allowed to say anything."

"If you're saying 'not guilty', you should be allowed to talk yourself, put your side forward."

While the opportunity to express their perspective and have it taken on board is fundamental to a young person's article 12 right, and while current guidelines for the youth court stipulate that a child should be given the opportunity to speak directly to the court if they wish to (subject to the consent of their legal representative), it is imperative that the facilitation of this right be managed in tandem with the 'best interests' of the child. It is equally imperative that any direct contribution by a child be made with clear and full understanding of the implications in a manner that does not undermine the protection of their best interests. General Comment Number 10 provides comprehensive guidance as to how this should be facilitated and fully implemented as a matter of urgency (CRC 2007b).

8.11 Disposals Available to the Court

Upon appearing at court, if a young person pleads not guilty, a date will be set for their trial when the magistrate will hear all the evidence and decide whether or not they are guilty. If a young person pleads guilty or the decision at trial is one of 'guilty', the magistrate will then decide on the most appropriate sentence for the young person concerned.

The YJA website identifies the range of options currently available to a court when dealing with a young person's case where there is a plea or finding of guilt. These are as follows:

- **Absolute discharge:** the offender is found guilty but punishment is not appropriate, therefore no further action is taken.
- **Conditional discharge:** the young person is discharged on the condition that they do not commit any further offences during a set period (six months to two years). If another offence is committed during this time, both the new and old offences can be considered.
- **Fines:** a set sum of money to be paid to the court, determined by age related limits.
- **Deferred sentence:** a sentence is imposed but deferred for up to six months. If the young person stays out of trouble or makes amends to repair damage to the victim, the case may be reconsidered in a positive light.
- **Attendance Centre Order (ACO):** the young person is required to attend an attendance centre for between 12 and 24 hours, over a number of weeks in 1–2 hour sessions that will not interfere with school or work activities. Work at the centre will focus on the understanding the reasons for, and impact of, the offence and how to prevent further offending.

- **Community Responsibility Order (CRO):** the young person is required to attend a community services project for 20 to 40 hours, in a series of 2–4 hour sessions that will not interfere with school or work activities. The purpose of the sessions is largely similar to those of an ACO, but may include undertaking practical activities to make amends.
- **Reparation Order (RpO):** the young person is required to complete an agreed activity for the benefit of the victim or community, for a period of up to 24 hours. YJA Community Services oversee the discharge of this Order.
- **Youth Conference Order (YCO):** subject to their consent, the young person is referred to 'youth conference'. The plan agreed at the conference is submitted to the court for approval and, if accepted, overseen by the YCS. If a court Order from a youth conference is breached, the court can either deal with the breach or re-sentence for the original offence.
- **Community Service Order (CSO):** young people over 16 may be given a CSO, involving unpaid work in the community for between 40 and 240 hours, for an offence which is punishable by detention or imprisonment.
- **Probation Order (PO):** young people over 10 years of age can be put under the supervision of a Probation Officer for between 6 months and 3 years, during which time probation will assess and manage the risk of reoffending.
- **Juvenile Justice Centre Order (JJCO):** this Order is normally given for six months, but can be given for up to two years. Half of the time is served in the JJC, with the remainder served under supervision in the community.[98]

The application of JJCOs is supposed to be restricted to serious crimes and protection of the public, although grave crimes can result in a specified period of custody in conditions ordered by the Secretary of State. Despite the limited intended usage of custodial sentencing, an average of 10% of all under 18s convicted of an offence between 1999 and 2004 were sentenced to immediate custody (SC/CLC 2008).

While many of the above options have been available to the courts for some time now, others have been introduced more recently under the Justice (NI) Act 2002 and Justice (NI) Act 2004 and, as such, will be the subject of more detailed consideration in this report.

The CRO, RpO and YCO were all introduced under the 2002 Act. Retrospectively commenting on the significance of their introduction, the NIO observed *"since all three of these were based on the principles of restorative justice, taken together they marked a new approach to dealing with youth offending. The new sentences were introduced in December 2003 and gave the courts more options when dealing with young people found guilty of offending"* (NIO 2006a:ii).

98. http://www.youthjusticeagencyni.gov.uk/youth_justice_system/court_outcomes/ [accessed April 2008].

The introduction of these, more restorative, court disposals is very much in line with both UNCRC standards and the diversionary options available to the PSNI and PPS, as outlined above. Together they offer a range of opportunities, at different points in the process, whereby a young person may be diverted from judicial and custodial options and engage in a more restorative and less punitive response to their offending behaviour.

8.11.1 Reparation Orders and Community Responsibility Orders

RpOs and CROs were introduced under Articles 54 and 55 of the 2002 Justice (NI) Act as a 'viable alternative' for disposal if a young offender did not consent to the option of youth conferencing (NIO 2006a). While RpOs are a variation of those previously in operation in England and Wales, CROs are unique to NI:

"The new orders were intended to give more options for disposals for young offending with each appearing to have a particular function. The ACO, which was already in existence, was viewed as a community based disposal, which was programme-based and did not have a particular focus on reparation. The reparation order was brought in as an activity-based community disposal, which would focus on reparation through meaningful activities. It was thought that an order of this kind would be useful where remorse was deemed to be achievable and/or present. The community responsibility order was a mixture of these two, with instruction in citizenship along with reparative activity based on this instruction" (NIO 2006a:20).

The legislation stipulates that a court may make either an RpO or CRO where a child is found guilty by, or before, any court of an offence, other than that for which the equivalent adult sentence would be fixed by law as imprisonment for life. The court must not, however, make an RpO or CRO in respect of an offender unless the offender consents, a pre-sentence report is produced and the court does not propose to deal with the offence in any other way.

When making either order, the court must explain to the offender in 'ordinary language' why it is doing so, the effect and content of the order, the consequences of non-compliance and the possibility of review if requested by either the offender or the responsible officer. The requirements specified in either order should, as far as practicable, be sensitive to religious beliefs and avoid interference with any other orders to which the offender is subject or any educational or employment activities within which they are engaged. Completion of the stipulated requirements must be overseen by a responsible officer (facilitated via one of the 23 YJA Community Services projects across NI), and achieved within a period of 6 months from the commencement of the order.

An RpO *"…is intended to be a flexible community-based disposal that has the potential to benefit the victim, the community at large and the young offender. The sense in which the word reparation is being used within the order is restricted to one of two or three possibilities: the acceptable meaning includes making reparation, or redressing and injustice or making amends. It excludes the notions of financial restitution,*

or recompense, as well as the stronger sense of retaliation or punishment" (NIO 2006a:18).

An RpO requires the offender to make reparation for their offence to either the victim of the offence, another person affected by the offence or the community at large (subject to the recipient's consent), in non-monetary terms, for a period of up to 24 hours. *"Suggested examples of possible forms of reparation include a meeting with the victim of the offence to apologise and to learn directly about the consequences of the offence; writing a letter of apology to the victim; repairing criminal damage for which the young person has been responsible, cleaning graffiti, collecting litter or helping out at a charitable organisation"* (NIO 2006a:19).

Though there are many similarities between the two orders, a CRO differs from an RpO in that it requires the offender to undertake relevant instruction in citizenship (covering community responsibility, impact of crime on victims and contributory factors to offending) in addition to the 'practical activities' required of them (NIO 2006a:20). The practical activities to be included are *"normally planned and developed in direct consultation with the young person"* and often involve either making an item for donation or carrying out a task for others (NIO 2006a:iv). A CRO can range in duration from 20 to 40 hours, with at least half of the total hours being allocated to citizenship instruction, and unlike an RpO contains no obligation to contact victims.

The NIO produced an assessment of both orders in August 2006, almost three years after their introduction to the youth courts in December 2003. The report observes that:

- Courts were slow to use the new orders initially, with only 3 orders being given in the first year, though by end of February 2006, there had been a total of 59 orders given (54 CROs and 5 RpOs).
- In terms of the recipients of these orders, over 82% were male; over 64% had a previous conviction; over a quarter were looked after children who, in at least half of these cases, had committed their offence in a residential care home. The average age of recipients was just over 15 years old.
- Theft, criminal damage and assault were the three main offences for which an order was given (NIO 2006a:iii).

According to the NIO report, *"the new orders were well received by all those involved in the process of managing and delivering them…all felt that the orders represented an improved and more constructive way of dealing with young offenders…not only was it considered a better way of dealing with youth crime, it was thought to have a positive impact on the attitudes of the young people"* (NIO 2006a:iii). Successes noted by staff involved in delivering the orders, included participants returning to education or finding work, continuing to volunteer time after completion of the order and/or acquiring victim empathy. These were not, however, universal to all young people involved.

Difficulties noted by personnel involved in delivering the orders centred around court reluctance to give orders, potential confusion around appropriate use of CROs, RpOs and YCOs, delays between a young person receiving and commencing an order, the challenge of

effectively engaging victims in the process and the issue of reporting back to the courts on the success of an order (NIO 2006a).

The young people and parents interviewed in the assessment process were generally satisfied with the orders, and found completion of the requirements to be a rewarding experience, though did report some initial confusion or uncertainty around what it entailed and why it had been given (NIO 2006a). This confusion around the use of orders was not, as highlighted above, restricted to young people and parents. The authors of the report noted *"a range of views about exactly where the orders should be used – within the spectrum of offending – as a suitable disposal…For some they were perceived on a tariff or hierarchical basis…However others saw them as being most useful if thought of as a needs-led disposal: that is being suitable under certain circumstances and conditions, particularly where reparation was deemed achievable…there was also a concern that using the orders for a first time offender could mean drawing young people into the criminal justice system when a less intrusive intervention might have sufficed"* (NIO 2006a:v).

The authors note that it is not yet possible to assess the success of the orders in terms of addressing reoffending rates, due to the small number of orders completed to date and the short time span between their completion and the time of the study. Further research will be required to address this. In concluding their findings, the authors of the assessment predict that demand for the RpO will likely remain at a low level, given the continued roll out of the YCS. They did however feel that the CRO provided *"a useful and beneficial addition to the range of available options for addressing youth offending…though there were a small number of management and practice issues to be addressed these were not considered to be taking away from the benefits to be had for young people and indeed the wider community"* (NIO 2006a:v).

8.11.2 Youth Conference Service

"The Youth Conference Service is internationally recognised as an example of best practice in youth justice" (NIO 2008d:3).

The YCS was introduced under the Justice (NI) Act 2002, with the aim of integrating a restorative approach to justice within the Northern Ireland juvenile justice system. The roll out of the YCS began in December 2003 with 10–16 year olds living in the Greater Belfast area. A gradual roll out across NI followed over the next three years, with full geographical coverage achieved by December 2006. September 2005 saw the extension of the scheme to 17 year olds, as per the original intention of the Criminal Justice Review 2000, which stated:

"We recommend that restorative justice should be integrated into the juvenile justice system and its philosophy in Northern Ireland, using a conference model (which we term a 'youth conference' based in statute, available for all juveniles (including 17 year olds once they come within the remit of the youth court), subject to the full range of human rights safeguards" (Criminal Justice Review Group 2000:205).

For a young person to be referred to youth conferencing they must:

- be aged between 10 and 17 years inclusive
- be residing in NI
- have committed an offence in NI on or after 1 December 2003
- plead guilty to or be found guilty of the offence
- consent to referral for conferencing.

There are two possible referral routes for youth conferencing: the diversionary route and the court ordered route. The former occurs under the auspices of the PPS when a young person has admitted the offence and consented to referral and, if successful, prevents the young person having to engage in a court based process. The latter, as the name suggests, falls under the auspices of the youth court and again depends on an admission or finding of guilt and a willingness to be referred. Ineligibility for, or refusal of, referral via the diversionary route does not preclude referral via the court ordered route.

A total of 3,672 referrals have been made to the YCS between its inception in December 2003 and January 2008: 42.4% have been diversionary referrals and 57.6% court ordered. According to the YCS website, *"the youth conference order is now the predominant disposal in the youth court"*.[99]

In principle, youth conferencing offers a more restorative and participative approach to dealing with young people in conflict with the law. As Campbell et al (2006:iii) explain, in their NIO funded evaluation of the YCS:

"In contrast with more traditional models of justice, youth conferencing seeks not only to encourage young people to recognise the effects of their crime and take responsibility for their actions, but also to devolve power by actively engaging victim, offender and community in the restorative process."

Typically a youth conference takes the form of a semi structured meeting ('the conference') consisting of the young person in question, the victim (or a nominated representative) of the offence, supporters of the offender and/or victim, a police officer and a Youth Conference Coordinator. Attendance of a victim (representative) or their supporter is optional; attendance for all others is mandatory in order for a conference to proceed. In recognition of the potential difficulty for victims in facing the offender, a variety of participation options are available including face to face contact, observation rooms, video conferencing, oral recordings or written submissions.

The principle behind this approach is that in hearing the impact of their offence on others, the young person can gain understanding of the offence and recognise the impact their actions can have on others. Simultaneously, in meeting the offender the victim is given the chance to 'exorcise' their feelings about the offence, see the individual behind the 'offender' and seek relevant amends. Fulfilment of these objectives is facilitated via interactive group dialogue,

99. www.youthjusticeagencyni.gov.uk/youth_conference_service/about_us/progress [accessed May 2008].

followed by the devising of a mutually agreeable 'conference plan' for how the young person can best make amends. Once agreed by conference participants, the conference plan must be signed off by either the PPS or court, depending on the initial referral source. Once agreed by the PPS or court, the plan becomes a statutory order with monitoring processes attached. Plans emanating from a PPS referral are not classed as criminal convictions; however, those resulting from a court ordered conference are classed and recorded as criminal convictions.

A comprehensive evaluation of the operation of the pilot stages of this initiative in 2004/05 was produced by Campbell et al in 2006. Further evaluations of the initiative were produced by Maruna et al in 2007 and the Criminal Justice Inspectorate in February 2008. All evaluations were, on the whole, positive of the introduction and existence of statutory youth conferencing in terms of its introduction of restorative principles to the NI juvenile justice system, the experience of both offender and victim and/or potential impact on recidivism rates. The principles of the service and the onus to refer are certainly in line with the Committee's recommendations for a more 'rehabilitative and restorative' approach to juvenile justice and a move away from judicial proceedings for 'children who commit minor offences' or 'first-time child offenders' (CRC 2007b:para 12). A number of concerns and development issues were however identified in these evaluations of the project. These include:

Referral Process

- the percentage of young people still charged to court – *"the figure remains high at almost 30% for a jurisdiction that has a youth conferencing approach as its core approach to youth offending"* (CJI 2008b:6)
- lack of transparency in referral processes and the absence of reasoning for the course of action taken (CJI 2008b)
- delays in processing due to increasing demands on the service without an accompanying increase in resources (CJI 2008b)
- inconsistency of information presented to young people when being offered the option of a court ordered conference (Campbell et al 2006)
- the disproportionate number of looked after children being referred to the service (Campbell et al 2006)
- time delay from offence to conference (Campbell et al 2006)
- a proportion (21%) of young people stating that they had not been informed of their right to legal advice (Campbell et al 2006).

Conferencing Process

- the effectiveness of repeated conferencing of an individual for different offences (Campbell et al 2006; CJI 2008b)
- content of plan being influenced by likely court decision (Campbell et al 2006)
- self reported negative conference experiences that actually exacerbated young people's problems – frustration at an inability to express oneself; labelling; feeling 'harangued and harassed' leading to a sense of defiance; having to accept entire responsibility for a shared offence (Maruna et al 2007)
- negative reactions to a police presence in the conference (Maruna et al 2007).

Outcomes

- lack of data on reoffending and reconviction rates post conferencing (Campbell et al 2006; CJI 2008b)
- possibility of court rejecting a plan if a young person becomes an adult in the course of proceedings (Campbell et al 2006)
- possibility of court rejecting plan for other reasons – eg it is disproportionate to the offence; as Maruna et al (2007:2) conclude *"by undermining the decisions worked out in the restorative conference, the court in these situations, essentially undermined the legitimacy of the YCS, but indeed of the whole of reparation"*
- regional variations in content of and acceptance of conference plans (Campbell et al 2006)
- the fact that youth conference orders cannot be combined with a further court order – therefore cannot have a plan if the offence attracts a mandatory penalty (Campbell et al 2006)
- issuing of conditional discharges after a young person has gone through the conference process (Campbell et al 2006).

These and other issues must be addressed as the scheme continues to develop. Further research is also needed in order to fully assess the effectiveness of youth conferencing both in terms of impact of recidivism rates and whether the 'best interests' of young people (whether as 'victims' or 'offenders') are served by participation in the scheme. However, the restorative principles that inform the scheme are certainly a move in the right direction in terms of adopting a rights-based approach to juvenile crime.

8.12 Children Deprived of Their Liberty – Detention as a Last Resort?

Both the UNCRC and the UN Rules for the Protection of Juveniles Deprived of their Liberty are unambiguous in their position that the detention or imprisonment of a child should only be used 'as a measure of last resort, for the shortest appropriate period of time'. That said, both recognise that there may be 'exceptional circumstances' where deprivation of liberty is either necessary or in the best interests of the child. Recognising this, they provide a set of minimum standards that should be applied equally to all juveniles deprived of their liberty, in order to ensure both their protection and wellbeing.

Reporting to the Committee recently, the NI Government considered the situation in NI to be both in line with, and directly informed by, these principles:

"Within NI custody for children is regarded very much as a sanction of last resort reserved only for serious and persistent offenders. The arrest, detention or imprisonment of children is governed by statutes which take account of the UNCRC and, in particular, that they are detained only as a last resort and for the shortest appropriate period of time" (OFMDFM 2007b:63).

The Committee, in its 2008 Concluding Observations, reached a different conclusion, noting with concern that *"the number of children*

deprived of liberty is high, which indicates that detention is not always applied as a measure of last resort" (CRC 2008:para 77).

There are currently three main routes via which children and young people can be detained in the JJC or the YOC. They are:

- committed under a JJCO to a fixed period of between 3 and 12 months, followed by an equivalent period of supervision in the community
- remanded by the courts under the CJCO, pending trial or sentence
- remanded by the police under PACE (CJI 2004; NIHRC 2006).

The proportions detained via each route, between January 2006 and October 2007, were as follows: 48% remanded under PACE, 45% on remand under the CJCO (pending trial or sentence) and only 7% actually on sentence (CJI 2008a:4).

While it is certainly true that the development of a range of alternative disposals and the introduction of higher thresholds for custody has contributed to an overall decrease in the numbers of children committed or remanded to custody via these routes over the last decade, there are still a number of issues of concern that cast doubt over the government's claim that custody for children is a last resort, reserved for only serious and persistent offenders. These include the continued detention of under 14s, the disproportionate numbers of looked after children in detention and, as the government itself recognises, *"the high proportion of those placed on remand due to shortcomings within other parts of the continuum of care"* (OFMDFM 2007b:63). As CJI observed in its 2004 Inspection, *"too many young people are being pulled further into the juvenile justice system than need to be, by being remanded in custody or sent to the Juvenile Justice Centre under PACE. The drip feed also from the "looked after" care system into justice is particularly worrying"* (CJI 2004:11).

CJI further observes in its 2008 Inspection of the JJC:

"Available information suggested that many of the children whom Inspectors met [in Woodlands JJC] were neither serious nor persistent offenders. They were troubled children whose JJC placements often resulted from benign intent on the part of courts or police. When unsure how to deal with them, they were placed in custody as much for their own safety as in response to their offending behaviour. Such placements breach international safeguards, and inappropriate use of custody for children remains a more pronounced problem in Northern Ireland than elsewhere in the UK" (CJI 2008a:vii).

8.12.1 Detention of Under 14s

The Criminal Justice Review (2000:238) recommended that 10–13 year old children *"should not be drawn into the juvenile custodial system and that the presumption should be that they will be diverted away from prosecution unless they are persistent, serious or violence offenders…children aged 10–13 inclusive who are found guilty of criminal offences should*

not be held in juvenile justice centres…their accommodation needs should be provided by the care system".

Custody care orders, designed to provide a secure solution to the accommodation needs of 10–13 year olds separate from the upper age range of young offenders, were legislated for under the 2002 Criminal Justice Act. However, as CJI (2004:14) explains, the legislation *"has not been commenced as the creation of a "stand alone" secure Centre for the younger age range could often be under-utilised, as few of these children are sentenced to a JJCO".*

A 2005 review of 10 to 13 year olds entering custody in 2003/04 found that 29 children of this age were admitted to custody during the year and a half under review, totalling between them 71 admissions during this time. Reflecting on these figures, the author comments:

"Given that custody should only be used as a last resort – a statement which is particularly true for this younger age group – it might be expected that a high proportion of these children would go on to serve a custodial sentence, if their offending was serious enough to place them in a custodial setting in the first place. It is significant then that, of the 71 admissions to custody over the period of the report, only four of the admissions resulted in a custodial sentence, and two of these children were 14 by the time this sentence was passed" (McKeaveney 2005:3).

8.12.2 Remand

Despite the introduction of a positively evaluated Bail Supervision and Support Scheme in 2003, designed to allow young people to complete their period of bail within the community (NIO 2006b), concern still exists as to the numbers of young people being held on remand within NI. Concern as to whether *"pre-trial detention is [actually] being limited to exceptional circumstances as required by international and domestic law"* was raised by the NIHRC in their 2006 report 'Still in our Care' (NIHRC 2006:32). It has also been raised again by the Committee in its 2008 Concluding Observations, in which it notes concern that the number of children held on remand remains high, reiterating its call for the government to ensure that detention is used only as a measure of last resort and for the shortest time possible.

Statistics cited in the NIHRC 2006 report reveal that only 14% of the children remanded to the JJC in 2005 were deemed to require custody, subsequently receiving a JJCO when their case returned to court, with the remainder receiving bail (81%), being released by the court (4%) or having their charges dropped (1%) (NIHRC 2006:32). More recent statistics from CJI reveal that almost half (45%) of all children held in the JJC from January 2006 to October 2007 were there on remand. Questions must also be asked as to why so many were detained in this way, in light of the fact that only 8% of them went on to receive a custodial sentence (CJI 2008a:4).

Possible reasons for *"the unacceptably high level and inappropriate use of remand under the*

CJCO" identified in the NIHRC report include *"insufficient specialist services and alternatives to custodial remand"* and the *"failure of solicitors and/or social workers to attend court hearings"* (NIHRC 2006:32). Commenting in their 2004 Inspection of the JJC, CJI stated *"the best remedy would be to reduce the amount of remand by ensuring that young people have a fair and prompt court hearing. Otherwise custody becomes a misuse of a highly expensive remedy and may unnecessarily 'criminalise' a child as well as denying their basic right to liberty"* (CJI 2004:3).

The other possible route for remand in the JJC is that contained within PACE which stipulates that a child may be held in custody pending a court appearance, when they have been charged with an offence and bail cannot be granted or no place of safety can be secured. Although PACE admissions tend to be for a shorter period, often 1–2 days, they continue to represent a consistently high proportion of admissions to the JJC – 48% of all admissions between January 2006 and October 2007 (CJI 2008a; SC/CLC 2008). Furthermore the fact that 42% of children held on PACE during this time *"were subsequently released at court…calls into question the value of placing them in custody in the first instance, in terms of individual impact as well as the disruption to other children living in the JJC"* (CJI 2008a:4).

While the JJC has instigated procedures to minimise referrals to custody under PACE, *"notwithstanding JJC efforts, the use of the Centre to hold children under PACE remains unacceptably high and continues to demonstrate [a] lack of commitment to international standards"* (NIHRC 2006:34). It is also out of line with practice in other UK jurisdictions, where they are rarely used (CJI 2008a).

A further breach of children's rights with regard to the continued use of remand is the failure to adequately separate young people detained under remand from those detained under a JJCO. Rule 17 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty states that 'untried detainees should be separated from convicted juveniles'. This is not the case within NI where children are not segregated according to their offending behaviour or admission status (NIHRC 2006), and must therefore be urgently redressed.

8.12.3 Looked After Children

The over-representation of looked after children in custody, and in the justice system generally, continues to be an issue of serious concern. These children appear particularly vulnerable to the 'revolving door' effect of finding themselves in and out of custody, and though steps are being taken to address this, looked after children are still more likely to be drawn into the justice system and custodial settings than their non-care counterparts (CJI 2004; NIHRC 2006; SC/CLC 2008).

Almost one third (30%) of admissions to the JJC from January 2006 to October 2007 (199 admissions of 97 children) came from looked after backgrounds, with looked after children having, on average, twice as many admissions (4.4) as non-looked after children (2.7) (CJI 2008a).

Possible reasons for the over-representation of looked after children in custody include PACE remands as a response to 'management problems' in care homes (SC/CLC 2008) inadequate care provision in the community, the use of custody as 'respite care for parents or staff in children's homes' (NIHRC 2006) and gate-keeping processes in relation to accessing secure care (CJI 2008a). Also, as noted in minutes of a meeting between the Office of Social Services (OSS), DHSSPS and the NIO, *"courts too readily accept the reluctance or inability of social services to provide accommodation"* (cited in CJI 2008a:5).

CJI noted that in many cases courts, social services and even children themselves felt they were better off in the JJC than living at risk in the community or in residential care (CJI 2008a). This is an alarming indictment of these children's experiences of State care.

8.13 Distinct Juvenile Facilities

Article 37(c) of the UNCRC specifically recommends the separation of children and adults in detention 'unless it is considered in the child's best interest not to do so'. General Comment Number 10 (CRC 2007b:para 85) expands on the rationale behind, and intended implementation of, this provision:

"Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate…This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of younger children in the facility."

The UK has maintained a reservation to article 37(c), thereby permitting the detention of juveniles with adults if there is a lack of suitable accommodation or inadequate facilities. This is in clear contradiction with the Committee's position that children should never be detained with adults for *"the convenience of State Parties"* (NIHRC 2008). The government's recent announcement, in September 2008, that it will withdraw this reservation is consequently to be welcomed.

Welcoming the government's commitment to withdraw its reservation to article 37(c), the Committee has once again called upon the government to *"ensure that, unless it is in his or her best interests, every child deprived of liberty is separated from adults in all places of deprivation of liberty"* (CRC 2008:para 78). As illustrated below, this is a matter of particular concern within NI.

There are currently two custodial institutions for children and young people in NI – Woodlands JJC and Hydebank Wood Prison and YOC.

Woodlands JJC was opened in January 2007, replacing the previous provision at Rathgael. The

new centre can accommodate up to 48 children at any one time, aged 10 to 17 years inclusive, and offers distinctly juvenile provision.

Hydebank Wood accommodates both juveniles and adults on the same site. As the NI Prison Service website explains, it *"accommodates all male offenders aged between 17 and 21 years on conviction, serving a period of 4 years or less in custody and all female prisoners, including youth offenders…Legislation also permits inmates of 15 years old to be held in Hydebank Wood if their crime is deemed to be of a very serious nature".*[100]

While the provision at Woodlands JJC is in line with UNCRC recommendations in terms of the separation of children and adult offenders, that at Hydebank Wood is clearly not.

Under 18 year old males accommodated at Hydebank Wood, though held on a separate 'juvenile' landing, are still detained in the same institution as adults, albeit young adults. Under 18 year old females do not even have the option of a distinct landing, and are currently housed together with adult females on the YOC site, though the NI Government in its contribution to the UK 2008 UNCRC report describes this situation as *"currently under review"* (OFMDFM 2007b:45).

The NI Government, in its contribution to the UK 2008 UNCRC report, states that *"in Northern Ireland only in very exceptional circumstances are children ever accommodated with adults"*, highlighting the fact that courts are now able to send vulnerable 17 year olds to the JJC where younger children are detained (OFMDFM 2007b:42). However, although the Justice (NI) Act 2002 did bring 17 year olds within the jurisdiction of the youth courts from 2005 on, restrictions to the sentencing powers of the court mean that many 17 year olds are still being sentenced to adult rather than juvenile provision:

"The 2002 Act restricts the power of the courts to sentence 17 year-olds to the JJC under a Juvenile Justice Centre Order (JJCO) to those who will not reach the age of 18 during the period of the Order and who have not received a custodial sentence within the previous two years. The courts' power to remand 17 year-olds to the JJC has been restricted to those who are under 17 years and six months old and who have not received a custodial sentence within the previous two years" (NIHRC 2006:19).

Although the new Criminal Justice (Northern Ireland) Order 2008 introduces further changes in relation to the detention of 17 year olds, these changes do not yet suffice, in terms of ensuring the consistent separation of juveniles and adults in detention. The new Order maintains the above restrictions on the courts' power to remand 17 year olds to the JJC and links prohibition of custody of 17 year olds with adults to a notification from the Secretary of State that there is no suitable accommodation in a YOC. While such notification may address the issue of young females being accommodated with adults in Hydebank Wood, it is unlikely to resolve the issue of young males being accommodated with adults:

100. www.niprisonservice.gov.uk/index.cfm/area/information/page/hydebankwood [accessed April 2008].

"The Commission is concerned that there is a level of uncertainty about how Article 96 will work in practice. It does not explicitly prevent detention of all children in Prison Service custody with adults and instead suggests that this is prohibited only if there is a notification from the Secretary of State that there is no suitable accommodation in a young offenders' centre. The Commission would question whether or not it is appropriate that the detention of children with adults should depend on a notification of suitability. Also, given that there is already a young offenders' centre for males in Northern Ireland, the Commission is concerned that the new provisions will not reduce the incidence of boys under the age of 18 detained in Prison Service custody" (NIHRC 2008:28).

Both the 2002 Justice (NI) Act and the 2008 Justice (NI) Order maintain provisions for detaining children as young as 15 years in Prison Service custody – *"this is provided for children aged 16 and 17 years under the Treatment of Offenders Act (NI) 1968 and for those aged at least 15, deemed to be at risk of harming themselves or others, under the CJCO"* (NIHRC 2006:20).

These restrictions on the power of the courts to sentence 17 year olds to the JJC and the continued possibility to detain children as young as 15 in Prison Service custody must be urgently addressed if the principles of the UNCRC are to be implemented and upheld within the NI juvenile justice system.

8.14 Treatment in Detention – Expected Standards

Article 37 of the UNCRC states that every child deprived of their liberty should:

- be treated with humanity and respect, in a manner which takes into account the needs of persons of his/her age
- have the right to maintain contact with his/her family through correspondence and visits, save in exceptional circumstances
- have the right to prompt access to legal and other appropriate assistance
- have the right to challenge the legality of the deprivation of their liberty before a court or other relevant authority and the right to a prompt decision on such action.

General Comment Number 10 outlines a further set of principles and rules that need to be observed in all cases where a child is deprived of their liberty:

- appropriate physical environment
- right to appropriate education
- contact with family and wider community
- restraint or force to be used only when the child poses an imminent threat of injury to themselves or others and only when all other means of control have been exhausted
- discipline consistent with dignity of the individual
- right to make requests or complaints
- regular inspectors – 'place special emphasis on holding conversations with children in the facilities, in a confidential setting' (CRC 2007b:para 89).

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Further guidelines for the protection of juveniles deprived of their liberty are contained within the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, which provide minimum standards with regard to the treatment of juveniles under arrest or awaiting trial and the management of juvenile facilities. The UN Committee on the Rights of the Child has urged all State parties to *"incorporate these rules into their national laws and regulations, and to make them available in the national or regional language to all professionals, NGOs and volunteers involved in the administration of juvenile justice"* (CRC 2007b:para 88).

Together these guidelines and commentaries provide very clear guidance on expected standards for institutions caring for children deprived of their liberty.

Further guidance on the standards expected in places of detention for children and young people within the UK are contained within the HM Inspectorate of Prisons document 'Juvenile Expectations'. This document stipulates that four key tests should be applied in inspections to determine the 'health' of a juvenile detention centre:

- safety: children and young people, even the most vulnerable, are held safely
- respect: children and young people are treated with respect for their human dignity
- purposeful activity: children and young people are able, and expected, to engage in activity that is likely to benefit them
- resettlement: children and young people are prepared for release into the community and helped to reduce the likelihood of reoffending (HM Inspectorate 2005).

According to the NI Government Report to the CRC, the treatment of children deprived of their liberty is in line with recommended standards in terms of respect and the best interests of children and young people:

"Children are treated with fairness and respect (as reflected in the Value Statement of the Youth Justice Agency) and in a manner appropriate to their assessed needs and age" (OFMDFM 2007b:73).

While there have certainly been notable improvements in the treatment of children deprived of their liberty within NI in recent years, there are still significant areas of concern with regard to their experiences both within the JJC and the YOC that must be addressed, as highlighted below.

8.15 Woodlands Juvenile Justice Centre

As highlighted previously, the majority of juveniles under 17 deprived of their liberty are now detained within Woodlands JJC. A number of inspections and evaluations of the JJC have been completed in recent years, most notably those by the NIHRC and the Criminal Justice Inspectorate. These studies have observed notable improvements in the treatment of children deprived of their liberty within the JJC in the last few years, a development that is clearly to be welcomed. However, as outlined below, they have also identified a number of key areas

where further progress is required if children's rights are to be adequately protected and fulfilled within this custodial setting.

8.15.1 Use of Restraint

General Comment Number 10, issued by the Committee in 2007, clearly states that restraint or force should only be used *"when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted"* (CRC 2007b:para 28c). It further stipulates that, in all circumstances, the use of discipline must be consistent with the dignity of the individual.

The use of restraint with young people deprived of their liberty has been raised as a matter of concern for many years. However, more recent investigations into its use have noted positive developments within the field, noting significant reductions in the use of physical restraint, better training of staff with regard to this and better recording and monitoring of incidents where restraint is employed (NIHRC 2006; CJI 2008a).

CJI's 2008 Inspection of the JJC found there to be an average of 17 restraints per month between January and November 2007, with detailed records maintained for each incident including reasons for restraint, consequences of restraint (in most cases, removal of the child to their bedroom) and any injuries caused. The Inspection notes that this compares with an average of 62 restraints per month in English Secure Training Centres, but does not clarify if these figures are directly comparable or if they are based on different population sizes (CJI 2008a).

One of the key reasons identified as contributing to lower levels of restraint within the JJC, is staff training in Therapeutic Crisis Intervention (TCI). According to the NI Government report, *"all staff in JJC who work directly with children complete full Therapeutic Crisis Intervention (TCI) training to give them the skills to de-escalate volatile situations without resort to physical restraint. These staff also receive full initial and refresher training in the use of Physical Control and Care (PCC) to facilitate safe restraint when this is unavoidable"* (OFMDFM 2007b:31).

Both the NIHRC 2006 report and the CJI 2008(a) Inspection report confirm the training provided to staff in TCI and PCC, with the latter noting that *"this training, combined with individual planning for each child, represented a major change in the underlying philosophy and approach to managing juveniles in custody. It had contributed significantly to staff skills and confidence in understanding and addressing challenging behaviours, and most staff preferred to use their relationships with children rather than resort to physical restraint"*. The report further notes that *"as a predominantly non-pain compliant method of restraint, PCC was the preferred approach"* when restraint was deemed necessary, and when used *"there were no records of serious injuries to children during restraints at the JJC"*. The Inspectors also positively note that *"all staff were alert to the risks involved in restraining children"* and that *"the Centre Director participated in the national PCC Management Board in order to share best practice"* (CJI 2008a:19).

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8.15.2 Child Protection

The NIHRC report 'Still In Our Care' documented a history of inadequate child protection measures for children in custody (NIHRC 2006). Reporting more recently, CJI Inspectors noted improvements to the system, concluding that child protection was treated seriously at the JJC, not only while children were held in the centre, but also in relation to handling allegations of abuse suffered by children before being sent to Woodlands (CJI 2008a).

While this finding is to be welcomed, the accompanying finding that the child protection policy cited within the Staff Handbook does not comply with the Area Child Protection Committees or the YJA's Child Protection Policy is a matter of grave concern that must urgently be redressed (CJI 2008a).

8.15.3 Education

General Comment Number 10 stipulates that all children deprived of their liberty should have access to appropriate education. Rule 38 of the UN Rules for the Protection of Juveniles Deprived of their Liberty further stipulates that 'every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty'. It is a matter of concern that not only do those children who are detained "*not have a statutory right to education*", but that "*their education is not the responsibility of the department responsible for education*" (CRC 2002a:47).

According to the NI Government, "*children in the Juvenile Justice Centre are encouraged to improve their standards of education and achievement and are provided with a full range of education, training and development opportunities appropriate to their age and ability…The centre is not required to deliver the National Curriculum but provides a broad range of subjects aimed at meeting the particular needs and interests of the young people, the majority of whom have dropped out of formal education some years beforehand*" (OFMDFM 2007b:63).

The recent CJI Inspection of the JJC noted that "*much had been achieved in the work of the Education Learning Centre (ELC) since the last inspection*" (CJI 2008a:29). Welcome developments, identified by the Inspectors, included the fact that misbehaviour in class no longer led to exclusion from school, the generally good working relationships between teaching staff and children, the benefits offered by 'extended vocational curriculum and accreditation pathways', identified learning pathways for all children and, relatedly, achievement levels of those attending the ELC. Areas identified as requiring further development were 'the coherence of its curriculum', collaborative working within and beyond the ELC, data collation and analysis and staff access to professional training and support (CJI 2008a).

While the positive developments in the provision of education to children in the JJC are to be welcomed, the issue of the national curriculum not being delivered within the JJC remains an issue of grave concern –*"children detained in custody have no legal entitlement to be educated within the Northern Ireland curriculum because the Northern Ireland Office (rather than the Department of Education) has responsibility for their education…[thereby] marginalising them from mainstream education"* (SC/CLC 2008:37). This issue was singled out for comment by the Committee in its 2008 Concluding Observations, in which it calls upon the government to *"provide for a statutory right to education for all children deprived of their liberty"* (CRC 2008:para 78).

This failure to deliver the national curriculum to children deprived of their liberty is both potentially detrimental for the children and young people involved and in clear breach of article 28 of the UN Rules for the Protection of Juveniles Deprived of their Liberty. Furthermore, as the NIHRC observes, *"this may give rise to a claim of discriminatory treatment under the Human Rights Act 1998"* (NIHRC 2006:117). It is imperative that responsibility for education in the JJC be transferred from the NIO to DE and that opportunities to follow the national curriculum be made available to children deprived of their liberty. Consideration should also be given to allowing children in custody to receive education in schools, when appropriate, and to integrate them back into a school or college towards the end of their sentence (NIHRC 2006).

8.15.4 Health

Under article 24 of the UNCRC all children and young people are entitled to the highest standard of attainable healthcare. According to the non-discrimination principle, no child should be deprived of their access to healthcare, including those deprived of their liberty. General Comment Number 10 states that: *"every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided where possible, by health facilities and services of the community"* (CRC 2007b:para 89).

According to the YJA, young people in Woodland JJC are provided with both nursing and dental services *"from admission to discharge – Nursing and Dental Services provide general and psychiatric nursing services to meet the wide range of medical and psychiatric needs of young people"*.[101]

While this is the stated commitment of the Centre, CJI's 2008 report observed that nursing shortages within the centre currently *"constrain the centre's ability to provide therapeutic services and health promotion to children"* (CJI 2008a:31). This is particularly concerning in light of the mental health needs of detainees recorded in this report: of the 30 children in residence on 30 November 2007, two thirds had a diagnosed mental health disorder, over half had a history of self harm and just under

101. www.youthjusticeagencyni.gov.uk/custodial_services/services_and_facilities/nursing_and_dental_services [accessed April 2008].

one third had at least one suicide attempt on record (CJI 2008a). There is an urgent need for better resourcing of healthcare provision within the JJC and the development of better links with Child and Adolescent Mental Health Services teams within the community, if young people's right to healthcare is to be met while in the centre and on their release to the community.

8.15.5 Access to Advocacy and Complaint Procedures

A CJI Inspection of the Handling of Complaints within the Criminal Justice System (carried out in late 2006) identified a number of concerns regarding the handling of complaints within the JJC. These included young people's lack of confidence in the complaints system ('there's no point'), difficulty accessing complaints forms, the gatekeeper role played by some staff, lack of consistency and delays in dealing with complaints, inadequate confidentiality and fear of retribution. Together, these sit in clear contradiction with *"every juvenile's right to make a request or complaint without censorship"* (UNGA 1990a:Rule 75).

The dominant theme of young people's complaints, noted in both this inspection and a more generic inspection of the centre carried out in late 2007, were those of food, clothing, activities and the operation of the progressive regime system of rewards, privileges and incentives (CJI 2007d; 2008a).

Concluding their 2007 report, Inspectors recommended that the YJA Complaints Charter be fully implemented within the centre as a matter of urgency, with particular attention paid to ensuring young people are aware of their right to complain, with access to adequate and appropriate support should they wish to do so (CJI 2007d). Inspectors also presented the JJC with a list of specific recommendations that should be addressed in order to ensure effective operation of complaints procedures within the centre. These included complaints awareness work, age appropriate communication and materials, ensuring unfettered access to forms, greater confidentiality in complaints handling and the implementation of thorough review and evaluation of procedures. It is positive to note that, returning one year later, Inspectors noted that most of their recommendations had been addressed, though implementation of the remainder must be urgently facilitated (CJI 2008a).

The area of independent advocacy for children and young people deprived of their liberty also continues to be one requiring redress. Though there is a service level agreement with a voluntary organisation to provide independent representatives for children residing in the centre, this is not yet operating as anticipated with many young people not knowing who these representatives were or what role they were meant to play (CJI 2007d). Furthermore, as the Northern Ireland NGO Shadow Report to the Committee on the Rights of the Child observes *"although Independent Representatives (IRs) visited the JJC to discuss any issues or raise or raise young person's concerns with staff and management, they are not independent advocates"* (SC/CLC 2008:49).

The concerns raised by CJI in its 2007 report with regard to a lack of independent advocacy provision for young people in the centre were reiterated again in its 2008 report as an issue that had not yet been resolved. Though the government highlights young people's access to IRs and plans to develop an advocacy aspect to the work as a positive aspect of provision within the JJC (OFMDFM 2007b), the CJI report would suggest that the current provision of external advocacy and support services is far from adequate (CJI 2008a).

8.16 Hydebank Wood Prison and Young Offenders Centre

Though most young people held on remand or sentence are accommodated within the JJC, many 17 year olds, and indeed some 15 and 16 year olds, continue to be placed in Hydebank Wood Prison and YOC, in clear breach of children's rights standards:

"Currently on any given day between 25–30 children in Northern Ireland are detained with adults in Hydebank Wood Womens' Prison and Young Offenders Centre…on average there were two boys aged 14–16 held in the YOC in 05/06…The fact that the Northern Ireland Prison Service does not differentiate between those held as children and those aged over 18 indicates that children held within the prison estate do not receive the special attention that they are entitled to" (CLC 2008:6).

Hydebank Wood is operated and governed by the Northern Ireland Prison Service, therefore all young people accommodated within it are accommodated in a Prison Service facility rather than Youth Justice Service facility.

Women and female young offenders were moved to Hydebank Wood in June 2004. An Inspection by HM Chief Inspector of Prisons and The Chief Inspector of Criminal Justice in NI in November of the same year found the accommodation for females in Hydebank Wood to be *"unsuitable for children"* (HMCIP 2005a:31). They found punishments, including those for children, to be 'very severe', though noted this may have been due to inadequate training in other means of responding to challenging behaviour. They also found inferior physical surroundings, inadequate purposeful activity and 'seriously deficient' child protection procedures for the under 18s, thereby concluding *"we do not believe that Ash House was, or can be, a suitable environment in which to hold girls. Their educational and developmental, as well as safeguarding, needs were not being met, and could not be, within such a mixed and constricted environment"* (HMCIP 2005a:5).

A report by Scraton and Moore 'The Prison Within' also reported concerning findings in relation to the imprisonment of young women in Hydebank Wood, including inadequate child protection policies and procedures and inadequate transport and induction procedures. The fact that this report, published as recently as 2007, reiterated many of the concerns of previous work undertaken a number of years prior (HMCIP 2005a; Scraton and Moore 2007), is a matter of grave concern. It is imperative that commitments made by the Prison

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Service to improve the experiences of young women held at Hydebank Wood be urgently implemented in order to address their rights and needs in the short-term. At a more strategic level, it is imperative that the provisions of the 2008 Criminal Justice (NI) Order be both operationalised in a manner that ensures an end to the shared detention of juvenile and adult females and strengthened in order to remove the possibility of such provision in future.

An unannounced inspection of provision for male offenders at Hydebank Wood in March 2005 also raised significant concerns around the suitability of the provision for young males held within the centre. Although the Inspectors noted some areas of progress since their last inspection in 2002, including those of physical environment and resettlement, there were still many areas of significant concern that are in clear breach of international children's rights standards, including:

- unsatisfactory first night arrangements for juveniles
- inconsistent and overly punitive punishments
- too much use of cellular confinement with loss of all privileges
- requirement to 'full body-search' everyone (including children) entering the special supervision unit
- insufficient training of staff regarding the use of force and insufficient monitoring of its use
- inadequate awareness of child protection procedures amongst staff – only a third of staff in the juvenile units, and 4 of the 11 managers who could be responsible for making preliminary child protection assessments, had been trained in child protection
- insufficient 'purposeful activities'
- lack of education and training opportunities – a third of juveniles had no access to education at all
- poor access to physical education (HMCIP 2005b).

At the time of the inspection, there were 34 under 18 year olds (including four 16 year olds) accommodated on a juvenile landing in Hydebank Wood. The Inspectors noted with concern that the facilities and regime experienced by these juveniles *"did not mirror that of the juvenile justice centre, nor would that be possible in view of the vastly different resources available to the two establishments"*. The Inspectors also noted the absence of a formal transfer process between the JJC and YOC, highlighting the necessity of such a process to ensure appropriate information-sharing and pre-transfer planning for all young people to be transferred (HMCIP 2005b:19).

"The fact that the Northern Ireland Prison Service does not differentiate between those held as children and those aged over 18 indicates that children held within the prison estate do not receive the special attention that they are entitled to" (CLC 2008:6). This is a situation that must urgently be redressed as, under the provisions of the UNCRC, there is no justification for juveniles to be detained with adults, unless, in a rare occasion, this is determined to be in their best interests.

8.17 Conclusion

Changes introduced to the youth justice system in NI in recent years have, in many ways, brought it into closer alignment with a rights-based approach to the administration of justice. As highlighted previously such changes provide a strong platform for the more effective realisation of children's rights within this arena and, as such, are to be welcomed. There are, however, a number of areas which remain in direct conflict with both the letter and the spirit of the Convention and these require urgent redress. These have been highlighted throughout this chapter and the most pertinent of these are reiterated in the priority action areas below. It is imperative that the government address these issues within a rights-based framework, shaped and informed by the full implementation of international standards on juvenile justice.

8.18 Priority Action Areas

- Full implementation of international standards of justice, in particular those contained within the United Nations Convention on the Rights of the Child, the Beijing and Havana Rules and the Riyadh Guidelines, as per the Committee's 2008 Concluding Observations on the UK.
- Raising the minimum age of criminal responsibility in line with international best practice and the recommendations of the Committee.
- Greater investment in the provision of preventative services for children at risk of becoming involved in offending behaviour. Such services should be delivered prior to contact with the criminal justice system and separately from those provided for 'offending youth'.
- Enactment of the extension of the definition of 'juvenile' under the Police and Criminal Evidence (Northern Ireland) Order 1989, already legislated for under article 18 of the Police and Criminal Evidence (Amendment) (Northern Ireland) Order, to include 17 year olds in the definition of arrested juveniles.
- Ensuring that children are not, under any circumstances, prosecuted through adult courts or tried as an adult, without the added protections afforded them in the juvenile justice system.
- Further investment in, and promotion of, diversionary measures to ensure that custody is only used as a last resort for young people, as per the recommendations of the Committee. Particular attention must be paid to the continued numbers of children placed in custody on remand and the over-representation of particular groups within detention facilities.
- Ensuring that any child or young person who is detained is not, under any circumstances, accommodated with adults, in line with the UK Government's commitment to remove the reservation to article 37(c).
- Ensuring that the rights of all detained children and young people to health, wellbeing, protection and education, are fully respected and protected and that all measures are taken to reintegrate them fully into the community post release.

NICCY
northern ireland commissioner
for children and young people

NOTES: