**Protecting the best interests of the child: A comparative analysis of the youth justice systems in Ireland, England and Scotland**

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**Abstract**

*In the Republic of Ireland the government has proposed amending the Irish Constitution in order to improve children’s rights. In this article I will argue that the proposed amendment represents a serious diminution in the rights historically afforded to young people who offend, disregards Ireland’s commitments under international law and also ignores the well established link between child maltreatment and youth offending. The Irish approach echoes developments in the English youth justice system where the welfare concerns of young people who offend have become marginalised. I will compare the Irish and English approaches with the Scottish youth justice system which looks beyond young people’s offending behaviour and provides a multi-disciplinary assessment of the young person’s welfare needs. I will conclude that in Ireland, and in England, the best interest principle must be applied fully, without any distinction and integrated in all law relevant to children including laws regulating anti-social and offending behaviour.*

**Keywords:** welfare of the child, youth crime prevention, United Nations Convention on the Rights of the Child.

**Introduction**

Protecting the welfare of the child has traditionally been at the heart of youth justice systems. This article will provide a comparative analysis of three jurisdictions – the Republic of Ireland, England and Scotland – and examine the extent to which welfare considerations are still an important part of responding to youth offending. The welfare, or best interests, principle has received intense critical scrutiny, however typically it is discussed in terms of balancing the welfare of the child with the rights of other family members in family law disputes (for example see Choudhury and Fenwick, 2005; Eekelaar, 2002; Reece, 1996). This article will consider the concept of the welfare of child in terms of how young people are treated in youth offending cases. This timely analysis is pertinent in light of the Irish government’s proposal to amend the Irish Constitution in order to acknowledge the natural and imprescriptible rights of all children. The proposed amendment enshrines the need for Irish courts to secure the best interests of the child in all court proceedings except criminal proceedings involving young people. Troubled young people who engage in offending behaviour are specifically excluded from this constitutional protection of young people’s best interests. The English youth justice system has also adopted an approach where welfare considerations of young offenders have been relegated to a secondary concern. By marginalising the best interests of young offenders, both England and Ireland are ignoring their obligations under international law to protect the best interests of all young people in all court proceedings and also ignoring the harsh reality of the lives of young people who offend.

In this article I will examine the extent to which the Irish youth justice system protects the welfare and best interests of young people who engage in offending behaviour. I will also consider the extent to which welfare concerns have been eroded in the English youth justice system and assess what impact this has had on young people in England and Wales. Both the Irish and English approach to young offenders contrast sharply with the Scottish approach to youth offending. In Scotland, until the age of 16, the response to youth offending is focused on the child’s best interests and such children are much less likely to be punished or locked up than in England (UK Children’s Commissioners, 2008: 7). An analysis of the Scottish youth justice system should provide salutary lessons for the Irish and English youth justice systems on the need to arrest the diminishment of welfare considerations of young people who offend.

**The importance of protecting the welfare of young offenders**

Historically young offenders were treated the same as adults, punishment was focused on deterrence rather than reform and children were convicted and punished as adults in adult courts. In the latter part of the 19th century it was acknowledged that children were uniquely vulnerable. Consequently child-centred and welfare-based treatments were developed. Welfare-based treatments require that all interventions should be directed to meeting the needs of young people, rather than responding solely to their deeds (Muncie, 2004: 257). Since the late 19th century the principles of acting in a child’s best interests and making welfare considerations a paramount concern in court proceedings have underpinned the development of youth justice systems throughout the world. For example in the USA the founders of the juvenile court assumed the role of benevolent parent and social worker rolled into one. The first official juvenile court judge asked ‘why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offence, to find out what he is physically, mentally, morally…’ (Mack, 1909).Using broad discretion the early juvenile court judge was to provide the necessary help and guidance to a young person who might otherwise proceed further down the path of chronic crime (Fox, 1996). This view of young offenders was also prevalent in Canada in the early 20th century. Section 38 of the Canadian Juvenile Delinquents Act 1908 states that ‘every juvenile delinquent shall be treated not as a criminal, but as a misdirected and misguided child and one needing aid, encouragement, help and assistance…’ During the Parliamentary debates surrounding the Canadian Act, protection of the child and the interests of society were presented as a means of achieving each other, it was believed that no distinction should be drawn between neglected and delinquent children, that all should be recognised as of the same class and should be dealt with in a manner which serves the best interests of the child (Scott, 1907-1908).

Similarly in England throughout most of the twentieth century young offenders were perceived as in need of protection and redirection rather than punishment. In 1927 the Moloney Committee recognised the importance of the welfare of young offenders, most of whom were victims of social and psychological conditions and in need of individualised treatment (Home Office, 1927). In this respect the Committee felt that there was little to distinguish the young offender from the neglected child:

*‘It is often a mere accident whether he is brought before the court because he was wandering or beyond control or because he committed some offence. Neglect leads to delinquency.’* (Home Office, 1927: 6).

The recommendations of the Moloney Committee formed the basis of the Children and Young Persons Act 1933. Section 44 of the Children and Young Persons Act 1933 imposes an important welfare principle which requires every court to have regard to the welfare of a child or young person who is brought before it, either as an offender or otherwise. The welfare principle’s main virtue is that it requires a decision made with respect to a child to be justified from the point of view of a judgment about the child’s interests. It would be inconsistent with the welfare principle to make a decision that is overtly justified by reference to the way the outcome benefited some other interests (Eekelaar, 2002). In England, the Children and Young Persons Act 1969 was also underpinned by a philosophy of treatment which removed any lingering distinction between children who offended and those who needed care and protection. The causes of offending and deprivation were seen as the same, both types of children suffered from essentially the same problems and had the same treatment needs. Section 1 of the 1969 Act provided that a civil care order or a supervision order could be made where the young person was guilty of an offence, excluding homicide. It also had to be proved that there was a need for care and control which the young offender was unlikely to receive unless a court order were made. The separate power to commit a child to care in criminal proceedings (section 7 Children and Young Persons Act 1969) also reflected a fundamental purpose in the legislation, which was to treat all children in trouble as children in need of care and protection. The influential legal scholar Glanville Williams considered this function to be the most important aspect of the legal response to youth offending. Glanville Williams advocated bringing children into a criminal justice system that was focussed more on the welfare of offenders than punishment. He believed that to divert young people from the criminal justice system ‘saves the child not from prison, transportation, or the gallows, but from the probation officer, the foster-parents or the approved school’ (Williams, 1954: 498).

International law also emphasises the importance of protecting the welfare of young people who engage in offending behaviour. The United Nations Convention on the Rights of the Child emphasises the need for states to develop a child-centred youth justice system in which the child’s interests are paramount and the inherent dignity of the child is preserved. Article 3 of the United Nations Convention states that ‘in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative bodies or legislative bodies, the best interests of the child shall be the paramount consideration.’ Furthermore Article 40 of the Convention on the Rights of the Child requires states to promote the ‘dignity and worth’ of any child alleged, accused or recognised as having committed a criminal offence. Ratification of the United Nations Convention on the Rights of the Child is a commitment binding in international law. Ratifying states are required, as a matter of legal obligation, to protect Convention rights in their law and practice. In Ireland, England and Scotland the state has a conventional obligation to safeguard and promote the best interests of its youngest citizens up to their 18th birthday, including those young people who have engaged in offending behaviour.

The principles and provisions of the UN Convention on the Rights of the Child are informed by a number of more detailed Standards and Guidelines, for example the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985 and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) 1990. Although these instruments are purely recommendatory and are non-binding in that they have no direct legal impact upon either international or national legislative bodies, they serve to identify current international thinking on human rights for young people and they represent the minimum recommended standards on youth justice issues. The Beijing Rules recommend that every youth justice system should emphasise the well being of the young person. Article 52 of the Riyadh Guidelines requires governments to enact laws that promote the well-being of all young people.

All of these laws are underpinned by a substantial body of evidence which establishes that almost all young offenders have endured various kinds of abuse, neglect, deprivation and misfortune (Arthur, 2007). Young offenders are far more likely than the general population to have been in local authority care, to have suffered family breakdown or loss, to be homeless or insecurely housed and to have experienced child abuse (Farrington, 2002; McGhee & Waterhouse, 2007; Waterhouse *et al.*, 2004). O’Mahony *et al* found in their 4 year study of 100 industrial trainees and 870 young offenders in an Irish Juvenile Open Centre that young offenders were 5 times more likely to come from a home broken by divorce, separation or desertion (O’Mahony *et al.*, 1985). Thornberry and Smith concluded that a history of childhood maltreatment, serious enough to warrant official intervention by child protection services, significantly increases the chances of involvement in youth offending behaviour (Thornberry & Smith, 1995). Neglect by parents, poor maternal and domestic care, family conflict and the absence of a good relationship with either parent have all been shown to increase the risk of behaviour problems and subsequent offending (Utting *et al.*, 1993; Yoshikawa, 1994). The studies show that the personal and social experiences of young offenders are also found in the lives of children involved in the child care system. The well-established empirical link between child maltreatment and subsequent youth offending behaviour provides a strong rationale for viewing child welfare interventions as effective responses to youth offending behaviour. If youth offending is to be prevented there must be an acceptance of policies and programmes that are committed to protecting the young person’s welfare. In the next part I will examine the extent to which this evidence has influenced the development of modern youth justice systems in Ireland, England and Scotland.

**Protecting the welfare of young offenders in Ireland**

The Irish government has proposed a new Article 42A to be added to the Irish Constitution. The new Article 42A is intended to reflect the government’s belief that the fundamental law of Ireland should reflect a commitment to value and protect childhood (Government of Ireland, 2007: 48). Article 42A will enshrine the right of the courts to secure the best interests of the child in any court proceedings relating to adoption, guardianship, access or custody disputes. Court proceedings involving young offenders are specifically excluded from this list implying that the Children’s Court does not need to consider the best interests of children who offend. The proposed amendment to the Irish Constitution effectively creates a bifurcated approach towards troubled young people in Ireland in which young people in need of adoption, guardianship or those involved in custody and access disputes are afforded a level of constitutional protection from which young people who offend are excluded. Statutory law in Ireland also disregards the best interests of young people who engage in offending behaviour as a primary consideration. The Children Act 2001 aimed to provide Ireland with a modern statutory framework for the youth justice system (O’Donoghue, 1999), however the Children Act 2001 contains no statement that the child’s best interests should be a primary consideration. Instead the 2001 Act recommends that the child’s best interests must be balanced against competing concerns. For example a child who has offended will be diverted from the criminal justice system to the Garda Diversion Programme only if it is in the interests of the child and not inconsistent with the interests of any victim of the child’s offending or any of society’s interests (section 23(2) Children Act 2001). Furthermore, section 96 of the 2001 Act details the factors that must be taken into account by the Children’s Court when sentencing children. These include, amongst others: to take account of the child’s age and maturity; to interfere as little as possible with the child’s education, training or employment; and to promote the child’s development. All of these welfare considerations must be balanced with the requirement to have due regard to the interests of any victims of the child’s offending. Similarly section 135 of the Criminal Justice Act 2006 requires any court dealing with a child offender to have ‘due regard to the child’s best interest’ in addition to the ‘interests of the victim’ and ‘the protection of society’. Neither the Children Act 2001 nor the Criminal Justice Act 2006 requires the court to consider the child’s welfare or best interests as the paramount consideration.

The *National Youth Justice Strategy 2008-10* represents the most recent statement on youth justice policy in Ireland (Irish Youth Justice Service, 2008). The stated aim of this Strategy is to develop policies and programmes for young people in trouble with the law in a way which will meet the needs of young people and society. The Strategy acknowledges that it is mindful of the need for a child-centred approach to service delivery and outcomes with the best interests of the child being paramount. However the Strategy recommends that this work should be carried out in a way that is attentive to society’s responsibility to the victims of criminal behaviour and community safety (Irish Youth Justice Service, 2008: 8). If there is a conflict between, for example the child’s best interests or the child’s development and the best interests of any victim of the child’s offending, no guidance is provided in the Strategy or in law on how this conflict should be resolved. Had the proposed constitutional amendment included young offenders within its remit then this conflict would have been resolved in the interests of the young offender.

The Irish approach towards the welfare concerns of young people who engage in offending behaviour ignores Ireland’s obligations under international law to protect the best interests of all young people in all court proceedings. The United Nations Committee on the Rights of the Child has recommended that the best interests of the child should be a primary consideration in all decisions taken within the context of youth justice (United Nations Committee on the Rights of the Child, 2007). The best interest principle must be applied fully, without any distinction and integrated in all law relevant to children (United Nations Committee on the Rights of the Child, 2006: 23(a)), including presumably the Constitution. This recommendation was echoed by the Council of Europe Commissioner for Human Rights who urged the Irish Government to incorporate the best interests of the child as a general principle in their proposal for constitutional amendment (Commissioner for Human Rights, 2008: 44). The UN Committee has also advised that Ireland needs to give high priority to the drafting and implementation of a child-oriented, rights-based youth justice policy based on the Convention (United Nations Committee on the Rights of the Child, 2006: 69(a)). One efficient way in which Irish law could be reformed in order to ensure that it is fully complying with the UN Convention is by raising the age of criminal responsibility to 18 years of age. This would bring Ireland into line with countries such as Belgium, Brazil, Luxembourg and Peru. Such a move would also be consistent with the recommendations of influential think-tanks such as the Centre for Crime and Justice Studies which recommended raising the age of criminal responsibility in England from 10 to 18 years (Davis & McMahon, 2007: 61). Raising the age of criminal responsibility in Ireland would ensure that all young offenders would be treated as young people in need of guidance and support and would have their best interests secured under the proposed new amendment to the Constitution.

The Children Act 2001 raised the age of criminal responsibility in Ireland from 7 to 12 (section 52 Children Act 2001). This change means that children up to the age of 12 cannot be charged with a criminal offence. However the Criminal Justice Act 2006 allows for children as young as 10 years of age to be charged with the offences of murder, rape and aggravated sexual assault (section 129 Criminal Justice Act 2006). Section 129 of the Criminal Justice Act 2006 also abolished the rebuttable presumption that any child between 7 and 14 years of age is incapable of committing a crime because the child did not have the capacity to know that the act or omission concerned was wrong. Children between 12 and 14, and those between 10 and 14 if they have been charged with a serious offence, no longer enjoy the presumption of *doli incapax*. For serious offences Ireland now has one of the lowest ages of criminal responsibility in Europe. Moreover, the minimalist requirements to consider the best interests of the young offender will not apply to children of 10 years of age who are tried for serious crimes in the Circuit Court or Central Criminal Court. The Beijing Rules recommend that the minimum age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the UN Committee on the Rights of the Child has recommended states parties to increase their age of criminal responsibility to the age of 12 years as the absolute minimum age. The UN Committee also strongly recommended that states parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age (United Nations Committee on the Rights of the Child, 2007: 32-34). The UN Committee expressed disappointment that in Ireland the age of criminal responsibility was lowered to 10 years for serious crimes (United Nations Committee on the Rights of the Child, 2006: 66-67).

The combined effect of the proposed Constitutional amendment and the effective lowering of the age of criminal responsibility by the Children Act 2001 and the Criminal Justice Act 2006, is a bifurcated approach towards troubled young people in Ireland. Young people in need of support and care in the form of adoption, guardianship or custody are to be accorded constitutional protection of their best interests. Troubled young people who engage in offending behaviour are specifically excluded from this constitutional protection. Instead, the best interests of young offenders must be weighed against various competing concerns. This bifurcated approach not only ignores Ireland’s commitments under international law but also ignores the well established link between child maltreatment and subsequent youth offending behaviour. The Irish approach also mirrors developments in the English youth justice system where welfare considerations have been relegated to a secondary consideration. In the next section I will examine the extent to which the English youth justice system protects the welfare of young people who offend.

**Protecting the welfare of young offenders in England**

From the 1970s onwards in England, there was a noticeable change in the tenor of official concern about the welfare of young people who engage in offending behaviour. As occurred in the USA, the symbolic image of the ‘young offender’ became ascendant and the lived reality of the ‘child in need’ was overshadowed. This stance set the tone for refocusing policy and practice in relation to children in trouble upon punishment, retribution and the wholesale incarceration of children. Although the Children and Young Persons Act 1969 gave primacy to the family and the social circumstances of the deprived and underprivileged and aimed to reduce the criminalisation of young people; it did not have an easy passage through Parliament. Conservative Party politicians argued that it was unjust, that it gave insufficient recognition to the constructive role of the juvenile court, and that it interfered with police work with young people, especially in regard to more serious offences (Bottoms, 1974). The Magistrates Association was also opposed to the Children and Young Persons Act 1969 blaming it for the vast increases in youth crime thus precipitating a moral panic about the powerlessness of the juvenile court (Berlino & Wansell, 1974). Consequently large sections of the 1969 Act were never implemented and the welfare ideology underlying the Act never came to fruition. Juvenile courts continued to function largely as they had before, and though care proceedings following commission of an offence were made possible, such powers were used sparingly (Cavadino & Dignan, 2002, Harris, 1991). The Children Act 1989 removed from the juvenile court the power to order a young person into the care of a local authority. Section 90 of the Children Act 1989 repealed sections 1 and 7 of the Children and Young Persons Act 1969. Care and supervision orders can now only be made in the Family Proceedings Court and only when it is proved that the child in question ‘is suffering significant harm’ and is ‘beyond parental control’. Although section 1 of the Children Act 1989 requires that when a court determines any question with respect to the upbringing of a child ‘the child’s welfare shall be the court’s paramount consideration’, statutory *Guidance* states that this welfare principle only applies to proceedings under the 1989 Act (Department for Education and Skills, 2008: 1.9). Thus the overarching welfare principle of the 1989 Act does not extend to provisions dealing with young offenders.

The advent of the ‘New’ Labour government in 1997 signalled the development of a more punitive approach in youth justice in which the welfare needs of young people who engage in anti-social and offending behaviour continued to be marginalised and more and more young people were brought within the criminal justice system for an ever growing range of behaviour (Goldson, 2000). The marginalisation of the young persons’ welfare needs was reflected in the White Paper *No More Excuses* which stated that ‘punishment is necessary to signal society’s disapproval when any person including a young person breaks the law … Young people … should be in no doubt about the tough penalties they will face …’ (Home Office, 1997: 5.1). Section 37 of the Crime and Disorder Act 1998 places all those carrying out functions in relation to the youth justice system under a statutory duty to have regard to the principal aim of preventing offending by children and young people. Consequently the primary duty of those involved in the youth justice system, including the police, is to prevent offending and not to promote the child’s best interests (Hollingsworth, 2007). The new aim of youth crime prevention signals a political preference for a punitive response to young people’s behaviour (Pitts, 2001; Muncie, 2002; Smith, 2003) and allows for welfare considerations to be circumvented. This aim allows for young people to be portrayed as threats to public safety and the youth justice system is cast in the role of preventing this threat being realised. In this representation the young person’s welfare needs become a secondary concern (Smith, 2006: 97-98; Mason & Prior, 2008: 280).

Section 9 of the Criminal Justice and Immigration Act 2008 has elevated the aim of preventing offending and reoffending to the principal consideration when sentencing young offenders. In addition to the primary aim of preventing offending, the courts are required to have regard to the following factors when sentencing: the punishment of offenders, the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to the victims of their offences. Omitted from the list of considerations which courts should have regard to when sentencing young people are the individual’s age and vulnerability; evidence of the effectiveness of the proposed sentence; and what particular interventions have been tried if the person has been sentenced before and what would be appropriate now. While the courts are required to have regard to the welfare of the young person who has engaged in offending behaviour when sentencing, in accordance with section 44 of the Children and Young Persons Act 1933, section 9(3)(3) of the 2008 Act makes clear that welfare needs will not have equal status, nor will they override the primary aim of preventing offending (Bateman, 2007; Turner, 2007; Youth Justice Board, 2008). The ‘best interests’ of the child has been discarded as a consideration and displaced by the central aim of ‘preventing offending’. The most recent report of the United Nations Committee on the Rights of the Child expressed regret that the best interests of the child is still not reflected as a primary consideration in youth justice law and recommended that the best interests principle be integrated in all youth justice law and policy (United Nations Committee on the Rights of the Child, 2008: 26-27).

Solomon and Garside assessed the reforms to the English youth justice system since 1997 and considered the extent to which the government achieved its ambitious aim of preventing youth offending (Solomon & Garside, 2008). Solomon and Garside found that despite a substantial increase in spending the principal aim of the youth justice system to ‘prevent offending by children and young persons’ has yet to be achieved in any significant sense (Solomon & Garside, 2008: 65). Instead the number of children in custody in England and Wales has risen to the highest number of children imprisoned in Western Europe (Council of Europe, 2004). The United Nations Committee highlighted that youth custody in England and Wales was so high because detention is not always applied as a measure of last resort as required by Article 37 of the UN Convention (United Nations Committee on the Rights of the Child, 2008: 77). A consequence of this approach to youth custody is that most of the Youth Justice Board’s spending (64%) purchases custodial places for children ensuing that more than ten times more is spent on custody than on prevention (Margo & Stevens, 2008: 5; Solomon & Garside, 2008: 9). The UK Children’s Commissioners, in their combined report to the United Nations Committee on the Rights of the Child, expressed similar concerns about the very punitive approach to misbehaviour by children and young people in England and Wales and the high numbers of children locked up (UK Children’s Commissioners, 2008). The Commissioners were concerned that the principle of primary consideration for the best interests of the child is not being applied to children involved in the youth justice system in England and Wales. The Report estimated that between 2002 and 2006, crime committed by children fell, yet during the same period, it estimated that there was a 26% increase in the number of children criminalised and prosecuted (UK Children’s Commissioners, 2008: 174). The Commissioners were also concerned that custody is not being used as a last resort in England and Wales (UK Children’s Commissioners, 2008: 185). The Commissioners drew attention to the Scottish youth justice system which is less punitive and where imprisonment for under 16s is far less common. In Scotland, until the age of 16, the youth justice system is focused on the child’s best interests and children are much less likely to be punished or locked up than in England.

**Welfare considerations in the Scottish youth justice system**

The Scottish approach to youth offending provides a contemporary example of the importance of protecting the best interests of young offenders and the importance of recognising the connection between the difficult family and social circumstances which beset not only young people in need but also young people who offend. Scotland has one of the lowest ages of criminal responsibility in Europe, 8 years of age, but the consequences of youth offending are almost all framed within the welfare system. The origins of the Scottish system of youth justice date back to the Report of the Kilbrandon Committee (Kilbrandon, 1964). The Kilbrandon Committee believed that in terms of the child’s actual needs, the legal distinction between young offenders and children in need of care or protection was very often of little practical significance. Kilbrandon argued that more often than not the problems of the child in need and the delinquent child can be traced to shortcomings in the normal upbringing process in either the home, the family environment or in the schools. Kilbrandon described such children, whether they were children in need or offenders, as ‘hostages to fortune’. It was considered essential to extend to this minority of children the measures that their needs dictate and of which they have previously been deprived.

In Scotland, the overriding and paramount principle is the welfare of the child and all decisions must be made in the interests of safeguarding that welfare (section 16 Children (Scotland) Act 1995). Cases are initially referred to a Reporter from a range of bodies including social work departments, the police and education authorities. The Reporter must decide whether referrals should be discharged with no further action or whether they should be referred to a social work department or to a children’s hearing. The main grounds for referral to a children’s hearing are that the child: is in need, has offended, has been offended against, has truanted, has misused drugs or alcohol, has been physically, emotionally or sexually abused, has fallen into bad associations, is in moral danger, needs care and protection or the child is out of control (section 52 Children (Scotland) Act 1995). No distinction is made between children referred because of an allegation that an offence has been committed and the other grounds. When a case reaches a children’s hearing it is deliberated upon by three lay panel members who are selected to be reasonably representative of the community in terms of age, ethnicity and occupational background. The hearing can only proceed if guilt is admitted. If a child or parent denies the commission of an offence then the case is referred to the Sheriff’s court for the offence to be proved. If proved the child is referred back to the children’s hearing. The children’s hearing is solely concerned with deciding a future course of action and the welfare of the child is the paramount consideration in the decision making process (section 16 Children (Scotland) Act 1995). The hearing takes account of all aspects of a child’s conduct, not simply the offence that has been committed. The panel considers many different facts in reaching its decision, including findings from social workers, school officials, children’s homes and psychiatrists. The panel also considers what other people have done and neglected to do for the child. It recognises that the incident of an offence for which a child might be referred may only be one of several aspects involved in relation to a child’s welfare.

The Scottish system has won praise throughout the world for the relaxed and informal way in which it deals with children who have committed crimes (Arthur, 2004; King, 1997; Whyte, 2003). The advantages of the Scottish youth justice system include its child-centeredness and its focus on welfare. The Scottish system adopts a holistic approach, looking beyond the deeds of young offenders and provides a multi-disciplinary assessment of children under the age of 16 years. The Scottish system does not distinguish between troubled young people and young people in trouble. Indeed McGhee and Waterhouse found in their study of 482 children referred to the Scottish hearing system in February 1995 that 30% of ‘young offenders’ first entered the system on a care and protection ground and that 29% of ‘non-offenders’ first entered the system for committing an offence (McGhee & Waterhouse, 2007). These figures illustrate starkly that there is little to distinguish the young person who offends from the young person who is in need of adoption and guardianship or involved in access and custody disputes. Yet in Ireland, as in England and Wales, both groups of children are afforded varying levels of legal protection. The NCH Scotland reviewed the continuing relevance and fitness for purpose of the Scottish children’s hearing system and concluded that this system offers a more humane and effective response to children in trouble than the response of the English youth justice system (NCH Scotland, 2004: 26). The NCH specifically discouraged adopting an increasingly punitive response in Scotland. This warning echoes the advice of the UK Children’s Commissioners who recommended that the best interests and welfare of the child should be a primary consideration in dealing with children in trouble with the law throughout the UK and that consideration should be given to adopting an improved Scottish welfare-based children’s hearing system across the UK (UK Children’s Commissioners, 2008: 173). Improvements could include, for example, raising the age of criminal responsibility in Scotland which at 8 is the lowest in Europe. Similarly, by comparison with many European countries, the age of criminal majority in Scotland, at 16 years, is low. This contrasts with most European countries where the age of criminal majority is fixed at 18. Although children under 16 are less likely to be punished by the courts, custody rates for 16 and 17 year olds are the highest in Europe (UK Children’s Commissioners, 2008: 7).

**Conclusion**

The proposed amendment to the Irish Constitution mirrors developments in the English youth justice system where welfare considerations have been marginalised. In England this approach has resulted in a youth justice system which criminalises children at an earlier age than most comparable countries and where considerably more is spent on locking up young people than on projects to prevent them engaging in offending behaviour. This has resulted in the charge that England and Wales is ‘the site of the most punitive youth justice system in Europe’ (Goldson & Muncie, 2006: ix). The English youth justice system, similar to the Irish system, overlooks the reality of the lives of young people who engage in offending behaviour, represents a serious diminution in the rights historically afforded to young people who offend and also represents an abrogation of children’s rights under the United Nations Convention on the Rights of the Child. The proposed amendment to the Irish Constitution seeks to consolidate rather than reverse these conditions in Ireland. The legal response to youth offending should reflect the evidence which proves that most young offenders’ have suffered vulnerable, abusive and disadvantaged lives. Young offenders are victims of deprived and depriving families and should be seen as under-socialised individuals in need of help and assistance. Both troubled and troublesome young people share the same characteristics and needs, therefore both groups deserve the same constitutional protection of their best interests. Instead of mirroring developments in the English youth justice system, Ireland should adopt a more welfare-orientated approach to tackling youth offending. Smith recommends that we should reinsert a proper concern with the ‘welfare’ principle that has been crowded out of the youth justice system and thus develop an intervention strategy that is based on dealing with young people holistically and considering the factors underlying the offence (Smith, 2007: 227). One way of making this argument more compelling is to draw attention to the evidence which shows that countries that invest in universal welfare provisions tend to have the lowest levels of penal custody (Downes & Hansen, 2006). Thus investment in, and commitment to, protecting the welfare concerns of all young people, including young offenders, can be cost effective in the long term. Such a commitment to protecting the welfare of young people who offend would also help to create a youth justice system which addresses the root causes of youth offending rather than one which is committed to criminalising and incarcerating increasing numbers of young people.

**References**

Arthur, R., “Young Offenders: Children in Need of Protection”, *Law and Policy* 2004, (26(3 & 4)), 309-327.

Arthur, R., *Family Life and Youth Offending: Home is where the hurt is* (London: Routledge, 2007).

Bateman, T., “Youth Rehabilitation Orders to replace all existing community orders”, *Youth Justice* 2007 (7 (3)), 241-243.

Berlino, M., Wansell, G., *Caught in the Act* (Harmondsworth: Penguin, 1974).

Bottoms, A.E., “On the decriminalisation of the English juvenile court”, in R. Hood (ed.), *Crime, Criminology and Public Policy* (London: Heinemann, 1974).

Cavadino, M., Dignan, J., *The Penal System: An Introduction 3rd ed.* (London: Sage, 2002).

Choudhury, S., Fenwick, H., “Taking the rights of parents and children seriously: confronting the welfare principle under the Human Rights Act”, *Oxford Journal of Legal Studies* 2005, (25 (3)), 453.

Commissioner for Human Rights, *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to Ireland 26-30 November 2007* (Strasbourg: Council of Europe, 2008).

Council of Europe, *Space 1, Council of Europe Annual Penal Statistics, Survey 2004* (Strasburg: Council of Europe, 2004).

Davis, Z., McMahon, W. (eds.), *Debating Youth Justice: From punishment to problem solving?* (London: Centre for Crime and Justice Studies, 2007).

Department for Education and Skills, *Children Act 1989 Guidance and Regulations Vol. 1: Court Orders* (London: The Stationery Office, 2008).

Downes, D., Hansen, K., *Welfare and Punishment: The relationship between welfare spending and imprisonment* (London: Crime and Society Foundation, 2006).

Eekelaar, J., “Beyond the welfare principle”, *Child and Family Law Quarterly* 2002 (14 (3)), 237.

Farrington, D.P., “Developmental criminology and risk-focussed prevention”, in M. Maguire, R. Morgan, R. Reiner (eds.), *The Oxford Handbook of Criminology* 3rd ed., (Oxford: Oxford University Press, 2002).

Fox, S.J., “The early history of the Court”, *Future of Children*, 1996 (31), 35.

Goldson, B., (ed.), *The New Youth Justice* (London: Russell House, 2000)

Goldson, B., Muncie, J. “Editors’ Introduction”, in B. Goldson, J. Muncie (eds.), *Youth Crime and Justice* (London: Sage, 2006)

Government of Ireland, *Programme for Government 2007-2012* (Dublin: Department of the Taoiseach, 2007).

Harris, R., “The Life and Death of the Care Order (Criminal)”, *British Journal of Social Work* 1991 (21), 1-17.

Hollingsworth, K., “Judicial approaches to children’s rights in youth crime”, *Child and Family Law Quarterly* 2007 (19 (1)), 42.

Home Office, *Report of the Departmental Committee on the Treatment of Young Offenders* [The Moloney Report] (London: HMSO, 1927).

Home Office, *The Care of Children Committee* [The Curtis Report] (London: HMSO, 1946).

Home Office, *Report on the Committee on Children and Young Persons* [The Ingleby Report] (London: HMSO, 1960).

Home Office, *No more excuses: A new approach to tackling youth crime in England and Wales* (London: HMSO, 1997).

Irish Youth Justice Service, *National Youth Justice Strategy 2008-10* (Dublin: The Stationery Office, 2008).

Kilbrandon, Lord *Report of the Committee on Children and Young Persons*, (Edinburgh: HMSO, 1964).

King, M., *A Better World for Children: Explorations in Morality and Authority*,(London: Routledge, 1997).

Mack, J.W., “The Juvenile”, *Harvard Law Review* 1909 (23), 104-107.

Margo, J., Stevens, A., *Make me a criminal: preventing youth crime* (London: Institute of Public Policy Research, 2008)

Mason, P., Prior, D., “The Children’s Fund and the prevention of crime and anti-social behaviour”, *Criminology and Criminal Justice* 2008 (8(3)), 279-296.

McGhee, J., Waterhouse, L., “Classification in youth justice and child welfare: in search of ‘the child’’, *Youth Justice* 2007(7(2), 107-120.

Muncie, J., “A new deal for youth? Early intervention and correctionalism”, in G. Hughes, E. McLaughlin, J. Muncie (eds.), *Crime Prevention and Community Safety: New Directions* (London: Sage, 2002).

Muncie, J., *Youth and Crime* 2nd ed. (London: Sage, 2004).

NCH Scotland, *Where’s Kilbrandon Now? Report and Recommendations from the Inquiry* (Glasgow: NCH Scotland, 2004).

O’Donoghue, J., *Dáil Éireann Debates,* 1999 (517(32-33)).

O’Mahony, P., Cullen, R,. O’Hora, M.J., “Some family characteristics of Irish juvenile offenders”, *The Economic and Social Review* 1985 (17(1), 29-37.

Pitts, J., *The New Politics of Youth Crime* (Basingstoke: Palgrave, 2001).

Reece, H., “The paramountcy principle: Consensus or Construct?”, *Current Legal Problems* 1996, 267.

Scott, S., *Senate Debates* 1907-1908, 1044.

Smith, R., *Youth Justice: Ideas, Policy, Practice* (Cullompton: Willan, 2007).

Smith, R., “Actuarialism and Early Intervention in Contemporary Youth Justice”, in B. Goldson, J. Muncie (eds.), *Youth Crime and Justice* (London: Sage, 2006).

Solomon, E., Garside, R., *Ten years of Labour’s youth justice reforms: an independent audit* (London: Centre for Crime and Justice Studies, 2008).

Thornberry, T.P., Smith, C. “The Relationship Between Childhood Maltreatment and Adolescent Involvement in Delinquency”, *Criminology* 1995 (33(4)), 451.

Turner, A., “The Criminal Justice Merry-Go-Round”, *Justice of the Peace* 2007 (171), 729.

UK Children’s Commissioners, *Report to the United Nations Committee on the Rights of the Child* [www.11MILLION.org.uk](http://www.11MILLION.org.uk), 2008.

United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention. Concluding observations: Ireland CRC/C/IRL/CO/2* (Geneva: Committee on the Rights of the Child, 2006).

United Nations Committee on the Rights of the Child, *General Comments No. 10: Children’s Rights in Juvenile Justice CRC/C/GC/10* (Geneva: Committee on the Rights of the Child, 2007).

United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention. Concluding observations: Great Britain and Northern Ireland CRC/C/GBR/CO/4*(Geneva: Committee on the Rights of the Child, 2008).

Utting, D., Bright J., Henricson C., *Crime and the family: improving child-rearing and preventing delinquency* (London: Family Policy Studies Centre, 1993).

Waterhouse, L., McGhee, J., Loucks, N., “Disentangling offenders and non-offenders in the Scottish Children’s Hearings – A clear divide?”, *Howard Journal of Criminal Justice* 2004, (43(2)), 164-179.

Williams, G., “The Criminal Responsibility of Children”, *Criminal Law Review* 1954, 493.

Whyte, B., “Young and Persistent: Recent Developments in Youth Justice Policy and Practice in Scotland”, *Youth Justice* 2003 (3), 74-85.

Yoshikawa, H., “Prevention as cumulative protection: Effects of early family support and education on chronic delinquency and its risks”, *Psychological Bulletin* (1994) (115), 28-54.

Youth Justice Board, *Youth Justice Board Guidance* <http://www.yjb.gov.uk/en-gb/practitioners/CourtsAndOrders/CriminalJusticeandImmigrationAct/>, 2008.