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## **The Criminal Justice and Courts Act 2015 – legitimising state sponsored violence to maintain good order and discipline in secure colleges**

**Keywords:** restraint, youth custody, Criminal Justice and Courts Act 2015, *R(C) v Secretary of State for Justice, Every Child Matters*.

**Abstract:** The Criminal Justice and Courts Act 2015 empowers staff in secure colleges to subject young people in custody to dangerous force for the purpose of ensuring ‘good order and discipline’. The use of force to restrain young people in custody can cause serious physical injury, profound psychological damage and was found to be a contributory factor in the deaths of two young people who died in custody in 2004. Despite these dangers, in most youth custodial establishments the use of force remains high and has been increasing. The 2015 Act will further legitimise the use of coercive violence against vulnerable children, consequently ensuring that the power imbalance between children and adults is sustained, the special status of childhood is diminished and the child’s human rights are violated. This article will consider the effectiveness of using violent force to control young people in custody and argue that the deliberate infliction of pain as a form of control of young people in custodial settings should only be used as a last resort and exclusively to prevent harm to the child or others.

### **Introduction**

The Criminal Justice and Courts Act 2015, which received Royal Assent on 12<sup>th</sup> Feb 2015, legislates for the creation of huge new prisons, known as secure colleges, for holding up to 320 children as young as 12 years old. The secure college is envisaged as a new secure

educational establishment which will put intensive and innovative education delivery at the heart of youth custody and provide young people with the skills, qualifications and self-discipline they need to lead productive lives on release. The advent of the secure colleges will foreshadow the closure of secure training centres, secure children's homes and young offenders' institutions. The Criminal Justice and Courts Act also envisages allowing young people in secure colleges to be subjected to dangerous force by staff to enforce 'good order and discipline' (GOAD). This gives staff in secure colleges greater rights to discipline children than parents currently enjoy and effectively exempts secure colleges from the normal rules of child protection and welfare.

The government believes the use of force on children to maintain good order and discipline, does not raise any human rights issues.<sup>1</sup> However previous court rulings, including the European Court of Human Rights, have made clear that restraining a child solely for the purposes of maintaining 'good order and discipline' contravenes Article 3 of the European Convention on Human Rights, which provides an absolute protection against conduct that has serious physical or psychological effects on individuals. In this article, the rationale for using force to change the behaviour of young people will be juxtaposed with the evidence that use of force and violent restraint can have profound cognitive and behavioural effects on the restrained young person resulting in feelings of powerlessness, fear, rage and anxiety. The common theme that emerges from this evidence is that violent use of force profoundly affects the thoughts and behaviour of young people but has no proven impact on improving their behaviour. In light of this evidence, the article will consider whether this new law

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<sup>1</sup> Ministry of Justice *Government response to the Fourteenth Report of the Joint Committee on Human Rights, Session 2013/14: Criminal Justice and Courts Bill* (London: Ministry of Justice, 2014).

contravenes domestic child protection law, European Court of Human Rights rulings and international law obligations and standards. Moreover, it will consider whether this new law effectively denies young people in custody their status as children by prioritising objectives such as enforcement and compliance over goals such as safeguarding children and supporting the development of positive behaviour and attitudes which will impact upon young people's future compliance with the law.

### **Adverse effects of using forceful restraint**

The Criminal Justice and Courts Act authorises any secure college custody officer performing custodial duties to use reasonable force where necessary to ensure good order and discipline.<sup>2</sup> This new law contradicts the previously stated view of the current government, as expressed by Ken Clarke, the then Lord Chancellor and Secretary of State for Justice, that force 'should only ever be used as a last resort where it is absolutely necessary to do so and where no other form of intervention is possible or appropriate'.<sup>3</sup> The government's justification for the change in the law is that 'there are some situations in which the use of some reasonable force to ensure good order and discipline will be necessary, and that the relevant primary legislation should allow for that possibility'.<sup>4</sup> This rationale justifying the use of force to ensure good order and discipline pays little heed to the evidence that the use of force to restrain young people can have a number of serious adverse effects. A degree of positional asphyxia can result from any restraint position in which there is restriction of the neck, chest

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<sup>2</sup> Criminal Justice and Courts Act 2015, Sched 10, paras 8(c) and 10.

<sup>3</sup> K. Clarke *Written Ministerial Statements* 10<sup>th</sup> July 2012, col. 19WS

<sup>4</sup> Joint Committee on Human Rights *Fourteenth Report of Session 201314: Legislative Scrutiny (1) Criminal Justice and Courts Bill and (2) Deregulation Bill HL Paper 189/HC 1293* (London: TSO, 2014), para 1.62

wall or diaphragm, particularly when using restraint techniques where the head is forced downward towards the knees. Minor injuries resulting from the use of force have included redness to skin, welts, scratches, bruising, nose bleeds, grazes, concussions, sprains, being unable to breathe, feeling sick or vomiting, developing swelling to the face and neck and development of petechiae (small blood-spots associated with asphyxiation) to the head, neck and chest. Major injuries have included serious cuts, fractures, loss of consciousness and damage to internal organs.

Using violent force to restrain and control young people has long been a controversial issue within the youth secure estate and the tragic consequences of unnecessary and painful use of force against children in detention were obvious contributory factors in the deaths of Gareth Myatt and Adam Rickwood, both of whom died in custody in 2004. 15 year old Gareth Myatt died in April 2004 after being held in a lethal restraint position by G4S officers. Gareth was three days into serving a 12 month Detention and Training Order for stealing a bottle of beer and assaulting a social worker at a children's unit. When he refused to clean a sandwich toaster in the dining area, two members of staff followed him to his room and began removing his personal items, including a piece of paper which contained his mother's mobile phone number. Gareth lunged at the staff member and the two members of staff, now joined by a third, forcibly restrained him. They used a technique known as a seated double embrace, which involved two of the security officers forcing Gareth into a sitting position and leaning him forward, while a third held his head. Gareth lost consciousness while being restrained and choked to death on his own vomit.

The use of force to restrain young people can also have a negative psychological and emotional impact resulting in perceptions of unfairness, broken spirit and re-traumatisation.<sup>5</sup> Smallridge and Williamson, in their independent review of the use of restraint in youth custodial settings emphasised that there is no such thing as an ‘entirely safe restraint’ and that restraint is intrinsically unsafe as even where it does not end in physical injury it can be ‘profoundly damaging psychologically’.<sup>6</sup> Adam Rickwood committed suicide after he had been subjected to a violent and painful nose distraction technique by staff restraining him. The nose distraction technique involved an upward chop of the hand under the detained child’s nostrils against the counter-force of holding the back of his head. Adam was a remanded detainee aged 14, located some distance from his family home. He had been assessed as posing a high risk of self-harm but had otherwise been very compliant. Adam had refused an order to return to his cell and had sat on the floor in protest, struggling when staff sought to lift and move him. Use of the nose distraction technique had caused his nose to bleed for approximately an hour and had made him upset and angry. His frame of mind was further undermined by the associated loss of privileges and news that a bail application on which he had pinned his hopes would not be pursued. Adam left a note in which he asked ‘what gave the staff the right to hit him in the nose?’ An inquest in 2011 found that the painful nose distraction technique used on him contributed to his suicide

The Children’s Commissioner for England found that the use of restraint generated strong emotional responses from most of the participants, but the way girls experienced restraint

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<sup>5</sup> T.D. Strout ‘Perspectives on the experience of being physically restrained: An integrative review of the qualitative literature’ (2010) 19 *International Journal of Mental Health Nursing* 416

<sup>6</sup> P. Smallridge and A. Williamson *Independent review of restraint in juvenile secure settings* (London: Ministry of Justice and Department for Children, Schools and Families, 2008), 4-5

varied dramatically from the boys.<sup>7</sup> Many of the girls in this study felt that the procedure impacted on them negatively in terms of their mental health and well-being, and they disliked it intensely, boys in contrast reported feelings of anger. Research on legitimacy and the law supports the basic claim, tested under a variety of sampling and measurement conditions, that people's views about the legitimacy of law and authorities are shaped by their experiences of the law and of authorities exercising their statutory functions.<sup>8</sup> Individual's notions of the fairness and morality of legal rules may subsequently influence their future behaviour. Fair treatment strengthens ties and attachment to the law and creates a set of obligations to conform to those laws which are considered legitimate and moral.<sup>9</sup> Fair treatment may also reduce feelings of anger that lead to rule breaking<sup>10</sup> and contribute to future law abiding behaviour.<sup>11</sup> Thus how figures of authority such as secure college staff, for example, exercise their authority will directly influence young people's views about the legitimacy and fairness of the law and their future compliance with the law. What young people see and experience through interactions with secure college staff may enhance their views about the legitimacy

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<sup>7</sup> Office of the Children's Commissioner *Young people's views on restraint in the secure estate* (London: Office of the Children's Commissioner, 2011).

<sup>8</sup> T.R. Tyler *Why People Obey the Law* (New Haven: Yale University Press, 1990); T.R. Tyler and Y.H. Huo *Trust in the Law* (New York: Russell-Sage, 2002).

<sup>9</sup> J. Fagan and T.R. Tyler 'Legal Socialization of Children and Adolescents' (2005) 18 *Social Justice Research* 217-241, 221

<sup>10</sup> R. Agnew 'Foundation for a general strain theory of crime and delinquency' (1992) 30 *Criminology* 47-87; L.W. Sherman 'Defiance, deterrence and irrelevance: A theory of the criminal sanction' (1993) 30 *Journal of Research in Crime and Delinquency* 445-473.

<sup>11</sup> R. Paternoster, R. Brame, R. Bachman, L.W. Sherman 'Do fair procedures matter? The effect of procedural justice on spouse assault' (1997) 31 *Law and Society Review* 163-204.

of the law and the legitimacy of authority to deal fairly with citizens who violate legal rules<sup>12</sup> or it may arouse negative reactions such as anger leading to recurring defiance of the law's norms.<sup>13</sup> As Cook states, '[i]f a society cannot guarantee "the equal worth of all citizens", mutual and self-respect and the meeting of basic needs, it cannot expect that all citizens will feel they have an equal stake in abiding by the law and it cannot ... enhance confidence in the law'.<sup>14</sup>

### **Prevalence of forceful restraint in the youth custodial estate**

Despite these dangers the Chief Inspector of Prisons, has observed that 'in most establishments the use of force remain[s] high'<sup>15</sup> and has been increasing. The Ministry of Justice and the Youth Justice Board found that in 2009/10 '6,904 incidents of restraint were reported, of which 257 resulted in injury'.<sup>16</sup> 8,419 restraint incidents were recorded in 2011/12 across secure children's homes, secure training centres and young offender institutions, an increase of 17 per cent on 2010/11 when there were 7,191 incidents. This amounted to an average of 659 incidents involving 429 children every month. There were 33

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<sup>12</sup> J. Fagan and T.R. Tyler 'Legal Socialization of Children and Adolescents' (2005) 18 *Social Justice Research* 217-241, 220

<sup>13</sup> R. Paternoster, R. Brame, R. Bachman, L.W. Sherman 'Do fair procedures matter? The effect of procedural justice on spouse assault' (1997) 31 *Law and Society Review* 163-204; L.W. Sherman 'Defiance, deterrence and irrelevance: A theory of the criminal sanction' (1993) 30 *Journal of Research in Crime and Delinquency* 445-473.

<sup>14</sup> D. Cook *Criminal and Social Justice* (London: Sage, 2006) 21-22

<sup>15</sup> HM Chief Inspector of Prisons for England and Wales, *Annual Report 2010-11* (London: HM Inspectorate of Prisons, 2011), 62.

<sup>16</sup> HM Chief Inspector of Prisons for England and Wales, *Annual Report 2009-10* (London: HM Inspectorate of Prisons, 2011)



restraint incidents involving injury in secure children's homes, 68 in secure training centres, and 153 in young offender institutions during 2011/12.<sup>17</sup> In Oakhill Secure Training Centre the Chief Inspector of Prisons explained that '[w]e found... staggering levels of use of force [which]... had been used 757 times in nine months'.<sup>18</sup> At Castington YOI the Chief Inspector found 'that the use of restraint was high; moreover, it had resulted in four confirmed or suspected fractures among children and young people'.<sup>19</sup> In 2013 *The Guardian* reported that between 2009-11 five young people at Hindley YOI suffered broken limbs while being restrained, one young person had his wrist broken twice while being restrained by the same staff member.<sup>20</sup> Four of these restraint incidents were responses to non-compliance, rather than as a response to an imminent harm. Gyateng *et al.* found that 53 per cent of young people in secure children's homes, 44 per cent in secure training centres and 39 per cent in young offender institutions reported being physically restrained. This research involved a survey of 1,245 young people aged between 14 and 17-years-old and serving a custodial sentence.<sup>21</sup> Similarly Elwood found that the number of young people reporting they had been physically restrained by staff was high, 30 per cent (59 per cent in one establishment) said

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<sup>17</sup> Ministry of Justice, Youth Justice Board *Youth Justice Statistics 2012-13* (London: YJB 2014)

<sup>18</sup> HM Chief Inspector of Prisons for England and Wales, *Annual Report 2007-08* (London: HM Inspectorate of Prisons, 2009), 69

<sup>19</sup> HM Chief Inspector of Prisons for England and Wales, *Annual Report 2008-09* (London: HM Inspectorate of Prisons, 2010), 67

<sup>20</sup> E. Allison 'Youth prison investigated after five inmates suffer broken bones' (2013) *The Guardian* 20<sup>th</sup> September <http://www.theguardian.com/society/2013/sep/20/youth-prison-investigated-inmates-broken-bones>

<sup>21</sup> T. Gyateng, A. Moretti, T May and P J *Young people and the secure estate: needs and interventions* (London: Youth Justice Board, 2013)

they had been physically restrained by staff.<sup>22</sup> Higher proportions of black and minority ethnic young men reported that they had been physically restrained in the period 2011–13.<sup>23</sup> Muslim young men were more likely to report that they had been physically restrained in 2011–12 (44 per cent compared with 36 per cent of non-Muslim young men). Similarly in 2012–13 a larger proportion of Muslim young men in custody (35 per cent) reported feeling unsafe compared to non-Muslim young men (28 per cent) in custody.<sup>24</sup> In March 2013, the Justice Committee published its report on youth justice in which it expressed serious concern that: ‘despite the fact that the use of force in restraining young offenders has now been definitively linked to the death of at least one young person in custody, the use of restraint rose considerably across the secure estate last year’.<sup>25</sup> These increases in the use of restraint have taken place against the backdrop of falling numbers of young people in custody. Since 2009/10 there has been a 36 per cent reduction in the number of young people in custody,<sup>26</sup> which means that restraint is being used proportionately more than the above disconcerting figures suggest.

### **Judicial views on the use of forceful restraint on young people in custody**

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<sup>22</sup> C. Elwood *Children and Young People in Custody 2012–13 An analysis of 12–18 year-olds’ perceptions of their experience in secure training centres* (London: HM Inspectorate of Prisons, Youth Justice Board, 2013)

<sup>23</sup> E. Kennedy *Children and Young People in Custody* (London: HM Inspectorate of Prisons & Youth Justice Board, 2013), para 9.3.13

<sup>24</sup> *ibid* para 9.5.12

<sup>25</sup> House of Commons Justice Committee *Youth Justice, Seventh Report of Session 2012–13 Volume 1* (London: TSO, 2013)

<sup>26</sup> Ministry of Justice *Youth Justice Statistics: 2012/13 England and Wales* (London: Ministry of Justice, Youth Justice Board, 2014), 4.

Previously the courts have ruled that the use of force against children in detention to ensure good order and discipline is contrary to basic human rights standards and notions of decency, other than where it is used for the purposes of preventing harm. In *R(C) v Secretary of State for Justice* the Court of Appeal found that using force to maintain good order and discipline breached Article 3 of the European Convention on Human Rights.<sup>27</sup> This case examined section 9 of the Criminal Justice and Public Order Act 1994 which allowed a custody officer performing custodial duties to use reasonable force where necessary to ensure good order and discipline, which is almost identical to the 2015 Act. Because of the dangers discussed in the previous section, the court in *C* found the practice of restraint would amount to ‘inhuman and degrading treatment’ unless the government could show that the use of restraint in order to maintain good order and discipline was necessary, for example to prevent injury to the young person or others. The government had failed to show that such a dangerous practice is necessary purely for the purpose of enforcing good behaviour. Accordingly Buxton LJ concluded that resort to physical force which has not been made strictly necessary by the detainees own conduct is in principle an infringement of Article 3. The court believed that the very open-ended terms of ‘good order and discipline’ allowed too much discretion to officers on the ground, and the boundary between refusal to comply and threats to good order was very unclear. The court ruled that the deliberate infliction of pain and force on children as young as 14 could only be justified by very compelling reasons rather than generally to support staff orders. The current government believes that this judgment does not preclude all use of force on children to maintain good order and discipline, and accordingly that the new

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<sup>27</sup> [2008] EWCA Civ 882

provisions in the Criminal Justice and Courts Act will not infringe Article 3 of the European Convention.<sup>28</sup>

In *C* the Court of Appeal emphasised the special obligation owed by the state to vulnerable young people deprived of their liberty. Children involved in crime, particularly where that involvement is persistent, have often had difficult, deprived backgrounds and serious multiple problems in terms of their school achievement, psychological health and drug abuse.<sup>29</sup> Every study of the personal and social experiences of young people in custody reveals that almost all of them have endured various kinds of abuse, neglect, deprivation and misfortune.<sup>30</sup> Children in custody 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. These children are the most disadvantaged, have the poorest educational experiences and are more likely to suffer from poor health, including mental health and substance misuse. Between 65-78 per cent of young people in the secure estate have had a period of non-attendance at school;<sup>31</sup> nearly 50 per cent have literacy and numeracy levels below those of the average 11 year-old, and over 25 per cent equivalent to

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<sup>28</sup> Ministry of Justice *Government response to the Fourteenth Report of the Joint Committee on Human Rights, Session 2013/14: Criminal Justice and Courts Bill* (London: Ministry of Justice, 2014).

<sup>29</sup> R. Arthur *Family Life and Youth Offending: Home is where the hurt is* (London: Routledge, 2007).

<sup>30</sup> P. Whitehead, R. Arthur 'Let no one despise your youth': A sociological approach to youth justice under New Labour 1997-2010' (2011) 31 *International Journal of Sociology and Social Policy* 469-485

<sup>31</sup> T. Gyateng, A. Moretti, T. May, P. Turnbull (2013) *Needs and Interventions* (London: Youth Justice Board, 2013), p39

those of the average seven year-old or younger;<sup>32</sup> over 53 per cent of young people in custody meet the threshold for conduct disorder<sup>33</sup> and 60 per cent have speech and communication difficulties which significantly impacts on the ability of these children to engage with mainstream educational approaches.<sup>34</sup> 18 per cent suffer from depression and 10 per cent have anxiety disorders.<sup>35</sup>

In *R (Howard League for Penal Reform) v Secretary of State for Home Department*<sup>36</sup> Munby J held that the duties which a local authority would otherwise owe to a child in need under section 17 of the Children Act 1989 do not cease to be owed merely because a child is currently detained in a young offender institution (YOI) or other Prison Service establishment, subject to the necessary requirements of imprisonment. Thus the Children Act 1989 applies to children in any such establishment and, accordingly local authorities are under a duty to respond to a child in need referral concerning a child in custody and

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<sup>32</sup> ECOTEC *An Audit of Education Provision within the Juvenile Secure Estate: A Report to the Youth Justice Board* (London: Youth Justice Board, 2001) p.9

<sup>33</sup> S. Fazel, H. Doll, N. Långström 'Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys', (2008) 47(9) *Journal of the American Academy of Child and Adolescent Psychiatry* 1010-1019

<sup>34</sup> Royal College of Speech & Language Therapists (2009) *Locked up and Locked out: Communication is the key* (Wales Justice Coalition: Cardiff, 2009), p.8

<sup>35</sup> S. Fazel, H. Doll, N. Långström 'Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys', (2008) 47(9) *Journal of the American Academy of Child and Adolescent Psychiatry* 1010-1019

<sup>36</sup> [2002] EWHC 2497

undertake a child in need assessment, to see whether the child satisfies the criteria in s 17(10).

Section 17(10) states that:

‘A child is in need if (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining a reasonable standard of health or development without the provision of services by a local authority, or (b) his health or development is likely to be significantly, or further, impaired without the provision for him of such services, (c) or if he is disabled.’

Both section 17, which sets out local authorities duties to children in need and their families, and section 31, which defines the criteria for care proceedings, refer to the impairment of health or development as the basic condition which must occur in order to trigger local authority intervention. Health includes physical and mental well-being, both psychiatric and psychological. Therefore a child who is suffering from a psychological disorder is entitled to have his needs assessed under section 17(10) of the 1989 Act, including, for example, psychological disorder resulting from forceful restraint. Development is widely defined to encompass physical, intellectual, educational, emotional, social or behavioural development.<sup>37</sup> Section 31 of the 1989 Act, as amended by the Adoption and Children Act 2002, includes harm suffered as a result of seeing or hearing the ill-treatment of another as one of the threshold criteria necessary to trigger a care or supervision order. The definition of children in need also requires that local authorities must concern themselves not only with those children who are already in need, in the sense that they already have been subjected to a physical assault, but also those who are likely to find themselves in that position if an intervention is not provided. Through its reference to likelihood, section 17(10) Children Act

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<sup>37</sup> *F v Suffolk County Council* [1981] 125 SJ 307

1989 paves the way for important preventive functions to be given to local authorities as the inclusion of the prospective element emphasises prevention rather than cure.

Additionally, the 2003 green paper, *Every Child Matters* set five key outcomes for children: staying safe and being protected from harm and neglect; growing up able to look after themselves; being healthy; enjoying and achieving; and making a positive contribution to the community and to society.<sup>38</sup> The Children Act 2004 incorporated many of the proposals from *Every Child Matters* and accordingly imposes a duty on children's services to improve the well-being of children in relation to 'the contribution made by them to society' and to cooperate in helping children become responsible citizens. Section 10(2) of the 2004 Act defines wellbeing, by reference to the five outcomes, as relating to (a) physical and mental health and emotional well-being; (b) protection from harm and neglect; (c) education, training and recreation; (d) the contribution made by them to society; and (e) social and economic well-being. The 2004 Children Act requires all professionals, including those working with young people in custody, to work towards achieving the *Every Child Matters* five outcomes in order to safeguard and promote the welfare of children. Secure custodial settings, within the context of *Every Child Matters*, are required to recognise their pivotal role in improving the health and well-being of vulnerable children and young people.<sup>39</sup> Secure custodial settings have a vital contribution to make to all of the five *Every Child Matters* outcomes, but in particular, in the context of the Criminal Justice and Courts Act 2015, to

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<sup>38</sup> Chief Secretary to the Treasury *Every Child Matters* (London: HMSO, 2003)

<sup>39</sup> E. Lewis, B. Heer *Delivering Every Child Matters in Secure Setting* (London: National Children's Bureau, 2008)

ensuring the outcome of ‘staying safe’ and free from bullying, discrimination and violence.<sup>40</sup> The Children Act 2004 sets out an explicit duty on the Governors and Directors of young offender institutions and secure training centres to make arrangements to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children. Young offender institutions are required to have a specific strategy to develop the physical, mental and social health of inmates by preventing the deterioration of inmates health during custody and by building on the concept of ‘decency’ in the prison estate.<sup>41</sup> The Criminal Justice and Courts Act extends these duties to principals of secure colleges.<sup>42</sup>

The emphasis in the Children Acts 1989 and 2004, *R (Howard League for Penal Reform) v Secretary of State for Home Department* and *Every Child Matters* is on the equality of treatment between young people in trouble and young people with troubles. This echoes the legal philosopher Ronald Dworkin’s emphasis on egalitarianism as a core principle of law. Dworkin stressed that everyone’s lives matter equally,<sup>43</sup> accordingly the law needs to treat humans with empathy, concern and respect for their rights. Dworkin argued that a government which professes to take rights seriously, must honour the majority promise to minorities, that is that their human dignity and equal worth will be recognised.<sup>44</sup> Dworkin developed and defended a rights-based theory of law and argued that if a person has a moral

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<sup>40</sup> Home Office *Every Child Matters: Change for Children in the Criminal Justice System* (London: Home Office, 2004), 1.

<sup>41</sup> Prison Service Order 3200, 23/10/2003

<sup>42</sup> Criminal Justice and Courts Act 2015, Sched 9, paras 14, 21

<sup>43</sup> R. Dworkin *Taking Rights Seriously* (London: Duckworth, 1977)

<sup>44</sup> R. Dworkin *Taking Rights Seriously* (London: Duckworth, 1977), 25.



right to something, then it should be accorded to them even if a utilitarian calculation shows that utility would be maximised by denying it to them. Dworkin characterises this as a ‘postulate of political morality’,<sup>45</sup> that is, it is a fundamental political right that governments must treat citizens with equal concern and respect.<sup>46</sup> Applying Dworkin’s egalitarian theory of the nature of law to the issues under discussion here means that children in custody deserve the same right to protection of their welfare and protection from physical abuse as all other children, any law to the contrary would lack morality and integrity. Not only does the Criminal Justice and Courts Act 2015 discriminate between children with troubles and children in trouble, but also as noted earlier, within the custodial estate, force and restraint have been used in ways which are discriminatory. The 2015 Act is thus contrary to Dworkin’s moral and egalitarian ideals of respect for human dignity, treating citizens with equal concern and respect, and the moral duty not to create an unreasonable risk of harm to others.<sup>47</sup> The next section will examine whether the 2015 Act also contravenes provisions of the European Convention on Human Rights and other instruments of international human rights law.

## **European law and United Nations law**

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<sup>45</sup> R. Dworkin ‘Liberalism’ in S Hampshire (ed) *Public and Private Morality* (Cambridge: Cambridge University Press, 1978), 115.

<sup>46</sup> M. Freeman ‘Taking children’s rights more seriously’ in M. Freeman *The Moral Status of Children* (The Hague: Martinus Nijhoff, 1997), 31

<sup>47</sup> R. Dworkin *Justice for Hedgehogs* (Cambridge, Massachusetts: Harvard University Press, 2011). Also, R. Dworkin *Law’s Empire* (London: Fontana Press, 1986), 22-26; R. Dworkin *Taking Rights Seriously* (London: Duckworth, 1977), 272-278.

In *Z v United Kingdom*, the European Court of Human Rights ruled that Article 3 of the European Convention ‘enshrines one of the most fundamental values of democratic society’ and requires states to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment by state agencies or others, including private individuals:

‘These measures should provide effective protection, in particular, of children and vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.’<sup>48</sup>

The European Court of Human Rights has ruled on the issue of using violence to control and discipline young people in custody, and other settings, and the impact of Article 3. *Tyrer v UK* involved the use of judicial corporal punishment on the Isle of Man.<sup>49</sup> Tyrer had been sentenced to ‘birching’ for an unlawful assault occasioning actual bodily harm. The birching raised but did not cut Tyrer’s skin and he was sore for approximately 10 days after the birching. Tyrer complained that this treatment amounted to degrading punishment as prohibited by Article 3 of the European Convention on Human Rights. The European Court ruled that the main aim of Article 3 was to protect a person’s dignity and physical integrity. The very nature of the treatment in *Tyrer* involved one human being inflicting physical violence upon another. This violence was considered to be ‘institutionalised’ violence as it was permitted by law and carried out by state authorities. The court concluded that all forms of institutionalised violence represent a breach of Article 3 and that a punishment does not lose its degrading character merely because it is believed to be an effective aid to control crime: ‘although the applicant did not suffer any severe or long lasting physical effects, his punishments whereby he was treated as an object in the power of the authorities, constituted

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<sup>48</sup> [2001] 34 EHRR 97

<sup>49</sup> [1978] 2 EHRR 1

an assault on precisely that which it is one of the main purposes of Article 3 to protect'.<sup>50</sup> In *Keenan v UK*<sup>51</sup> the European Court considered the meaning of 'degrading' within Article 3 and stressed that it will have regard to whether the treatment's objective is to humiliate and debase the person concerned. Also the Court will consider whether, as far as the consequences are concerned, the treatment adversely affected his or her personality in a manner which drove the victim to act against his will or conscience. In *Price v United Kingdom* the European Court acknowledged that there is an element of relativity and ruled that any judgements must take into account the circumstances of the case 'such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.'<sup>52</sup> Moreover, the European Court of Human Rights ruled in *Selmouni v France* that acts which were such as to arouse in the applicant 'feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance'<sup>53</sup> would be considered degrading within the context of Article 3. In *Selmouni* the applicant had been subjected to an assault occasioning actual bodily harm while in police custody for a four day period resulting in total unfitness for work for more than eight days; assault and wounding with a weapon (a baseball bat); indecent assault; assault occasioning permanent disability (the loss of an eye); and rape aided and abetted by two or more accomplices, all of which offences were committed by police officers in the performance of their duties. The European Court concluded that 'in respect of a person deprived of his liberty, resort to physical force which has not been made strictly necessary by

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<sup>50</sup> *ibid* para 33

<sup>51</sup> [2001] 33 EHRR 913

<sup>52</sup> [2001] 34 EHRR 1285. Also *Ireland v UK* (1980) 2 EHRR 25

<sup>53</sup> (1999) 29 EHRR 403, 7 BHRC 1, paras 99-100

his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3’.

The European Court of Human Rights has never permitted any ill-treatment that would fall within the scope of Article 3, even for the most pressing reasons of public interest and irrespective of the victim’s conduct. The unconditional wording of Article 3 renders the motivation for the alleged treatment irrelevant: the ends can never justify the means.<sup>54</sup> Referring to *Selmouni*, Buxton LJ stressed in *C* that Article 3 might be engaged even in circumstances that did not constitute the extreme violence, deprivation and humiliation evident in *Selmouni*. All that is required to invoke Article 3 is that in respect of a person deprived of his liberty, resort to physical force has not been made strictly necessary by his own conduct. Also in *R v Secretary of State for Education and Employment and others, ex parte Williamson and others* the House of Lords ruled that the use of corporal punishment at schools necessarily involved the intentional and formalised infliction of violence by an adult on a child in an institutional setting (para 28).<sup>55</sup> This case was brought by fundamentalist Christian parents who claimed that education legislation prohibiting corporal punishment in schools infringed their right to educate their children in conformity with their own religious convictions. The court concluded that although the European Convention on Human Rights protected the parents’ belief that their children should be exposed to physical punishment at

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<sup>54</sup> S. Palmer ‘A wrong turning: Article 3 ECHR and Proportionality’ (2006) 65 *Cambridge Law Journal* 438-452, 450.

<sup>55</sup> [2005] UKHL 15, per Lord Nicholls at para 28

school and education legislation infringed this right, nevertheless this interference was justified as the child has a right ‘to be brought up without institutional violence.’<sup>56</sup>

The state is also under an obligation under Article 37 of the United Nations Convention on the Rights of the Child, to treat young people in custody with humanity and in a manner which takes into account the needs of persons of their age and to protect them from torture and other cruel, inhuman or degrading treatment or punishment. 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. Article 19 requires states to take all appropriate measures, including legislative, to protect those aged under 18 years from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. 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.

Smallridge and Williamson, in their independent review of the use of restraint in youth custodial settings, concluded that in some circumstances pain compliance was necessary and suggested that the UN Convention on the Rights of the Child was not relevant to the limits of

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<sup>56</sup> Ibid., per Baroness Hale at para 86.

restraint that could be used in the UK, although they did puzzlingly stress that they came to this conclusion reluctantly and ‘with the safety of the young person as the paramount concern’.<sup>57</sup> Adam Rickwood’s mother sought a judicial review of the Coroner’s inquest into Adam’s death. In giving judgment in *R (on the application of Pounder) v HM Coroner for the North and South Districts of Durham and Darlington* Blake J emphatically stated that Smallridge and Williamson ‘were very much mistaken if they believed that the requirements of the UN Convention on the Rights of the Child were irrelevant to the limits of restraint that could be used in the UK’. Blake J observed that the power to use force ‘is not a free-standing right to use force whenever a staff member thinks it necessary or appropriate’ and he added:

‘Moreover, it should have been clear to all properly self-directing public authorities that the limits on the use of force on children in custody was driven by the core principles set out in the UN Convention on the Rights of the Child, to which effect was designed to be given in UK law by the Children Act 1989, and which informs any detailed elaboration of human rights relating to children set out in the Human Rights Act 1998’.

The UN Committee on the Rights of the Child considers that the deliberate infliction of pain is not permissible as a form of control of young people in custodial settings and that it should only be used as a last resort and exclusively to prevent harm to the child or others and that all

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<sup>57</sup> P. Smallridge and A. Williamson *Independent review of restraint in juvenile secure settings* (London: Ministry of Justice and Department for Children, Schools and Families, 2008), 7.

methods of physical restraint for disciplinary purposes be abolished.<sup>58</sup> The UN Committee on the Rights of the Child published a special ‘General Comment No.10’ on *Children’s Rights in Juvenile Justice* (2007) which encouraged the development of juvenile justice policies that ensure respect for children’s rights, and emphasises the principle that states must safeguard the child’s dignity at ‘every point of the justice process’. The UN Committee on the Rights of the Child stressed that the use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional and must never be used as a means of punishment. The Committee recommended that restraint or force only be used when the child poses an imminent threat of injury to themselves or others, and only when all other means of control have been exhausted.

The UN Rules for the *Protection of Juveniles Deprived of their Liberty* (Havana Rules) (1990) provide standards of reference to professionals involved in the management of the juvenile justice system from arrest through to release. They seek to uphold the safety and well-being of children in conflict with the law, emphasising in particular that the conditions and circumstances of detention should ensure respect for children’s rights, and each child must be individually assessed and cared for in line with their needs, status and special requirements. The Havana Rules recommend that recourse to instruments of restraint and to force for any purpose should be prohibited, except in exceptional cases to prevent the young person from inflicting self-injury, injuries to others or serious destruction of property and where all other control methods have been exhausted and failed. Restraint should not cause

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<sup>58</sup> 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), para 39

humiliation or degradation, and should be used restrictively and only for the shortest possible period of time. The UN *Guidelines for the Prevention of Juvenile Delinquency* (Riyadh Guidelines) (1990) adopt a child-centred approach and encourage states to adopt laws and processes that address the conditions underlying juvenile delinquency. Among other measures, states are asked to enact laws that promote and protect the rights and well-being of children and that ‘no child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions’.<sup>59</sup> The UN *Guidelines for Action on Children in the Criminal Justice System* (Vienna Guidelines) (1997) encourage the full implementation of children’s rights in the administration of justice. States are urged to develop separate, child-oriented juvenile justice systems that take account of the specific needs of individual children. Most importantly, these systems should guarantee respect for, and prevent the violation of, children’s rights.

The United Nations Secretary-General in 2006 published a *World Report on Violence against Children* to examine the nature, extent and global magnitude of the violence experienced by children across all settings, including juvenile justice. The study was undertaken in collaboration with the Office of the High Commissioner for Human Rights, the United Nations Children’s Fund and the World Health Organisation. The recommendations included, among other things, that states prohibit all forms of violence against children in all settings, promote non-violent values and awareness-raising and hold perpetrators of violence accountable through appropriate proceedings and sanctions.<sup>60</sup> This recommendation was subsequently re-

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<sup>59</sup> para. 54

<sup>60</sup> P. Pinheiro *Independent Expert for the United Nations Secretary-General’s Study on Violence Against*

*Children, World Report on Violence Against Children* (Geneva: UNICEF, 2006), 18-24



iterated by the UN Committee against Torture in its 2013 report.<sup>61</sup> The UN Secretary General's Guidance Note *UN Approach to Justice for Children (2008)* seeks to ensure the full application of international norms and standards for all children who come into contact with national justice systems. The 2008 Note argues that States should embrace a stronger rule of law for children by adopting strategies that specifically guarantee respect for children's rights. Guiding principles to be followed include the best interests of the child, the right to fair and equal treatment, the right to be heard, and the right to be protected from violence. States are urged to integrate these and other child-sensitive justice notions into relevant constitutional and legislative reform efforts, and to promote overall integrity and accountability in justice and law enforcement. In the *Resolution on Human Rights in the Administration of Justice, in particular Juvenile Justice* (2011) the UN Human Rights Council calls on states to take effective legislative, judicial, social, educative and other measures in implementing UN standards on human rights in the justice system. The 2011 Resolution recognises that children in conflict with the law must be treated in a manner consistent with their rights, dignity and needs and urges states to take all necessary and effective measures, including legal reform where appropriate, to prevent and respond to all forms of violence against children within the justice system.

The United Kingdom has committed itself to aspire towards fulfilling all the obligations outlined in these these Guidelines, Notes, Reports, Resolutions and Rules. 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

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<sup>61</sup> United Nations Committee against Torture *Report of the Committee against Torture Fiftieth Session*

GA/A/68/44 (Geneva: Committee against Torture, 2013), para 28

international thinking on human rights for young people and they represent the minimum recommended standards on youth justice issues. The European Commission has stressed the importance of the principles and standards upheld in these UN instruments. The 2011 EU *Agenda for the Rights of the Child* reinforces the full commitment of the EU to promote, protect and fulfil the rights of the child in all relevant EU policies and actions. The EU Commission's 2006 Communication *Towards an EU Strategy on the Rights of the Child* adopts the UN Convention on the Rights of the Child as the established benchmark for children's rights at EU level.<sup>62</sup> The 2011 Agenda includes 11 concrete actions where the EU can contribute in an effective way to children's well-being and safety; these actions include the development of a 'child-friendly' justice system. The EU Agenda stresses the importance of adhering to the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* (the Havana Rules) 1990. The Agenda also stresses the need for the continuing implementation of the 2007 *EU Guidelines on the Protection and Promotion of the Rights of the Child* which focus on combating all forms of violence against children. As part of making a child-friendly justice system, the 2007 *EU Guidelines* requires the EU to actively protect children from all forms of violence and to promote and pursue a human rights-based approach in the implementation of these objectives guided by the general principles of the UN Convention on the Rights of the Child.

The Committee of Ministers Recommendation on the *European rules for juvenile offenders subject to sanctions or measures* stresses the need for member states to better protect the rights and well-being of young people in conflict with the law and to develop a child-friendly justice system which upholds and promotes the rights and safety of young people in custody,

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<sup>62</sup> COM(2006) 367

in accordance with the principles and provisions of the UN Convention on the Rights of the Child, the Riyadh Guidelines and the Havana Rules.<sup>63</sup> This Recommendation specifically recognises that young people in custody are ‘highly vulnerable’<sup>64</sup> and accordingly imposes a requirement on member states to protect their physical and mental integrity and ensure that conditions in custody do not ‘aggravate the suffering inherent’ in custody.<sup>65</sup> Staff in custodial institutions are prohibited from using force against young people, except as a last resort. It is recommended that good order shall instead be maintained by creating a safe and secure environment in which the dignity and physical integrity of the young person are respected.<sup>66</sup> Furthermore, the Lisbon Treaty, for the first time, incorporated the ‘protection of the rights of the child’ within the stated objectives of the European Union.<sup>67</sup> This commitment is reinforced by Article 3(5) TEU which singles out the protection of the rights of the child as an important aspect of the EU’s external relations policy. Article 6(1) of the revised TEU accords Treaty-level status to the provisions of the *Charter of Fundamental Rights*. Article 24(1) of this Charter grants children a specific right to ‘such protection and care as is necessary for their well-being’ and Article 24(2) provides that ‘in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration’. In 2006 the Council of Europe launched a three year action programme to promote children’s rights and address the social, legal, educational and health impact of violence against children.<sup>68</sup> This programme has now been extended to 2012-2015

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<sup>63</sup> CM/Rec(2008)11

<sup>64</sup> Ibid. para. 52.1

<sup>65</sup> Ibid. para. 49.1

<sup>66</sup> Ibid. paras 90.1 and 88.1

<sup>67</sup> Article 3(3) TEU (Lisbon), Title I, Consolidated version of the Treaty on European Union, O.J. 2008, C115

<sup>68</sup> Council of Europe *Building a Europe for and With Children* at <http://www.coe.int/children> (last visited 23 October 2014).

and lists its objectives as including the elimination of all forms of violence against children and guaranteeing the rights of children in vulnerable situations. Stalford and Drywood have characterised these developments in EU activity as a ‘move towards a more strategic endeavour to engage with children’s rights issues’.<sup>69</sup>

### **The use of violence in custody: diminishing childhood**

The treatment of children is an important signifier of a society’s civility, maturity and humanity. It represents a profound symbolic marker of its core values, principles and moral integrity. The very practice of imprisoning children runs counter to the aims of preventing offending and protecting the welfare of the child. Chung *et al.* identify incarceration as the sanction that may have the greatest impact on young offenders’ ability to achieve psychosocial maturity.<sup>70</sup> The withdrawal from family, school, friends, and community life has an acute impact on the natural development of the young person as it severely limits reinforcement of societal norms and expectations. When a young person is in custody it is difficult to practice prosocial forms of behaviour and they are making no reparation to the victim or society. The vast majority of young people in custody pose no danger or risk to the community and may be a significantly greater danger on their return. Consequently child imprisonment makes little if any positive effect in preventing offending as patterns of

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<sup>69</sup> H. Stalford, E. Drywood ‘Coming of Age?: Children’s rights in the European Union’ (2009) 46 *Common Markey Law Review* 143-172, 145

<sup>70</sup> H.L. Chung, M. Little and L. Steinberg. ‘The transition to adulthood for adolescents in the juvenile justice system: A developmental perspective’, in DW Osgood, EM Foster, C Flanagan, and GR Ruth (eds.) *On your own without a net: The transition to adulthood for vulnerable populations*. (Chicago: University of Chicago Press, 2005).

reconviction with regard to children, following release from all forms of custodial institution are exceptionally high.<sup>71</sup> Hagell and Hazell noted with concern that child imprisonment compounds the likelihood of reconviction and that this has been a recurrent and enduring historical theme of youth imprisonment.<sup>72</sup> In 2011/12 the Ministry of Justice found that young people released from custody had a re-offending rate of 72.6 per cent.<sup>73</sup> In 2012/13, although the numbers of young people in custody had declined by 21.3 per cent on the previous year, the reoffending rate had decreased only very slightly by 0.7 per cent.<sup>74</sup> Subjecting children in custody to further violence seems to serve no useful purpose. In Gyateng *et al.*'s study, 57 per cent of the 1,245 young people surveyed said that the possibility of physical restraint did not make them change their behaviour.<sup>75</sup>

Children in contemporary society occupy a contradictory position, on the one hand they occupy a privileged space as the object of our collective good intentions, but simultaneously they are a large oppressed minority without a voice and subject to a whole range of abuse and exploitation. The Criminal Justice and Courts Act 2015 effectively legitimises the use of violence against vulnerable children who 'should be regarded as children first and offenders

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<sup>71</sup> B. Goldson 'Child imprisonment: a case for abolition', (2005) 5 *Youth Justice* 77

<sup>72</sup> A. Hagell, N. Hazel 'Macro and micro patterns in the development of secure custodial institutions for serious and persistent young offenders in England and Wales' (2001) 1 *Youth Justice* 3-16

<sup>73</sup> Ministry of Justice, Home Office, Youth Justice Board *Youth Justice Statistics 2011/12 England and Wales* (London: Youth Justice Board/Ministry of Justice, 2013)

<sup>74</sup> Youth Justice Board *Annual Report and Accounts 2013/14* (London: Youth Justice Board, 2014)

<sup>75</sup> T. Gyateng, A. Moretti, T May and P J *Young people and the secure estate: needs and interventions* (London: Youth Justice Board, 2013)

second'.<sup>76</sup> Lord Elstyan-Morgan, on behalf of the Joint Commission on Human Rights, condemned the infliction of severe pain to maintain good order and discipline:

‘[t]he idea that you should be allowed to use substantial force and pain as an instrument is quite wrong. Would you use pain to train a dog or horse? Why should you use pain to train a child?’<sup>77</sup>

The 2015 Act does not represent the only occasion in which coercive violence towards children is legitimised so that the power imbalance between children and adults is sustained, the special status of childhood is diminished and the child’s human rights are violated. The domestic laws against cruelty to children endorse the common law defence of ‘reasonable chastisement’, which allows those with parental responsibility to lawfully inflict violence upon children for the purpose of correcting or punishing a child. Section 58 of the Children Act 2004 limits reasonable chastisement to mild smacking and only when the punishment amounts to common assault, but not when it results in actual bodily harm. Nonetheless it still sends out a dangerous message that it is legally acceptable to assault a child even where the punishment results in grazes, cuts, scratches, abrasions, bruising or a black eye.<sup>78</sup> This position is increasingly at odds with its European neighbours as 24 European countries have abolished parents’ right to use any forms of physical punishment. As Freeman writes about English law: ‘[n]othing is a clearer statement of the position that children occupy in society, nor a clearer badge of childhood, than the fact that children are the only members of society

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<sup>76</sup> Joint Committee on Human Rights *The Use of Restraint in Secure Training Centres* (London: TSO, 2008)

<sup>77</sup> HL Deb vol 694 col 301 18<sup>th</sup> July 2007

<sup>78</sup> Home Office *Counting Rules for Crime* (London: Home Office, 2007); see also R. Arthur ‘Banning the physical punishment of children in the UK: a human rights imperative for children’ (2014) 44 *Family Law* 537-540

who can be hit with impunity.’<sup>79</sup> The challenge remains to do better for all children and young people, including those young people sentenced to custody. As the Council of Europe’s Human Rights Commissioner, Thomas Hammarberg, stressed, he was not aware ‘of any other member state that sanctions the use of deliberate pain as a method of restraining a child’ and he recommended the immediate discontinuation of methods of restraint that deliberately inflict pain upon children.<sup>80</sup> The numbers of young people in custody in England and Wales have been falling in recent years, between May 2010 and September 2014 there was a 58.55 per cent reduction in the number of young people under 18 years of age detained in the secure estate.<sup>81</sup> Nevertheless these numbers are 50 per cent higher than they were 20 years ago<sup>82</sup> and are still amongst the highest in Europe<sup>83</sup> and the use of restraint and violence is increasing. This suggests the need for a renewed commitment to compliance with the UN Convention on the Rights of the Child and the other human rights instruments discussed in this article and ultimately a commitment to the central message of the *World Report on Violence against Children*<sup>84</sup> that ‘no violence against children is justifiable, and all violence against children is preventable’. An example of such a commitment is evident in Northern Ireland’s cross-Department 10 year *Strategy for Children and Young People* (2006-2016)

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<sup>79</sup> M. Freeman ‘The Convention: An English Perspective’ in M. Freeman (ed.) *Children’s Rights: A Comparative Perspective* (Aldershot: Dartmouth, 1996), 100.

<sup>80</sup> T. Hammarberg *Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe CommDH 2008/27* (Strasbourg: Council of Europe, 2008)

<sup>81</sup> Ministry of Justice *Youth Custody Report September 2014* (London: Ministry of Justice, 2014)

<sup>82</sup> J. Pickford, P. Dugmore *Youth Justice and Social Work* (London: Learning Matters 2012), 93

<sup>83</sup> Council of Europe *Council of Europe Annual Penal Statistics: SPACE 1 – 2011* (Strasbourg: Council of Europe, 2008), 76.

<sup>84</sup> P. Pinheiro *Independent Expert for the United Nations Secretary-General’s Study on Violence Against Children, World Report on Violence Against Children* (Geneva: UNICEF, 2006), 18-24

which promotes the achievement of five high level outcomes similar to those in England's *Every Child Matters* framework while also adding an important sixth outcome: 'Living in a society which respect's children's rights'.<sup>85</sup>

## Conclusion

Physical restraint is a form of state sanctioned coercion and violence against children.<sup>86</sup> In January 2006 the Howard League for Penal Reform published an independent inquiry by Lord Carlile of Berriew QC which investigated the use of physical restraint of children in prisons, secure training centres and local authority children's homes. Lord Carlile recommended that restraint should never be used as a punishment or to secure compliance.<sup>87</sup> Lord Carlile found that 'some of the treatment children in custody experience would in another setting be considered abusive and could trigger a child protection investigation'. Similarly, Smallridge and Williamson recommended that a system of restraint should only be used as a last resort.<sup>88</sup> These views have been echoed by the domestic judiciary, the European

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<sup>85</sup> Office of the First Minister and Deputy First Minister (OFMDFM) *Our Children and Young People – Our Pledge. A Ten Year Strategy for Children and Young People in Northern Ireland 2006-2016* (Belfast: OFMDFM, 2006)

<sup>86</sup> B. Goldson 'Child Incarceration: Institutional Abuse, the Violent State and the Politics of Impunity' in P. Scraton and J. McCulloch (eds), *The Violence of Incarceration*, (London: Routledge, 2009)

<sup>87</sup> Lord Carlile of Berriew *An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes*. (London: The Howard League for Penal Reform, 2006).

<sup>88</sup> P. Smallridge, A. Williamson *Independent review of restraint in juvenile secure settings* (London: Ministry of Justice and Department for Children, Schools and Families, 2008).



Court of Human Rights, the United Nations Committee on the Rights of the Child and the Joint Commission on Human Rights, to name a few.

The Criminal Justice and Courts Act 2015 allows for the deliberate use of pain-inducing restraint techniques on children in secure colleges. Young people in custody have already suffered vulnerable, abusive and disadvantaged lives prior to their detention. They are amongst the most ‘in need’ of the highest standards of care. The 2015 Act embodies what Baker and Roberts referred to as ‘penal fundamentalism’ as it combines a ‘moral stance that the criminal should suffer through “hard treatment”’ with a ‘conviction that harsh punishment deters crime’.<sup>89</sup> According to this mentality, if someone fails to change, it is because the treatment was not harsh enough. This approach has also been reflected in views expressed by senior politicians. In the House of Lords Lord McNally, Minister of State for Justice, when discussing the use of physical restraints in secure training centres, referred to young people in custody as ‘... large and quite violent young people ... we use the word “children” very casually’.<sup>90</sup> Prior to this, when Jack Straw was Justice Minister he bluntly argued that young people in custody ‘... are not children; they are often large, unpleasant thugs, and they are frightening to the public.’<sup>91</sup> This portrayal of young people in custody as unpleasant and violent young adults has served to rationalise state authorised violence to control children in custody. This simplistic, desensitising and pejorative portrayal of young people in custody

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<sup>89</sup> E. Baker & J.V. Roberts ‘Globalization and the new punitiveness’, in J. Pratt, D. Brown, M. Brown, S.

Hallsworth, W. Morrisson (eds) *The New Punitiveness* (London: Routledge, 2005), 128

<sup>90</sup> HL Deb vol 720 col 973 21 July 2010.

<sup>91</sup> HC Deb vol 477 col 155 10 June 2008

plays on popular fears about young offenders and provides a ‘discursive benchmark’<sup>92</sup> which underpins and dominates the development of youth justice law and policy in a way which is antithetical to a discourse of rights, egalitarianism, inclusion and justice. The Criminal Justice and Courts Act 2015 diminishes the human rights of young people in custody by endangering their physical and emotional security and it ultimately prevents secure colleges from developing in a way which is dedicated to inclusion, human rights, equality and young people’s healthy development. The law needs to be more responsive to the range of complex realities facing those children sentenced to custody, and develop a framework for acknowledging their vulnerabilities and sensitivity and ensuring the protection of their rights and welfare while incarcerated. Where the state has deprived the child of their liberty, the state has a special responsibility for that child’s welfare. Accordingly it is incumbent upon the state to provide that child with practical and effective protection from inhuman and degrading treatment by the state’s own agents.

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<sup>92</sup> M.K. Meyers, B. Glaser, K.M. Donald ‘On the front lines of welfare delivery: Are workers implementing policy reforms?’ (1998) 17 *Journal of Policy Analysis and Management* 22-31.