

## RESOLUTION THROUGH DEVOLUTION? POLICING, YOUTH JUSTICE AND IMPRISONMENT IN WALES

**Gavin Dingwall\***

**De Montfort University, Leicester**

### **Abstract:**

Criminal justice was not devolved to the Welsh Assembly but the process of devolution has resulted in de facto differences emerging between England and Wales. In the previous edition of this journal, Jackie Jones argued that these differences would lead to the eventual devolution of criminal justice to the Assembly. This response article concentrates on three distinct areas of criminal justice policy – policing, youth justice and imprisonment – and seeks to situate the Welsh concerns in a broader context. The conclusion draws together what I see as the two central themes of Jones' paper: the inevitability of a Welsh criminal justice system and the desirability of this.

**Keywords:** Wales, devolution, criminal justice system, policing, young offenders

### **Introduction**

At a time when many believe that the Labour Government is in its final throws, it is worth remembering that, buoyed by an enormous popular mandate,<sup>1</sup> many reforms of genuine magnitude took place in its infancy. The 'wonder of Whitehall' truly 'hit the runway with armfuls of precise plans'.<sup>2</sup> One of the most significant was the devolution of power to the Welsh Assembly and to other bodies in London, Northern Ireland and Scotland.<sup>3</sup> In each case, the areas of competency were delineated in the relevant legislation: criminal justice, for example, fell within the competency of the Scottish Parliament<sup>4</sup> but not the Welsh Assembly. Jackie Jones' article, 'The Next Stage of Devolution? A (D)evolving Criminal Justice System for Wales' published in the previous edition of *Crimes and Misdemeanours*

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\*Reader in Law. I would like to thank my colleague Jonathan Merritt for his advice on the policing section of this paper. GDingwall@dmu.ac.uk.

<sup>1</sup> Labour won 419 seats as opposed to the Conservatives 165. The popular mandate though masks the fact that there was a 71.2% turnout and Labour 'only' achieved 43.2% of the vote.

<sup>2</sup> Polly Toynbee and David Walker, *Better or Worse? Has Labour delivered*, (Bloomsbury, 2005) p. 3

<sup>3</sup> See generally Vernon Bogdanor, *Devolution in the United Kingdom*, (OUP, 2001); Noreen Burrows, *Devolution*, (Sweet & Maxwell, 2000); Russell Deacon and Alan Sandry, *Devolution in the United Kingdom* (Edinburgh University Press, 2007); G Leicester, 'Scottish and Welsh Devolution,' in Robert Blackburn, and Raymond Plant, (eds.) *Constitutional Reform: The Labour Government's Constitutional Reform Agenda*, (Longman, 1999).

<sup>4</sup> The Scotland Act 1998 listed the reserved powers in Schedule 5. The remainder, including criminal justice, were therefore devolved to the Scottish Parliament.

argues that devolution has led to significant changes to criminal justice in Wales and assesses the possibility that a distinct Welsh system will emerge.<sup>5</sup> Her argument is rich and detailed so this response can only focus on aspects of it. Given my academic specialism, I will concentrate on criminal justice policy. Particular attention will be paid to policing, youth justice and imprisonment. None of these areas have been devolved to the Welsh Assembly but *de facto* differences have emerged between the provision of these services in Wales and England. This gives rise to the question of whether these existing differences will either provide the impetus for the devolution of criminal justice or will expose insurmountable difficulties with the current model which will necessitate fundamental constitutional reform.

The ordering in this paper is somewhat different to Jones'. The initial section covers policing. Attention will be paid in particular to the suggestion that the existing four Welsh forces should be merged into one force covering all of Wales, a proposal that Jones rejects. The second section addresses youth justice. The Youth Justice Board is responsible for both Wales and England, however, the position is complicated by the fact that many members of youth offending teams are drawn from devolved services such as education or social work. This has led to an *All Wales Youth Offending Strategy* being created in 2004.<sup>6</sup> Jones and I agree that the two current proposals – a reduction in the use of custody and greater co-operation between youth justice and other services – are welcome. Here my comments relate to the vagueness of the aims espoused by Labour and Plaid Cymru. Finally, the use of custody for adult offenders sentenced in Wales will be analysed. Jones states that greater use is made of imprisonment by the courts in Wales however the official statistics suggest otherwise. Nonetheless, her concerns are real and are not affected by the proportion of offenders receiving a custodial sentence. I conclude by drawing together what I see as the two central themes of Jones' paper: the inevitability of a Welsh criminal justice system and the desirability of this.

## **1 Policing: On the Meaning of 'Local'**

The Home Office retains responsibility for policing in Wales. Jones' article considers the impact of devolution on the traditional structure of policing in England and Wales.<sup>7</sup> For some

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<sup>5</sup> Jackie Jones, '[The Next Stage of Devolution? A \(D\)evolving Criminal Justice System for Wales.](#)' *Crimes and Misdemeanours*, 2(1) (2008) 1-39.

<sup>6</sup> Welsh Assembly Government and the Youth Justice Board, *All Wales Youth Offending Strategy*, (Welsh Assembly Government and Youth Justice Board, 2004).

<sup>7</sup> Jones, 'The Next Stage of Devolution?' pp. 22-25.

time there has been a national debate about the optimum size of police forces.<sup>8</sup> Essentially the debate boils down to effectiveness. Traditionally local forces, of which there are four in Wales, set their own priorities. The Police Act 1996, which consolidated the Police Act 1964 and the Police and Magistrates' Court Act 1994, states at s.10 that the chief constable is responsible for the 'direction and control' of the force, but that the chief constable has to act with regard to the local policing plan and objectives which are drawn up by the police authority in liaison with the chief constable. Both the chief constable and the police authority have to devise a strategy to cater for local need.<sup>9</sup>

Lord Carlile, amongst others, has challenged this framework by calling for an all-Wales force.<sup>10</sup> Would such a force better respond to the needs of Wales than the current model? The official argument for amalgamating the existing forces into one or two new entities is that larger forces would be better equipped to deal with 'new' threats such as terrorism. Such threats are often presented as a by-product of globalisation; crime no longer respects national borders let alone police force boundaries. There is though nothing new about terrorism in the British Isles. Many existing forces have had direct experience of dealing with it over the years. Maybe the nature of the threat has changed and this does demand significant changes to policing, but the case has not been made out by the Government. Peter Hain (former Secretary of State for Wales) needed to provide evidence to escape Jones' charge of scare-mongering.<sup>11</sup> It is though possible to combine local policing with specialist units. Newburn and Reiner argue that such an approach is likely to emerge in the United Kingdom, as it has elsewhere:

The British police are likely to move towards the international pattern of specialist national units for serious crime, terrorism, public order, large-scale fraud, and other national or international problems. Local police providing services to particular communities will remain, but with sharp differences between 'service'-style organizations in stable suburban areas, and 'watchman' bodies with the rump duties of the present police, keeping the lid on underclass crime in symbolic locations.<sup>12</sup>

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<sup>8</sup> See Barry Loveday, *Size isn't Everything: Restructuring Policing in England and Wales*, (Policy Exchange, 2006); Eugene McLaughlin, 'Forcing the Issue: New Labour, New Localism and the Democratic Renewal of Police Accountability,' *Howard Journal*, 44(5) (2005) 473-489. The Government's plans for widespread amalgamation, found in Her Majesty's Inspectorate of Constabulary, *Closing the Gap*, (HMIC, 2005) has been abandoned.

<sup>9</sup> See further Tim Newburn and Robert Reiner, 'Policing and the Police,' in Mike Maguire et al (eds.) *The Oxford Handbook of Criminology*, (4<sup>th</sup> ed., OUP, 2007) pp. 924-927.

<sup>10</sup> <http://www.news.bbc.co.uk/1/hi/wales/3047720.stm> cited in Jones, 'The Next Stage of Devolution?'

<sup>11</sup> Jones, 'The Next Stage of Devolution?' p. 22 .

<sup>12</sup> Newburn and Reiner, 'Policing and the Police,' p.944.

Lord Carlile's justification is different and relates not to a changed threat, real or perceived, but to the benefits of pooling resources and expertise.<sup>13</sup> He cites the Lynette White case, which took South Wales Police 15 years to solve, as a failure of the current model. One tragic case though does not provide sufficient grounds to justify amalgamation. Many large forces including the West Midlands and the Metropolitan Police have taken considerable time to apprehend offenders, sometimes through no fault of their own. Enlargement certainly does not of itself lead to efficiency.

The danger associated with this argument is that increasing the size of forces reduces the opportunity to cater for specific geographical need. Rural and urban areas often have different policing priorities, although one should be wary of drawing a simplistic rural/urban dichotomy. Environmental criminologists have shown that crime rates vary markedly between different parts of cities.<sup>14</sup> Similarly, research suggests that rurality should not be regarded as an undifferentiated 'other'. Moody recognises that criminologists have often fallen into this trap.<sup>15</sup> Jones, however, avoids it and provides the example of a particular problem affecting one predominantly rural area when she discusses people trafficking between Wales and Ireland.<sup>16</sup>

If, however, it is accepted that the broad hypothesis is correct, namely that rural areas generally have different policing needs from urban areas, the current situation in Wales appears fit for purpose. Dyfed-Powys and North Wales are essentially rural forces while the Gwent and South Wales forces police predominantly urban areas. Jones is correct in rejecting the call for amalgamation. Accordingly:

Chief constables, to a large extent already focusing their priorities in terms of local demand, can channel their operational forces and funding in the most appropriate local way, keeping in mind the (possibly) different policy, constitutional and language requirements in a specifically Welsh context.<sup>17</sup>

This argument goes beyond local need in so far as it recognises that there are policy, constitutional and language requirements that are unique to Wales. The Welsh, as opposed to the local, dimension could equally be catered for by creating an all-Wales force. What

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<sup>13</sup> <http://www.news.bbc.co.uk/1/hi/wales/3047720.stm>

<sup>14</sup> For an overview see Anthony Bottoms, 'Place, Space, Crime, and Disorder,' in Maguire et al (eds.) *The Oxford Handbook of Criminology*, (4<sup>th</sup> ed., OUP, 2007) chap. 17.

<sup>15</sup> Susan Moody, 'Rural Neglect: The case against criminology,' in Gavin Dingwall and Susan Moody, (eds.) *Crime and Conflict in the Countryside*, (University of Wales Press, 1998) pp. 23-24.

<sup>16</sup> Jones, 'The Next Stage of Devolution?' fn 102.

<sup>17</sup> *Ibid* pp 23-24.

Jones advocates recognises that smaller forces can cater for both needs. It is a compelling argument. The current model clearly cannot cater for every policing need – no model can – but the people of Wales (and indeed elsewhere) are best served by retaining forces which can respond to local policing issues. A further relevant consideration is the sheer cost that would be associated with amalgamation. Financial savings may be made in the medium to long term, but it is beyond dispute that the initial outlay would be considerable. Amalgamation would not only demand a policy justification but a clear acknowledgement of the financial implications. The benefits of amalgamation would not only have to be genuine, they would have to be considerable.

## 2 Youth Justice and the *One Wales* Agenda

Youth justice in Wales is an oddity. The Youth Justice Board, established in the Crime and Disorder Act 1998, has responsibility for monitoring the youth justice system across England and Wales.<sup>18</sup> However, most members of youth offending teams are drawn from services such as education or social work which have been devolved to the Assembly.<sup>19</sup> The services that are available therefore differ in practice. A further Welsh dimension is the existence of a document *Extending Entitlement* which contains 12 entitlements for young people.<sup>20</sup> There is obvious potential for conflict between the policies of the Youth Justice Board and the implementation of these entitlements in the Welsh context.

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<sup>18</sup> Crime and Disorder Act 1998, s.41. The Youth Justice Board's functions are listed in s.41(5):  
(a) to monitor the operation of the youth justice system and the provision of youth justice services;  
(b) to advise the Secretary of State on the following matters, namely—  
(i) the operation of that system and the provision of such services;  
(ii) how the principal aim of that system might most effectively be pursued;  
(iii) the content of any national standards he may see fit to set with respect to the provision of such services, or the accommodation in which children and young persons are kept in custody; and  
(iv) the steps that might be taken to prevent offending by children and young persons;  
(c) to monitor the extent to which that aim is being achieved and any such standards met;  
(d) for the purposes of paragraphs (a), (b) and (c) above, to obtain information from relevant authorities;  
(e) to publish information so obtained;  
(f) to identify, to make known and to promote good practice in the following matters, namely—  
(i) the operation of the youth justice system and the provision of youth justice services;  
(ii) the prevention of offending by children and young persons; and  
(iii) working with children and young persons who are or are at risk of becoming offenders;  
(g) to make grants, with the approval of the Secretary of State, to local authorities or other bodies for them to develop such practice, or to commission research in connection with such practice; and  
(h) themselves to commission research in connection with such practice.

<sup>19</sup> The Government of Wales Act 2006, Schedule 5, Part 1

<sup>20</sup> The National Assembly for Wales, *Extending Entitlement: supporting young people in Wales*, (National Assembly of Wales, 2000) pp. 6-8.

It should be said that the central tenets of policy are not in direct conflict.<sup>21</sup> There are though areas in need of resolution and this led to the creation of the *All Wales Youth Offending Strategy* which was devised by the Welsh Assembly Government in tandem with the Youth Justice Board.<sup>22</sup> The strategy is based on the premise that:

The best way to stop young people offending is to prevent it from happening in the first place. The more we can stop young people entering the criminal justice system, the more we reduce the risk of them getting into even worse trouble in the future. When a child or young person does offend, there need to be effective ways of dealing with them in the community. Sometimes custody will be a necessity. But it really does need to be a last resort. Locking up children and young people almost always stores up worse trouble for the future – creating new victims and more serious harm.<sup>23</sup>

The focus on need is welcome, as is the categorical statement that custody should really only be used as a last resort but, for reasons that are outlined later, there are dangers associated with welfare-based responses to offending which have to be recognised and guarded against. One should also be careful not to read too much into the comment that custody needs to really be a last resort: this comment in no way changes the legal test for custody which is not as restrictive.<sup>24</sup>

In June 2007 the Labour and Plaid Cymru groups in the National Assembly published an agreement document titled *One Wales: A progressive agenda for the Government of Wales*.<sup>25</sup> The paper goes beyond criminal justice to consider social policy more broadly. Many other areas receive greater attention. In a 43 page document, 'Ensuring an Effective Youth and Criminal Justice System' merits just half a page. The two central proposals regarding youth justice are a move towards the greater use of non-custodial sentencing and greater integration between the youth justice system and other services.<sup>26</sup> These are both

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<sup>21</sup> The Youth Justice Board Vision is that 'more offenders are caught, held to account for their actions, and stop offending; children and young people receive the support they need to lead crime-free lives; victims are better supported; and the public has more confidence in the youth justice system.' <http://www.yjb.gov.uk/en-gb/yjb/MissionVisionandValues/> Section 9(1) Criminal Justice and Immigration Act 2008 (which will apply to both England and Wales) changes these purposes. Now the court must have regard to the principal aim of the youth justice system (which is to prevent offending or re-offending by persons aged under 18), the welfare of the offender, and the following purposes of sentencing: the punishment of offenders; the reform and rehabilitation of offenders; the protection of the public; and the making of reparation. How these various competing aims are to be reconciled is not made clear.

<sup>22</sup> Welsh Assembly Government and the Youth Justice Board, *All Wales Youth Offending Strategy*

<sup>23</sup> *Ibid* foreword.

<sup>24</sup> See the Powers of Criminal Courts (Sentencing) Act 2000, ss.91 and 100.

<sup>25</sup> Labour and Plaid Cymru, *One Wales: A progressive agenda for Wales* (2007) available at <http://new.wales.gov.uk/about/strategy/publications/onewales/onewales.pdf?lang=en> .

<sup>26</sup> *Ibid* p 29.

common and welcome, aspirations in youth justice policy. The national Youth Justice Board is equally committed to a programme of non-custodial intervention<sup>27</sup> and claims to be fostering greater inter-agency co-operation.<sup>28</sup> The policy proposals largely mirror existing national priorities, even if the *One Wales* agenda expresses it with greater clarity.

The United Nations Convention on the Rights of the Child (hereafter 'the Convention'), which the United Kingdom is a signatory to, places states under an international obligation to divert young offenders from court and from custody save as a last resort.<sup>29</sup> Diversion, however, is a broad term which encompasses a range of pre and post trial initiatives. This is illustrated in Article 40 of the Convention which states that a 'variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available'. There is no obligation on signatories to make all of these available, but there is an obligation to provide a range of diversionary options.

The use of the term 'diversion' is not without problems. Dingwall and Harding comment:

The term is pleasingly and usefully concise and does possess some explanatory force, but it is also a concept which needs to be handled carefully and its definition is a matter of some importance. In particular, it suggests a certain norm and prioritisation as regards responses to criminal offending: that is, a formal and official process of prosecution, trial and sanctioning...But this idea of the centrality of formal criminal justice may be misleading, not only because many rule breakers do not experience the process but also because in many instances its use would never have been seriously contemplated in the first place. "Diversion" may be an appropriate description of what happens to those offenders for whom there is a conscious decision not to use the formal process of prosecution and trial in cases where there is a fair expectation that it would otherwise have taken place... "Diversion" begs the question of the norm: from what is the offender being diverted.<sup>30</sup>

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<sup>27</sup> Youth Justice Board, *Position Statement on Sentencing Young People to Custody*, (Youth Justice Board, 2007; Youth Justice Board, *Strategy for the Secure Estate for Children and Young People: Plans for 2005/06 to 2007/08*, (Youth Justice Board, 2005). When the United Nations Committee on the Rights of the Child visited the United Kingdom in 2002, they criticised existing policy on the use of custody and recommended that it only be used as a last resort.

<sup>28</sup> One of the Youth Justice Board's 'core principles' is Partnership: 'we recognise the value of working with others to help deliver our goals and targets.' <http://www.yjb.gov.uk/en-gb/yjb/MissionVisionandValues/>

<sup>29</sup> United Nations Convention on the Rights of the Child (1989) General Assembly Resolution 44/25 Article 37(b): 'The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'

<sup>30</sup> Gavin Dingwall and Christopher Harding, *Diversion in the Criminal Process*, (Sweet & Maxwell, 1998) pp. 1-2.

In England and Wales the most common way of responding to juvenile offending is through the use of reprimands and warnings.<sup>31</sup> These measures were introduced in the Crime and Disorder Act 1998 and replaced the use of police cautioning.<sup>32</sup> Put simply, an offender may be reprimanded only if he has not previously been reprimanded or warned<sup>33</sup> and may be warned if he has been reprimanded before or the offence is too serious to be dealt with by a reprimand.<sup>34</sup> A warning carries the additional requirement that the offender undergoes a rehabilitative programme administered by a local youth offending team.<sup>35</sup>

Officially the scheme was designed to offer a more robust response to juvenile crime.<sup>36</sup> Many young offenders, apparently, were offending with impunity despite receiving previous cautions.<sup>37</sup> The added requirements do though pose the question of whether this is truly a diversionary scheme. It is certainly debatable that it keeps many offenders out of custody.<sup>38</sup> After a certain threshold, the case is heard in the Youth Court. This is surely correct as a matter of principle. Most juvenile offending is minor in character<sup>39</sup> and requires minimal intervention. More serious cases require a different response and, due to the potential penalties involved, such defendants require the due process protection offered by a court. What seems more likely in reality is that the response to minor offending has become more punitive. Rather than acting as an alternative to custody, minor offenders are rapidly drawn into a system of reprimands and warnings.<sup>40</sup> If they re-offend, which many do,<sup>41</sup> the Youth Court beckons.

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<sup>31</sup> 62,524 reprimands and 32,011 warnings were issued in 2005/06 out of 212,242 disposals: Youth Justice Board, *Youth Justice Annual Statistics 2005/06*, (Youth Justice Board, 2008) p. 16. It is important to note that a young person may receive more than one disposal.

<sup>32</sup> Crime and Disorder Act 1998, s.65(8).

<sup>33</sup> s.65(2).

<sup>34</sup> s.65(3) An offender who has previously been warned or reprimanded may only be warned again if the offence was committed more than two years after the date of the previous warning and the constable considers the offence to be not so serious as to require a charge to be brought.

<sup>35</sup> Crime and Disorder Act 1998, s.66(2). The offender does not have to take part in a rehabilitative programme if it is thought inappropriate.

<sup>36</sup> Home Office, *No More Excuses*, (Home Office, 1997).

<sup>37</sup> *Ibid* para. 5.10. See also Audit Commission, *Misspent Youth* (Audit Commission, 1996). In fact the evidence did not support this conclusion. See Home Office, *Criminal Careers of those born in 1953, 1958 and 1963* Statistical Bulletin 7/85 (Home Office, 1985); Jean Hine and Anne Celnick, *A One Year Reconviction Study of Final Warnings* RDS online report No 05/01 (HMSO, 2001).

<sup>38</sup> Although it would be wrong to say that young offenders are never reprimanded or warned for what seem like serious matters. The juvenile statistics show that 58 reprimands or warnings were issued for death or injury by reckless driving, 293 for robbery and 1,636 for domestic burglary, *Youth Justice Annual Statistics* p. 21.

<sup>39</sup> Nacro, *Some Facts about Children and Young People who Offend – 2005 Youth Crime Briefing* (Nacro, 2007); D Wilson, C Sharp, and A Paterson, *Young People and Crime: Findings from the 2005 Offending, Crime and Justice Survey* Home Office Online Report 17/06 (Home Office, 2006).

<sup>40</sup> Darrell Fox *et al* 'Restorative Final Warnings: policy and practice,' *Howard Journal*, 45 (2006) 129-140.



A further concern is that, officially, the scheme is not classed as punitive in nature.<sup>42</sup> This means that a juvenile offender is not afforded the same human rights protection if he is reprimanded or warned than he would receive if he was being tried in the Youth Court.<sup>43</sup> This might appear non-problematic: guilt was admitted and the intervention is comparatively minor. Research, however, suggests that juveniles often admit to a particular interpretation of events without fully comprehending that such behaviour amounts to a crime.<sup>44</sup> Hine cites the example of a boy who received a final warning for the theft of a bicycle seat. He believed that the bike was abandoned and he was entitled to take the seat: 'I could understand if the bike was like a two grand bike that was sitting there in perfect condition and I just go up and whip the seat off but this bike was crap. It had just been left there.'<sup>45</sup> Arguably he was not guilty of theft as he had not acted dishonestly.<sup>46</sup> This lack of protection raises questions about whether the scheme complies with Article 40(3)(b) of the Convention which states that diversionary schemes must fully respect 'human rights and legal safeguards'.

Moreover, the initial intervention may appear minor but its effect can become significant on repetition or can have other major consequences for the offender.<sup>47</sup> At a fundamental level, Dingwall and Koffman have challenged the view that reprimands and warning are not punitive in character.<sup>48</sup> They argue that the process and consequences can certainly be perceived as a punitive response to criminal behaviour but that such a response can be viewed as a proportionate punishment to minor offending by juveniles.<sup>49</sup> The Convention

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<sup>41</sup> R Evans, and K Puech, 'Warnings and Reprimands: popular punitiveness or restorative justice?' *Criminal Law Review* (2001) 794-805 found no difference in re-offending rates between reprimands/warnings and cautions. Hine and Celnick, *A One Year Reconviction Study of Final Warnings*, found that warnings had a statistically better outcome by 6% in relation to a comparison group of cautions but found no difference between those given a change program and those who were exempted.

<sup>42</sup> *R v Durham Constabulary, ex parte R* [2005] UKHL 21.

<sup>43</sup> Alisdair Gillespie, 'Reprimanding Juveniles and the Right to Due Process,' *Modern Law Review*, 61 (2005) 1006-1015.

<sup>44</sup> Jean Hine, 'Young People's Perspectives on Final warnings,' *Web Journal of Current Legal Issues*, 2 (2007) <http://webjcli.ncl.ac/2007/issue2/hine2.html>

<sup>45</sup> *Ibid.*

<sup>46</sup> Theft Act 1968, s.2(1)(a). See also Simon Holdaway, 'The Final Warning: appearance and reality,' *Criminal Justice*, 3(4), (2003) 351-67.

<sup>47</sup> As in the *Durham Constabulary* case itself where the 15 year old offender was placed on the sex offenders register.

<sup>48</sup> Gavin Dingwall, and Laurence Koffman, 'Diversion, Punishment and Restricting Human Rights,' *Northern Ireland Legal Quarterly*, 57(3) (2006) 478-493; Laurence Koffman, and Gavin Dingwall, 'The Diversion of Young Offenders: A proportionate response?' *Web Journal of Current Legal Issues*, 2 (2007) <http://webjcli.ncl.ac/2007/issue2/koffman2.html>

<sup>49</sup> Koffman and Dingwall, 'The Diversion of Young Offenders': 'It is important to identify a coherent rationale for alternatives to prosecution, rather than some vague appeal to administrative convenience, so as to preserve the entitlement of the young offender to due process...This could be achieved by giving prominence to an assessment of offence seriousness, and a clearer articulation of

recognises that the disposition should in part reflect the seriousness of the offence: Article 40(4) provides that the measure must be 'appropriate to [the offender's] well-being and proportionate both to their circumstances and the offence'. In sum, diverting offenders from custody is valuable but diversionary schemes can take many forms. The model in operation in England and Wales raises serious concerns about net-widening and lack of due process.

Jones quotes the Commissioner's hope that the originality of the Scottish children's hearing system deserves to be met with success. She interprets this to mean that 'Scotland has it right on this issue',<sup>50</sup> although on face value the Commissioner's comment would appear to single out the originality of the scheme and the hope, as opposed to the claim, that the system is successful as a result. She continues by saying that perhaps Wales could also get it right if this area of criminal justice were to be devolved.<sup>51</sup> This can be taken in two ways. The first, and most obvious, is that Wales could improve its juvenile justice system by adopting the Scottish model or some variant thereof. Alternatively it might be the case that Jones sees children's hearings as one way, rather than the only way, of achieving an appropriate juvenile justice system. Given that she does not expand upon an alternative model, I will assume that she is at least sympathetic to the Scottish system. I too believe that Scotland has a preferable approach to England and Wales, though it needs to be recognised that there are dangers associated with it. Children's hearings, at least in their traditional guise, are focussed on the welfare of the child. Indeed offenders are only one category amongst several who can be referred to a hearing.

Recent research by McAra and McVie has, however, criticised the current approach on the basis that it is too invasive and that the scheme would benefit from less intervention.<sup>52</sup> This raises two issues. The first is that the welfare-based measures imposed may not be especially effective if re-offending rates are a measure of success. Minimal intervention may be preferable to the current Scottish approach. An allied danger is that the system is too inclusive. This is a particular concern with regard to the referral of non-offenders, but the approach would also legitimate perceived welfare needs determining the outcome of a hearing with scant regard to the seriousness of the offence. Someone who commits a more serious offence may well be judged to have greater welfare needs, but other factors can influence this decision – indeed they should if welfare is the primary aim. This is not to say

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the fact that there is no logical reason why a 'justice' approach should be synonymous with a more punitive approach'.

<sup>50</sup> Jones, 'The Next Stage of Devolution?' p. 19.

<sup>51</sup> Ibid p. 19.

<sup>52</sup> Lesley McAra and Susan McVie, 'Youth Justice? The impact of system contact on patterns of desistance from offending,' *European Journal of Criminology*, 4 (2007) 315-345.

that a young offender's welfare is not important. Rather it is a recognition that discarding or minimising the relevance of offence-severity challenges the principle that an offender (of any age) should not receive a disproportionate punishment.

Some may attempt to counter this argument by saying that a welfare programme of this nature, or indeed the programme undertaken after a warning is issued in England and Wales, should not be viewed as punishment. This is not the place to rehearse the definitions of punishment that have been offered, but it would seem that this claim confuses the *definition* of punishment with the *aim* of punishment. Rehabilitation is accepted as a justification for punishment (even if there is a debate about whether punishment can achieve this aim) but, if it seen as a justification *for* punishment, it follows that it *is* punishment. Bearing in mind the fact that the programme, which may be invasive, is triggered in this context by the commission of an offence, it seems difficult to argue that it is not a form of punishment.

Children's hearings do serve as an interesting alternative to the system of reprimands and warnings employed in England and Wales. If youth justice was devolved to Wales, careful consideration should be given to adopting a variant of children's hearings but the perceived benefits would need to be weighed against the dangers of over-intervention and the inevitable tension between perceived need and proportionality.

A further option would be to adopt the youth conferencing scheme that operates in Northern Ireland. The Justice (Northern Ireland) Act 2002 made statutory provisions for the development of a restorative justice approach to youth offending. Save with regard to the most serious offences, a conference can take place if the child admits guilt and consents to the process. Informal warnings are also available if the offence is insufficiently serious to warrant a conference. The conference must involve a youth conference co-ordinator, the child, a police officer and an appropriate adult.<sup>53</sup> The victim of the offence or, if the victim is not an individual, an individual representing the victim, a legal representative of the child and, if necessary, a supervising officer are entitled to attend.<sup>54</sup> After the conference, the convenor proposes a plan which requires the child to do one or more of the following.<sup>55</sup>

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<sup>53</sup> Criminal Justice (Children) (Northern Ireland) Order 1998 (S.I. 1998/1504 (N.I.9)), Article 3A(2)

<sup>54</sup> Article 3A(6)

<sup>55</sup> Article 3C(1)

- (a) apologise to the victim of the offence or any person otherwise affected by it;
- (b) make reparation for the offence to the victim or any such person or to the community at large;
- (c) make a payment to the victim of the offence not exceeding the cost of replacing or repairing any property taken, destroyed or damaged by the child in committing the offence;
- (d) submit himself to the supervision of an adult;
- (e) perform unpaid work or service in the community;<sup>56</sup>
- (f) participate in activities (such as activities designed to address offending behaviour, offering education or training or assisting with the rehabilitation of persons dependent on, or having a propensity to misuse, alcohol or drugs);
- (g) submit himself to restrictions on his conduct or whereabouts (including remaining at a particular place for particular periods); and
- (h) submit himself to treatment for a mental health condition or for a dependency on alcohol or drugs.

Conferences now take place throughout the province following pilots in Belfast. A recent evaluation of the scheme was generally positive:

Many of the post-conference “outcomes” in this research are positive. Most of the young people who had previously been in trouble felt as if their lives were back on track, had avoided any subsequent criminal justice involvement and were now desisting from crime. Numerous interviewees said that they first recognised that what they had done was wrong in the conference itself. This recognition of wrongdoing consistently led to an experience described by interviewees as a sense of “shame”. Still, most desisting interviewees were able to hold on to a sense of a “good core self” inside of them despite the mistakes they had made.<sup>57</sup>

Certainly Northern Ireland and Scotland provide two very different alternatives to the system in operation in England and Wales. Both would represent a radical departure and would need careful evaluation. Nevertheless, the failings of the current system require policy makers to seek more effective responses to juvenile offending as a matter of urgency.

The *One Wales* document contains two worthy and more general aspirations: it is difficult imagining anyone objecting to a ‘fair system of youth and criminal justice’ or to a

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<sup>56</sup> Option (e) is only available if the child has attained the age of 16: Article 3C(2).

<sup>57</sup> Maruna et al *Youth Conferencing as Shame Management: Results of a long-term follow up study* Report submitted to the Youth Conference Service by ARCS (UK) Ltd.( 2007) p. 2.

commitment to tackle the 'root causes of problematic behaviour'.<sup>58</sup> It has to be recognised that these are general aspirations rather than detailed proposals. There is a good reason for this. It is impossible to radically overhaul the system if you do not have the power to do so.

### 3 Custodial Sentencing and Prison Provision

The Home Office remain responsible for prisons in England and Wales. Jones raises two important, and to some extent related, issues about imprisonment in the Welsh context: the relative use of custody in Wales, and the provision of custodial accommodation in Wales.<sup>59</sup> She states that Wales makes comparatively greater use of custody than England and quotes figures to back up this statement. Unfortunately no reference was provided as to where the figures came from. In fact the official *Criminal Statistics for England and Wales 2006* show the opposite: 6.9% of those sentenced in England received an immediate custodial sentence compared to 5.7% in Wales.<sup>60</sup> Moreover, those sentenced to imprisonment were likely to receive a longer term in England than in Wales. The figures also show that this is a consistent trend. In every year from 1996-2006 inclusive a lower proportion of offenders received a custodial sentence in Wales than in England.<sup>61</sup>

These figures do mask a considerable disparity between the 42 criminal justice areas in England and Wales. Of the four which are in Wales, the percentage of offenders sentenced to immediate custody ranged from 4.5% in Dyfed-Powys to 6.5% in South Wales.<sup>62</sup> But when these figures are compared with the English data only four criminal justice areas have rates lower than Dyfed-Powys while 20 areas have rates higher than South Wales.<sup>63</sup> The Welsh criminal justice areas all make comparatively little use of custody and even the highest rate found in Wales is less than the English average.

This finding is not fatal to the second point; that the lack of custodial accommodation in Wales means that a high proportion of those sentenced in Wales are housed in English prisons a considerable distance from their home areas. This is a national problem as few

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<sup>58</sup> Labour and Plaid Cymru, *One Wales*, p. 29.

<sup>59</sup> Jones, 'The Next Stage of Devolution?' p. 17.

<sup>60</sup> Ministry of Justice, *Sentencing Statistics 2006*, (2008) table 5.1

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* Cheshire (8.2%); Cleveland (7.2%); Derbyshire (7.2%); Durham (8.6%); Essex (6.9%); Gloucestershire (6.9%); Greater Manchester (6.8%); Hampshire (7.0%); Humberside (7.8%); Kent (6.9%); London (8.1%); Merseyside (9.3%); North Yorkshire (7.1%); Northamptonshire (6.7%); Nottinghamshire (7.7%); South Yorkshire (8.1%); Staffordshire (8.5%); Sussex (7.4%); West Midlands (9.0%); and West Yorkshire (6.6%).

institutions are needed for certain categories of offender, most notably females.<sup>64</sup> Nonetheless the situation is particularly acute in Wales. The few institutions that exist are all in the south and no institutions exist for females. Moreover, the problem is not just one of distance. Institutions across the border lack suitable facilities for some Welsh offenders.<sup>65</sup>

There certainly are dangerous political implications to this argument. The obvious solution would be to increase capacity in the prison estate in Wales. This though would almost certainly encourage the use of custody by sentencers. Past experience suggests that spare prison capacity does not stay empty for long.<sup>66</sup> It may also be the case that the current arrangement suits some Welsh prisoners better than the alternative. A prison in Bristol may be far more accessible for many in South Wales than one situated in North Wales.

## Conclusion

In *One Wales: A progressive agenda for the Government of Wales*, Labour and Plaid Cymru agreed to 'consider the potential for devolution of some or all of the criminal justice system'.<sup>67</sup> This is far from a commitment or even an aspiration for devolution but a recognition that there is a case for further devolution that is worthy of consideration. It has to be recognised that the document is a creature of compromise following 'a rapid and intensive period of discussion and negotiation'.<sup>68</sup>

Two central themes run through Jones' paper: the inevitability of greater devolution; and the desirability of greater devolution. The first is seen as inevitable: 'it is simply a matter of time before Wales establishes a devolved criminal justice system that can accommodate the special features of Welsh constitutionalism (or federalism)'.<sup>69</sup> If Jones sees devolution in terms of the complete transfer of responsibility for all aspects of criminal justice from

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<sup>64</sup> There are currently 14 prisons for female offenders in England: Askham Grange; Bronzefield; Downview; Drake Hall; East Sutton Park; Eastwood Park; Foston Hall; Holloway; Morton Hall; Low Newton; New Hall; Peterborough; Send; and Styal. Jones, 'The Next Stage of Devolution?' specifically addresses Welsh female prisoners at pp 19-21. As she recognises '[the] issue of where to house women in prison is therefore a key concern of any devolved criminal justice system in Wales'. The problem is compounded by the consultation document *Joining Together in Wales: An adult and young person's strategy to reduce re-offending*, cited by Jones, p. 20 which advocates making provision for female prisoners in Wales without explicit recognition that this would entail building a prison for female offenders.

<sup>65</sup> Jones, 'The Next Stage of Devolution?' pp. 17-22.

<sup>66</sup> Mick Cavadino and James Dignan, *The Penal System: an introduction*, (4<sup>th</sup> ed. Sage Publications, 2007) p. 213.

<sup>67</sup> Labour and Plaid Cymru, *One Wales*, p. 29.

<sup>68</sup> *Ibid* p. 3.

<sup>69</sup> Jones, 'The Next Stage of Devolution?' p. 35.

Westminster to Cardiff, the process does not strike me as inevitable. It would be a contentious and hotly contested political issue. She does though appear to raise the possibility that parts of the criminal justice system could be devolved, she mentions youth justice in this context.<sup>70</sup> Presumably this means that some areas could be devolved whilst the remaining areas could remain the responsibility of the Home Office. What seems more predictable is that aspects where there is already a degree of local autonomy, say policing, will become increasingly different from England. These differences will emerge as a result not just of local issues (which have always had an influence) but of what Jones refers to as the special features of Welsh constitutionalism. The dynamic between Cardiff and other areas of Wales will be as interesting and as important as the dynamic between Cardiff and Westminster. What is certain is that there will be a debate about future devolution; what is less certain is where this debate will lead. I do not claim sufficient expertise of Welsh politics to hazard a guess.

On the question of desirability she is more equivocal, recognising dangers where they exist.<sup>71</sup> When evaluating the desirability of further devolution there is a danger that individual policy initiatives will form the basis of such a judgment. Yet individual policies may prove transient as political interest wanes. A focus on youth offending may be superseded by a focus on say enforcing road traffic legislation. The issue is more fundamental. Would a devolved criminal justice system be preferable to the current arrangement? Consideration of the merits of further devolution is sensible, although such a decision would benefit from waiting until the existing system is embedded. *One Wales* states that evidence will be required and considered.<sup>72</sup> So significant a decision requires the evaluation of a considerable body of evidence. The relevancy and the weight that should attach to the evidence will no doubt prove contentious. The jury remains out and the discussion is likely to be prolonged and passionate.

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<sup>70</sup> Ibid p. 19.

<sup>71</sup> Ibid pp. 29-34. The five concerns Jones identifies are law-making, the provision of legal services, funding, capacity and publicity.

<sup>72</sup> Labour and Plaid Cymru, *One Wales*, p. 29.