Submission to the Commission on Justice in Wales

By
Professor Kate Williams,
University of South Wales and Welsh Centre for Crime and Social Justice

Contents

Background

There are two min aspects to this submission: Youth Justice and Probation. However, as each is led by positive approaches to offending they are prefaced by a very brief introduction to justice as set out by Amartya Sen.

The second part of the submission considers youth justice and should apply to both males and females.

However, the third part of the submission considers probation. Whilst both male and female offenders should also enjoy the standards set out here there is an argument for a system of female justice which lies between that of youth and adult systems. There might also be an argument for a separate system for those between 18 and 25 years old, similar to that for women. I am not submitting a paper considering where the differences should lie. Importantly the sentencing laws and guidelines should be the same for men and women. However, they need to be altered as at present they impact more severely on women than men. The **present sentencing guidelines appear gender neutral (equal treatment) but are, in effect, discriminatory, leading to differences in outcomes, inequality.** The sentencing rules and guidelines **need to be replaced with a gender-neutral system of sentencing**. For both men and women greater use should be made of diversion (under gender-neutral rules); less recourse should be made to prison and there should be a more judicious use of probation (see below). What does need to alter is the systems of support used for men and women. Probation needs to work differently with men and women; it also needs to work differently with 18-25 year olds.

The references have been removed from this submission. If you would like a version with references please let me know.

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Justice Ideal

Considering how and to what extent offenders' rights and life chances should be supported is a question of justice. Due to Wales' priority of well-being (Social Care and Wellbeing Act, 2014) the ideal justice standard discussed here will be Sen's. Briefly Sen calls for care in setting the parameters of justice which he sees as focused on 'capabilities' and capacity. Put simply it suggests that well-being relies on what people are able to do and to be, the best life they can

effectively lead. Sen's motivation in developing the 'capabilities approach' is his concern over how to appropriately measure someone's standard of living or well-being. For Sen, it should include access to wealth, control over commodities (especially essentials such as food and accommodation) and should take account of the links between the individual and the wider community (relationships and connectivity) as well as the subjective view of the individual. However, all of that is still insufficient, it should also take account of whether access to any of these 'benefits' can be really enjoyed by the individual. The question here is: are the benefits 'real' to this individual? That is do they bring 'real' freedom to choose a life of value to the individual and, hopefully, to the community? One might say that I can choose to live where I like but if there is little affordable housing and I am poor my choice is not 'real' or if I have offended and the housing is only open to the law abiding again my choice is not 'real'. Therefore Sen does not limit his vision of a fair or just society to the distribution of resources but extends it to include the capacity to make use of them 'well-being freedom' as well as the right and means to choose 'agency freedom'. He recognises that this may mean the outcome achieved will be personal to the individual and may not be exactly what was intended by those providing the resources, this recognises that each individual should enjoy a 'freedom of outcome'. This requires recognising people's well-being and their agency as well as respecting their choice of lifestyle, it celebrates and facilitates diversity. In working with offenders it means the individual offender must be given some say in the content of the work done with him or her and whilst the workers and the state (judges) may have particular outcomes in mind they need to be flexible to ensure the outcomes are meaningful to the offender, only then will they be seen as just and only then will they be likely to 'work', likely to promote law-abiding behaviour. This does not mean that offenders should not be required to follow programmes to tackle their offending behaviour but these should not be the only, work nor should tackling offending be the only positive or accepted outcome (see below).

Sen proposes that well-being should be seen as the aggregation of an individual's capacity to 'function' in their society. 'Functionings' represent the various states and activities of an individual, their 'beings' (aspects of who they are - being well nourished, being educated, being an active member of a social or political community, being in relationships etc.) and 'doings' (activities such as participating in the political activities of the community, travelling, engaging in meaningful education or training as well as engaging in social activities, smoking, drinking etc). Importantly, throughout his writings Sen refers to well-being in terms of how a person *can* function, not just how one *does* function (a person may have many advantages and still 'choose' to function at low level, still choose to offend).

In relation to justice and crime this would entail working with offenders to increase their life chances, their capabilities and capacities. This entails building their pro-social capabilities to encourage and help them to live crime free. Of course one might also try to address their criminal behaviour but with some people turning their life around may address their criminal behaviour.

In short, Sen argues for the promotion of both community well-being through the lowering of criminal activity and the protection of both 'well-being freedom' and 'agency freedom' to ensure that a person's life-chances are enhanced not reduced.

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Devolving Youth Justice

Executive Summary – Youth Justice

1. **Whilst Youth Justice services are not devolved there is both a separate policy ideal and a measure of separate working in the present system.**

The Need for Devolution

2. As with many systems of youth justice around the World the **joint England and Wales** system of dealing with young offenders **lacks any clear focus**. It includes a number of objectives – punishment, justice, treatment, reform, restoration, risk-control, welfare etc. It is unclear about how far each is to be followed so is difficult to assess. **This is a deficit system** which focuses on past offending and future risk, it is **not child appropriate or child focused**.

3. Wales has very clear policies in relation to children. **Every child should enjoy their entitlements and rights** and should have their **well-being enhanced as much as possible.**

   Due to the YJ policy of **'children first, offenders second' Wales empowers children even when they offend**. Children should not be made responsible Adults take full responsibility, generally adults based in provider organisations, to ensure that each child enjoys his or her entitlements, to provide for children, even those who offend. This leaves children free to enjoy their rights. Wales aims to deal with children's offending through social justice and entitlement and only where necessary and to the extent necessary deals with them through the official youth justice system. This is a **positive, pro-social system which is both child appropriate and child focused.**

4. Without devolution the Welsh **'Children First, Offenders Second' policy can only apply to soften the Westminster system which Wales is still bound by.** This system calls children to account and focuses on past offending (it is a deficit system).

5. With devolution and taking full account of the well-being provisions as given practical application through Sen's capacity building, ensuring all children enjoy both ***'well-being freedom'*** **and** ***'agency freedom'*** it is possible to fully implement the present Welsh Government policies for children who offend.

Devolution and Governance

6. **Youth Justice could easily be totally devolved, indeed to ensure present policies are fully delivered devolution is necessary** but this would necessitate the following bodies:
   i. a body such as **YJB, Cymru, a fully autonomous strategic body** to oversee and help to steer the youth justice system in Wales, to ensure it works for Wales and to a Welsh political agenda.
   ii. a **system of training for youth justice professionals** working in Wales but with sufficient training in a range of systems to allow them to relocate in

other parts of the UK or further afield. This should be supplemented with a **refresher courses**, particularly designed **for those who wish to relocate to Wales** from other parts of the UK (or further afield).

iii. A **new inspectorate for youth justice in Wales**, or a **joint inspectorate for youth justice and youth work** which would permit normalisation of the former and a more entitlement, rights and well-being focus for both.

Given that **the ultimate goal of** youth justice under the Welsh agenda should be successful re/integration of children through improving their well-being and capacity I suggest an approach to measuring performance that is focused on five measures (and on the interactions between them):

a. Movement towards improving life-chances (measured through a child's version of the 'Intermediate Outcomes Measurement Instrument' (IOMI) to measure changes in respect of motivation, optimism, resilience, and well-being, which help sustain efforts to change.
b. Positive pro-social development and normalising relationships and integration
c. User satisfaction
d. Quality of service and inter-agency co-operation
e. There might be a small section on compliance (with orders and licences) and possibly even one on proven reoffending (officially recorded) though these should not be the core of any inspection

7. In relation to its organisational structure, **youth justice would be best delivered through a well-coordinated national system** in which youth offending teams (YOTs) and the secure estate work closely with YJB, Cymru and Welsh Government on strategic matters and with other agencies who provide services for children in all their workings with their clientele. This would ensure a consistent and coherent Welsh strategy and Welsh standards which are necessary to a system of justice as well as ensuring they enjoy the ame entitlements and rights as other children.

8. While **justice must be national, youth justice and youth work is inherently local**. To ensure the local connectivity of a national service, **I recommend the introduction of local youth justice services for each local authority** (maybe along the same boundaries as for the present YOTs in Wales) to work closely with other services children need in the area. Within a framework of Welsh national strategy and standards, creating semi-autonomous local services would allow devolution of most strategic and operational decisions into more regional and local hands, so permitting **the development of local partnerships and local accountability**. Local partnerships must involve the local judiciary, local police services, local government, local health services,, local housing, local education, local social services and the local voluntary and community sector (VCS). The VCS sector should be equal partners in these local bodies, their voices heeded and respected.

9. Within strategy and policy the work of the VCS should be respected, especially at regional and local levels. Given their crucial role in reintegration, I recommend that **a fixed proportion of allocated local youth justice budgets be used to subcontract services from the VCS.**

Youth Justice – Function and working (what the system might look like)

10. **The minimum age of criminal responsibility would have to be raised** to at least 12 but possibly higher.
11. **Devolution** would facilitate a youth justice system which **treats children appropriately**, as children**, and facilitates pro-social behaviour** through building relationships and encouraging and developing strengths (individual, family, community etc.) This needs to embrace the entitlements, rights and well-being which requires a capacity building approach which **respects both well-being and agency freedoms.** This would entail:
    a. A Welsh **assessment tool focused on potential and entitlements**.
    b. **Planning done** in partnership with the child, **done with the child not to them**. This should be driven by the idea of minimum intervention.
    c. Applying rights, entitlements and well-being there would be a **requirement on the adults to ensure the activities enhanced both the child's *'well-being freedom' and their 'agency freedom'* as well as ensuring that there were no other obstacles to attending the order**. This would leave little room for 'breach'.

1. Introduction

If Wales is to have a devolved youth justice service the governance changes listed above will be crucial to its success. Some of these will be considered in what follows but some will be left to be considered in later discussions. What follow is intended to provide an historical overview and a conceptual framework for youth justice devolution, this short paper starts with a brief and broad-brush consideration of the ideological underpinning of youth justice in England and Wales over time, before going on to consider how this is already different in Wales, what a capacity approach might look like if youth justice were devolved, why Wales needs devolution in order to fully put into practice its present policies, what a devolved system might look like and need (based on present Welsh policies).

2. Youth Justice – underlying models across England and Wales

As with many systems of youth justice around the World the joint England and Wales system of dealing with young offenders lacks any clear focus. It includes a number of objectives – punishment, justice, treatment, reform, restoration, risk-control, welfare etc. It is unclear about how far each is to be followed so is difficult to assess.

In the early part of the 20th Century the focus was on **welfare** though there was always an underlying punishment ideal. The intention underlying the welfare approach was the protection and treatment of children for their own good which involved an increase in the control of children and youths through intrusion into their lives not only for crimes they had committed but also for moral or 'delinquent' transgressions such as 'incorrigibility', 'vicious or immoral behaviour', 'truancy', 'Indecent language' and 'growing up in idleness'. The public was increasingly encouraged to report children for minor offences so that official action could be taken for the 'child's good' and reports of child offending grew, tolerance reduced and official interventions in minor youth transgressions grew. Children faced more formal state intervention which increasingly was seen as problematic.

In 1982 through the Criminal Justice Act the tide shifted from a model based largely on welfare to one more clearly linked to punishment but limited by the seriousness of the offence. Custody was used only when the court believed that no other method of dealing with the young person was appropriate. This approach was labelled **the *New* Orthodoxy** (Haines and Drakeford, 1989) and led to decreases in both the levels of custody and of recorded youth crime over the next 10 years (Allen, 1991, Bell and Haines, 1991).

The Criminal Justice Act 1991 saw the start of a **pure punishment or 'just-deserts' model** and marked the start of the political battle to be 'tough on crime'. It moved community interventions such as probation away from being alternatives to punishment to being community punishments. The system used punishment to call people (including children) to account for their actions (made them responsible).

In 1998 New Labour moved outside the welfare v just desserts (punishment) agenda and ushered in **new managerialism founded largely on risk**. The Crime and Disorder Act 1998 set risk assessment at the core of decision-making and interventions. The prevention of crime through assessing risk, particularly individual risk factors, then choosing punishment based on that risk and interventions designed to reduce it and/or to boost protective factors. This risk-based approach places the responsibility for offending with the child, child offenders are 'demonised' so punishment and control are logical responses which should happen early. Labelling is a positive, marking these children out as different from, more risky or dangerous than other children. A risk-based approach focuses on what a child lacks or their negative factors and blames them for their actions.

Alongside all of these, from 1970 through to today there has been a rise in the consideration of victims. Their place in the CJS has rightly improved and **restorative ideals or restorative justice** are/is now at the forefront of many decisions in the justice system. However, it is important to ensure that their ascendancy is not at the expense of justice for young offenders (children). The victims may be adult and the offenders are children so it may be difficult to ensure that restorative justice does not coerce the child.

Starting around 2008 the government moved to **reduce the numbers officially dealt with** by tackling the number of First Time Entrants (FTEs). Almost immediately numbers began to drop, FTEs were reduced by 20% within 12 months and the diversionary policy has continued. Whether stimulated by **financial stringency** or a genuine acceptance of the evidence that less intervention is more likely to succeed is unclear but the **new policy expanded the pre-court disposals** open to the police and youth justice service, it permitted more flexibility so opening the doors for many new policies. To complement this the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012 brought in more flexibility in sentencing. In effect, this meant that rather than always being more punitive each time a person re-offended sentencers could use lower punishments if professionals felt this to be more appropriate in the circumstances. This is still **essentially a deficit model** based on reducing offending and reducing first time entrants and reducing criminogenic risk factors all measured by negative targets.

Since 2010 youth justice work has increasingly embraced **desistence** which focuses on changing the choices people make. Building on strengths, facilitating their integration into wider society and helping them overcome obstacles (see the section on Probation for a fuller discussion). Again about moulding the individual though here they do play a part. This certainly takes us in the right direction but at its core it calls on children and young adults to change. Is 'change' the right idea when children are still developing? Would it be more relevant to discuss **positive**

development? Also whilst desistence takes account of some life chances it does not necessarily preserve the rights, interests and democratic entitlements of offenders.

This constant altering of ideals has led to large shifts in approaches to children who offend and it is questionable whether it has ever been a truly just system.

3. Wales – Already a Different Ideology

In 1998 devolution in Wales was fragmented at best. However, almost all services related to children were devolved – health, education, social services etc., the only exception was youth justice. The Assembly chose to lead on providing a positive environment for children and introduced ***Extending Entitlements****: Supporting Young People in Wales* (Welsh Assembly Government, 2000), a document not based on rights but which drew out 10 elements essential to a child as he or she develops. This was accompanied by a **rights based approach to children**, one fully based on the UNCRC (1989). In provision for children Wales was moving away from the idea that public services were rooted in consumerism towards one based on rights. This is particularly evident since the 2011 *Rights of Children and Young People Measure* gave real legal force to this position. This is no small change because children should no longer need to rely merely on charity nor on moral or political obligation but should now be able to rely on legal obligation to protect their interests.

All of this has given children in Wales a citizenship position different from that enjoyed by children in England, Ireland and Scotland. In Wales children are citizens in their own right. Human rights protect children from harm (mental and physical) and from problems; promote and provide for their best interests and for what is necessary for them to reach their full potential; ensure that they can participate in social life; and ensure that they are heard in judicial and administrative proceedings but do not empower children.

The Welsh approach adds **empowerment through the statutory application of entitlements** to the rights. Due to the YJ policy of **'children first, offenders second' it empowers children even when they offend**. The core principle in Wales is, therefore, that children should not be made responsible, they are not adults. Adults take full responsibility, generally adults based in provider organisations, to ensure that each child enjoys his or her entitlements, to provide for children, even those who offend. This leaves children free to enjoy their rights. Wales aims to deal with children's offending through social justice and entitlement and only where necessary and to the extent necessary deals with them through the official youth justice system. This treats children who offend with respect, preserves their entitlements and so their rights even if they are to be punished.

This all sounds already devolved BUT the Welsh **'Children First, Offenders Second' policy can only apply to soften the Westminster system which Wales is still bound by** – YOTs are inspected and tested under Westminster rules (they are only allowed a little local leeway). Therefore, despite a backdrop of 'Children First, Offenders Second' many YP are failed – given interventions the system sees as relevant rather than those which might be relevant to them. If the interventions are not felt by the child to be relevant or they are unable to comply they may be breached.

Even within the Westminster constraints Wales has moved a long way: the number of FTE has plummeted and the number in prison has dropped from a high in 2008 of over 200 children to an average of 30 in 2017 and still dropping. They have also introduced new and innovative

practices such as Bureau (which was evaluated in various areas and is now used across Wales) and the Enhanced Case Management (ECM) approach (which has been evaluated and is now being rolled out across Wales). The Bureau is based on 'children first, offenders second' and works to divert children away from the YJS whilst offering them support. Often the work done with the child is voluntary and helps them both to improve their life-chances and deal with issues about their offending. This approach is NOT just about changing the child, it is also about **ensuring the child enjoys his or her rights and entitlements.** The ECM way of working is based on a trauma recovery model where a team of professionals (youth justice, education, police, health, mental health, social services etc.) get together to consider the adverse childhood experiences (social, physical and psychological) which this child has faced and use this to decide how best to work with the child, what might be most likely to help that child to improve their pro-social living. The information and resultant plan is discussed with psychology experts to ensure that it is the best way forward for that child. The plan might expect a number of agencies to work in different ways and on different parts of the child's needs e.g. housing, education, building social capital and supporting and guiding the child towards a more positive life-style. This approach is NOT just about changing the child, it is also about ensuring the child enjoys his or her rights and entitlements and is treated appropriately for his/her age and development (physical, emotional, social and cognitive stages of development may be very different). Time is spent ensuring that children enjoy things necessary for their basic needs before moving on to build trust and then to support them to address problems the child is facing and then build on strengths. This has to be run within a largely risk based system, though since 2016 desistence has become part of the YJ system in England and Wales and this sits more comfortably with ECM and other systems designed under the 'Children First, Offenders Second' policy.

See below - Table 1 – Models of Youth Justice

4. Wales – Room for More Change

As noted above children in Wales, even those who offend, should enjoy free access to rights and entitlements but at the moment this is hampered by the need to answer to Westminster as well as Cardiff agendas. Devolution would be a first step ensuring that all children who offend in Wales enjoy their rights and entitlements – they are 'real'. However, more is necessary. Recent Welsh Government provisions (Social Care and Wellbeing Act, 2014) have added well-being to the list of rights and entitlements and required co-production to deliver it. If these are to mean anything then under devolution Wales would need to work to make them 'real'.

To deliver all of this, make it real, I suggest a system of justice based on Sen's 'Capabilities approach'. This requires working with someone to improve their basic living standards whilst also increasing their capacities in order to deliver real well-being. Sen adds two types of freedom or capacity which are necessary for this – **'*well-being freedom*' and '*agency freedom*'**. These accept that the final outcome may not be what was intended by those providing the resources – 'freedom of outcome' but it will be more likely to be positive for the individual being supported.

Well-being focuses on a child's capability to function both in terms of their entitlements and their freedoms whilst their agency freedom recognises their capability to choose basic features of their own life. Well-being takes account of **how a person can function** not just how they do – what choices are available to them?

Table 1 – Models of Youth Justice (Based on Haines and Case, 2015)

	Welfare	Justice	The New Orthodoxy	Risk-focused	Restorative Justice	Desistance	Children First, Offenders Second
Overall aim	To meet the needs of children	To serve the interests of justice and proportionality	To decriminalise and to divert from the formal YJS	To respond to assessed risk	To respond to the needs of victims and communities	To support the child to move towards a crime free life.	To promote the interests of the child, support them in building a pro-social life and to improve outcomes.
Process	Needs of children and the causes of their behaviour are investigated. Emphasises professional expertise and discretion	The legal rights of children are safeguarded by the application of the 'due process' of the Law	Systems management – targeting decision-making points in the YJS	The nature, frequency and duration of interventions are determined by assessed risk	The victim's needs are ascertained and meetings set up or apologies arranged	Building on the strengths of the child, facilitating their integration into wider society and helping them overcome obstacles	Promoting the interests of the child and responding to their views
Main concerns	Addressing needs	The Law and the determination of guilt	Avoiding the detrimental effects of formal intervention	Risk	Victims	Changing the behaviour of the child	The child
Scope	Children in need	Identified offenders	Identified offenders, decision-making	Offenders and potential offenders	Identified victims	Identified offenders or those who are anti-social	Comprehensive - prevention through to post-custody
Basis of sentencing	The welfare needs of the child and treatment	The offence and proportionality	Diversion and anti-custody	Responding to assessed risk	Not usually part of a sentence but intended to heal the damage.	Changing behaviour away from offending.	Normalisation
Type of sentence	Indeterminate	Determinate	Community, intermediate treatment	Offence- and offender-focused	Not usually a sentence.	Not usually a sentence. Used by professionals to help children change.	Child-appropriate, child-focused

If the state desired outcome is not offending this might be achieved by a child being supported to grow out of offending or by locking them up to prevent further offending. Both lead to the same outcome – no offending BUT the first enhances well-being and, if successful, delivers no offending for longer whilst the latter destroys it and may only prevent offending during incarceration. If a child is supported to develop out of crime by being forced to do so – having to comply with interventions they do not agree with then again their well-being has been reduced because their agency has been taken away, this might prevent offending for a time but is unlikely to be long-term as it is done to not with the child. Example:

> Adam, a young person, has been referred to the local Youth Offending Team (YOT) because he has been repeatedly caught stealing (groceries) from shops. Upon assessment, it becomes clear that Adam is stealing in order to provide for his younger siblings. If he steals again he will be taken to court. Clearly, there is a danger to his well-being: a criminal record presents all sorts of barriers to achieving legitimate, desired capacity. The YOT put him onto a cognitive behavioural programme (CBT) to improve his decision-making and reduce his criminality. He performs very well on that programme. However, concern for his own well-being is overridden by his concern for his siblings, and so Adam steals again. He understands his action is wrong but chooses to ignore that fact. Clearly his criminal behaviour should not be encouraged even though it would enhance his agency freedom. However, the 'children first' policy linked with the well-being policy mean that the adults, those in the YOT and other agencies should ensure that his well-being capabilities are enhanced such that he is in a position to make a real choice about his offending – they need to ensure that both he and his siblings are well-nourished and comfortable through legitimate means. In other words, the responsibility should lie with the professional adults to ensure that Adam has a real choice – he has the CBT training to increase his understanding and improve his decision-making but to make those choices 'real' it is necessary to increase his life-chances and those of his siblings, without doing this it is arguably immoral to punish him if he commits further crimes to feed the family.

The child, their social, physical and psychological well-being and environment all need to be worked on to ensure that there is a real increase in the child's well-being. This involves an investment by the child but also the community (to provide for him and his siblings). This is an easy example but in other cases the community may be called on to provide education, training, work opportunities, improved corporate parenting, improved parenting, club membership, enhanced relationships supportive of pro-social living or many other possible 'needs' necessary to increase the child's capacity and make their choices 'real'. This move to justice is a logical conclusion of the present policies for children – entitlements, rights, well-being and 'children first, offenders second' but is only fully possible in a devolved system. Under a deficit system (such as the present Westminster system) where the child takes responsibility this is very difficult to work towards though many YOTs and the YJB working with the WG have done their best. However, to fully implement Welsh policy devolution of youth justice is necessary.

This then opens up all manor of possibilities:

5. Minimum Age of Criminal Responsibility

Presently the age of criminal responsibility in England and Wales is 10 (s.16(1) Children and Young Persons Act, 1963 as amended by s.34 Crime and Disorder Act 1998*)*. Under 10 children are insufficiently developed to be 'responsible' (*doli incapax)* at 10 and above they are criminally responsible - their age and any possible lesser intent will only be considered at the sentencing stage. Westminster Government claim that children understand what they are doing, can weigh the consequences and should therefore be held responsible for their actions. However, in developmental terms children do not enjoy full capacity. Children tend to be: less altruistic, something which is learned; are dependent on adults; and are less competent both physically and intellectually. Importantly they tend to have a limited capacity to reason and to choose actions based on fully reasoned ideas. Biologically, psychologically and socially our understanding of when a child develops various functions is socially constructed, it alters over time and reflects cultural ideas. However, in all these respects there is general agreement that children of 10 have not developed sufficiently to face full criminal responsibility. Taking account of the legal age for other activities (consenting to sexual activity, marriage, joining the armed forces etc.) in England and Wales would suggest that ten is far too young and that 16 or maybe even 18 should be the age of criminal responsibility.

International human rights standards consider that the absolute minimum age of criminal responsibility should be 12. For many in the international arena the choice of 12 was disappointingly low and the Child's Rights International Network suggest that it was chosen because it was the average of all the minimum ages rather than because it represented the correct age at which to place criminal responsibility. Indeed it is clear that the UN considered 12 to be an absolute minimum and a higher age would be more appropriate. Anything lower fails to recognise the rights of the child.

The Welsh Government have already stated that, for Human Rights reasons, they want to **raise the minimum age of criminal responsibility to 12**. However, 12 is also too low, **why not 16 or 18** and then apply the gentler sentencing to 18 – 25 year olds. Were the age of criminal responsibility to be moved to 16 or 18 it would still be possible to intervene to address unacceptable behaviour but not at a criminal level. In fact, as shown by an intelligent application of the Welsh Government's 'Children First, Offenders Second' policy intervention to support the child to develop out of their offending behaviour is essential to a rights approach which recognises the responsibility of the state to support all children to meet their true potential. Clearly in order to fully implement their present policies they need youth justice devolved to permit them to set a Wales appropriate age for criminal responsibility.

6. A Welsh Youth Justice System

Once youth justice is devolved Wales can fully implement a system of 'children First, Offenders second' and ensure that this includes entitlements, rights and well-being. This would permit Wales to move away from a system based on risk and punishment where children are responsible and the most important aim is to prevent children from offending. This deficit centred system could be replaced with a youth justice system which **treat children appropriately**, as children**, and facilitates pro-social behaviour** through building relationships and encouraging and developing strengths (individual, family, community etc.) This needs to embrace the entitlements, rights and well-being which requires a capacity building approach (see 4 above) which **respects both well-being and agency freedoms**

a. Welsh youth justice - structure

Until recently YJB Cymru has been permitted (within Westminster parameters) to set its own strategy and policy. As can be seen above it has worked closely with the Welsh Government to ensure that this aligns closely to Welsh children's policy more generally. YJB Cymru has also worked closely with YOT managers to encourage them and front line workers to design ways to implement 'children first, offenders second', the bureau system and enhanced case management are good examples of this.

However, recently this system has been diluted. The whole of the YJB is being restructured and whilst there will still be a YJB Cymru some of the people who presently are Wales only facing will, in the future, be England and Wales and the aspects of youth justice they consider will therefore take on a wider view. The Director is about to leave YJB Cymru and may not be replaced (the position on this has not yet been decided), if this happens then the strategic direction of YJB Cymru will be decided in London. All of this means a dilution of strategy and policy set in Wales and for Wales. It is likely to undermine or at least dilute what has already been achieved and loosen the ties with Welsh Government policy. The only way to prevent this may be through devolution.

With devolution the Welsh Government can re-instate **YJB Cymru as a fully autonomous strategic body to oversee and help to steer the youth justice system in Wales, to ensure it works for Wales and to a Welsh political agenda.** It should be trusted to work with the WG and YOTs to prevent offending and reoffending by children and young people under the age of 18 through working to improve children's life chances. It should take control of the custody of young people, working to reduce its use and to ensure that when necessary custody is safe and secure for children and it works to both help children build their capacity in ways that are meaningful to the child and thereby address the causes of their offending behaviour.

They should provide or **ensure provision of training and retaining for youth justice professionals**. The training needs to prepare people for working in Wales but with sufficient breadth in a range of systems so as to allow professionals to relocate in other parts of the UK or further afield. This should be supplemented with **refresher courses**, particularly designed **for those who wish to relocate to Wales** from other parts of the UK (or further afield).

This new body should continue to work (with Welsh Government, YOTs, the secure estate and academics in Wales) through Hwb Doeth to develop, evaluate and disseminate good practice so as to continue to improve their work with children who offend or at risk of offending. As multi-agency working builds through systems like bureau and enhanced case management they should consider expanding membership of Hwb Doeth so as to integrate youth justice into more universal services.

Through a deeper working with capacity building for children who offend, are at risk of offending and for all other children in Wales youth justice might become the agency specialising in support for children with more entrenched difficulties, often those **requiring multi-agency responses to complex social and other traumatic issues** in their lives. Here **the division between offenders and non-offenders** could dissolve. That dichotomy **is negative and tends to lead to stifling child development** through labelling. Youth justice could become just that, a service to deliver justice to children and to provide services for the court when children transgress legal boundaries (offend), this would fit with a raising of the age of criminal responsibility to 16 or even 18. In all work, by all agencies the focus of interventions (individual and group) needs to be **positive pro-social development and normalising relationships over time** achieved through trusting relationships with workers used to mentor and build connections

with prosocial family, peer, community and the broader socio-cultural-political context. Whilst this might require some work to address causes of offending behaviour this should be work that delivers benefits for the child as well as the community.

b. Assessment

The Westminster (England Wales) system uses AssetPlus to assess children's risk of offending. The original Asset was entirely deficit-focused, entirely risk focused. AssetPlus is still at core a risk based assessment though it does now also incorporate assessment of aspects of 'desistance'. The tool is enormous and takes a long time to complete. At the moment many workers use the risk aspects more than the desistance when deciding how best to work with a child, they are aware that failure to address risk will cause problems in inspections.

Devolution would free Wales to design their own **assessment tool focused on potential and entitlements**. It might be based on Adverse Childhood Experiences, recording social (housing, education etc) as well as more personal problems which might have prevented or impeded pro-social development, or development of any sort. It would also identify where entitlements are lacking and have only a short section concerning risks (both to the child and to others). This could be a shorter and less onerous document and might be suitable for both statutory and non-statutory cases. It might also be relevant to children with problems not related to offending.

c. Work with the Child

Flowing from the assessment the present planning priorities tend to be: not offending; not hurting others; repairing harm; keeping safe; and life opportunities. Under a devolved system where entitlements, rights and well-being come to the fore the priorities would focus on pro-social development: building relationships (normalising relationships) with family, peers, community and the broader socio-cultural-political context; building life opportunities; building resilience; opening up access to entitlements and rights; keeping safe (the child and others); repairing harm and rebuilding bridges with the child. All of this **planning done in partnership with the child, done with them not to them**.

This planning should lead to minimum intervention in all cases. However, where necessary the focus should be on preventing children becoming involved with offending in the first place (often done with other agencies so normalising rather than stigmatising children) and diversion whenever possible (alternatives to prosecution and again working on a voluntary and normalised basis whenever possible). Both prevention and diversion should be delivered in an environment where there is a positive focus: on achievement, celebrating success; what young people have to contribute; and on building capacity to become independent, make choices and participate in the democratic process.

There will always be some cases which require court intervention but these should be kept to a minimum and orders delivered as far as possible through or with non-criminal agencies or the voluntary sector and custody kept to a minimum. Whilst recognising that some children pose risks one should not focus on this first and foremost, often if their case is taken to an ECM session reasons emerge and a more positive way of addressing all their problems arise which will inturn help to address the offending behaviour.

d. Non-Compliance

Much YJ work in Both England and Wales is designed to enhance the well-being of the child: activity requirements, substance misuse sessions, groupwork based around drama, etc. all aim to

increase a child's well-being and capacity to participate in a law abiding life. In the youth justice system of England and Wales such activities are presented as 'opportunities for change' and the child has a responsibility to 'take advantage' of these 'opportunities'. If the child fails to engage in these sessions they can be taken back to court for the offence of 'breaching a statutory order' and be punished for not taking full advantage of the 'chance'.

In a devolved system with the entitlements, rights and well-being agenda in Wales these activities should be seen as part of their entitlement meaning that the adults should be responsible. Post devolution, applying rights, entitlements and well-being there would be a **requirement on the adults to ensure the activities enhanced both the child's *'well-being freedom' and their 'agency freedom'* as well as ensuring that there were no other obstacles to attending the order**. This would leave little room for 'breach' and therefore the adults would need to work with the children to find a solution acceptable to both and still within the boundaries set by the court.

e. Inspectorate and Criminal Records

At the moment the inspection process for children is fractured and could probably be reformed anyway but certainly if youth justice were devolved there would be a need for a new inspectorate. At the moment youth justice is inspected by probation inspectorate. Assuming a devolved youth justice system would include the present policy agenda (entitlements etc.) A **new inspectorate for youth justice in Wales** would be necessary or they might be inspected alongside other child centred work. Youth work is presently assessed through ESTYN which situates them close to education which is not particularly helpful to their well-being and entitlement agendas. Therefore a **joint inspectorate for youth justice and youth work** might be considered permitting normalisation of the former and a more entitlement, rights and well-being focus for both.

Given that **the ultimate goal of** youth justice under the Welsh agenda should be successful re/integration of children through improving their well-being and capacity I suggest an approach to measuring performance that is focused on five measures (and on the interactions between them):

a. Movement towards improving life-chances (measured through a child's version of the 'Intermediate Outcomes Measurement Instrument' (IOMI) to measure changes in respect of motivation, optimism, resilience, and well-being, which help sustain efforts to change.
b. Positive pro-social development and normalising relationships and integration
c. User satisfaction
d. Quality of service
e. There might be a small section on compliance (with orders and licences) and possibly even one on proven reoffending (officially recorded) though these should not be the core of any inspection

The system of criminal records in relation to children needs to be totally overhauled. Clearly if the age of criminal responsibility were 16 or 18 the job would be largely achieved. With a lower age of criminal responsibility (say 12) they should be expunged at 18, allowing for real capacity building without being shackled by the errors of youth. There might be one or two offences which need more careful consideration e.g. serious sexual offending (such as rape) and killing. Again all of this is in line with present child policy in Wales.

7. Victims

Currently there is a strong link between youth justice and restorative justice. Many believe that restorative justice is positive for both victim and child offender. However, this is not clear and such work can be very damaging especially where the victim is an adult, here power differentials have the potential to damage the child's development especially where any restorative action takes place face to face. This should only be undertaken with real care and probably not on a routine basis. It should not be permitted to interfere with or derail the positive work being done to help build the child's pro-social capacity. This is not to say that nothing should be done. In some cases, possibly many, once the child is ready (often it takes a lot of time to reach that point) a letter of apology may be appropriate. IF restorative work is to take place it could them be through cross-agency discussion rather than a bespoke Victim Liason Officer being placed in a youth justice team. Separating the systems guards against restorative justice being seen as a core function of youth justice practice which should always be about positive pro-social work.

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Devolving Probation

These notes have been produced based on a paper produced in November 2018 by Professor Fergus McNeill and myself for the Ministry of Justice

Executive Summary - Probation

Devolution and Governance

1. **Whilst Probation services are not devolved there is a measure of separate working in the present system.**

2. The present England Wales probation system is **a deficit based system**. **For well-being a more positive capacity building system is necessary.** For that reason probation should be devolved. What follows is a blue-print for that system.

3. **Probation could be totally devolved** but this would necessitate the following bodies:
    iv. a body such as HMPPS, Wales to oversee both probation and prisons OR two bodies one for probation and the other for prisons. HMPPS ensures that court sentences are carried out either in custody or the community and works to rehabilitate people in prison or on probation. The present body says they do this through education and employment but a Wales only body might set a different agenda (see section concerning justice).
    v. a **system of training for probation professionals** working in Wales but with sufficient training in a range of systems to allow them to relocate in other parts of the UK or further afield. This should be supplemented with a **refresher courses**, particularly designed **for those who wish to relocate to Wales** from other parts of the UK (or further afield).

vi. A **new inspectorate for probation in Wales**, or agreement for the England Wales body that they will conduct inspections in Wales to the policy and standards set in Wales.
Given that **the ultimate goal of** probation should be successful re/integration of people who have offended, I suggest an approach to measuring performance that is focused on four measures (and on the interactions between them):

a. Distance travelled towards re/integration
b. Quality of service
c. User satisfaction
d. Compliance (with orders and licences), proven reoffending (officially recorded)

4. In relation to its organisational structure, **probation would be best delivered through a well-coordinated national system** in which the NPS and CRCs are reunited as a single public service. A Welsh strategy and Welsh standards would provide the consistency and coherence that a system of justice requires.

5. While **justice must be national, reintegration is inherently local**. To ensure the local connectivity of a national service, **I recommend the introduction of local probation services for each court area or for each local authority** (maybe along the same boundaries as for the present YOTs in Wales or for present IOMs in Wales). Within a framework of Welsh national strategy and standards, creating semi-autonomous local services would allow devolution of most strategic and operational decisions into more regional and local hands, so permitting **the development of local partnerships and local accountability**. The recent positive working of Integrated Offender Management in Wales (a system which generally works effectively and efficiently, pulling together different agencies to a single end) offers much insight into how to make these kinds of local partnerships effective. Local partnerships must involve the local judiciary, local police services, local government, local health services and the local voluntary and community sector (VCS). The VCS sector should be equal partners in these local bodies, their voices heeded and respected.

6. Within strategy and policy the work of the VCS should be respected, especially at regional and local levels. Given their crucial role in reintegration, I recommend that **a fixed proportion of allocated local probation budgets be used to subcontract services from the VCS (as used to be the case).**

Probation – Function and working

7. **The role of probation should be to implement court-imposed sanctions in such a way as to work for a just social order by seeking to reintegrate people who have offended.** That requires probation to:

a. properly apply court-imposed restrictions (and the punishments they constitute and entail)
b. creatively support constructive reparation
c. effectively provide resources and services to encourage and support probationers' rehabilitation.

8. Penal supervision should be carefully focused. Since it always punishes by limiting ordinary citizenship rights, **supervision should only ever be imposed where this can be justified (1) by the seriousness of the offence(s) and/or (2) in the interests of public safety**. Although there need be (and should be) no such limits (of proportionality or parsimony) on the *offer* of help and support to people in need, need alone should never provide the basis for imposing the *compulsory* restriction that penal supervision entails.

9. With these principles in mind, and also to free up resources, I suggest a **re-think of the present Westminster policy to supervise for 12 months all those released after short sentences**. Not all people who have served short sentences need to be on licence for this long; many may not need it at all. The legislation could be amended such that all short-term prisoners are *offered* reintegration support and all remain liable to recall if convicted of further offending. However, compulsory supervision (and support) should be reserved for those whose risk of reoffending and/or risk of harm requires such a legal mandate to be imposed. In those cases, an Integrated Offender Management (IOM) approach would be advisable. IOM is working very well in Wales at the moment so that tapping into this system would be a strength for a devolved service. **Probation should only be used when the risk of re-offending and/or public safety require it. Support should be offered to all offenders. All probation should embrace an IOM approach.**

10. Also to ensure probation is only used when appropriate the judiciary should be more closely linked to probation work. The **involvement of the judiciary with local probation services would** allow them to more fully understand probation's potential. This may help to reduce any unnecessary or inappropriate use of custody, thus easing prison overcrowding.

11. **Good probation practice** motivates people, it develops their capabilities and it seeks to secure opportunities for them to live better lives. It is rooted in an understanding of desistance from crime and how it can be best supported. It requires a forward-looking approach focused first on building a trusting relationship, often through strengths-based work. The intelligent use of accredited interventions (e.g. offending behavior programmes) should also be promoted. Good quality practice works on strengths, risks, needs, resources and capabilities, and communicates a positive approach.

    This requires **well trained, highly skilled and suitably experienced professionals**, who are properly supported and supervised and who have caseloads such that they can offer appropriate support to people. In particular, since desistance pathways are different for different people (for example, varying in relation to gender and ethnicity), staff need to be specifically trained to understand and work with diversity. They also need access to the kinds of resources required to support change locally.

    Good practice is also fair practice, and that requires the legitimate and respectful use of authority.

1 Introduction

The first question is whether Wales should have a devolved system of probation. The answer to that is, yes. For Wales to fully apply the policy commitments given legislative backing in the Social Care and Wellbeing Act, 2014 it is necessary to ensure that this applies to all people, even offenders. The present probation system makes that almost impossible, it is even more risk reliant than the system applied to children and therefore is **a strongly deficit based system**. **For well-being a more positive capacity building system is necessary** and it is that which is set out below.

If Wales is to have a devolved probation service the governance changes listed above will be crucial to its success. Some of these will be considered in what follows but some will be left to be considered in later discussions. What follow is intended to provide a conceptual framework for probation devolution and reform, this short paper starts by locating probation within a liberal retributive approach to punishment, before going on to consider how probation should be best targeted, what best practice might look like, how devolution and localism might be addressed, how links to the VCS might be best conceived, what sorts of partnerships are required, and how performance and success might be best assessed. I have not included citations to the body of research that informs this paper, but would be happy to do so if that would be helpful.

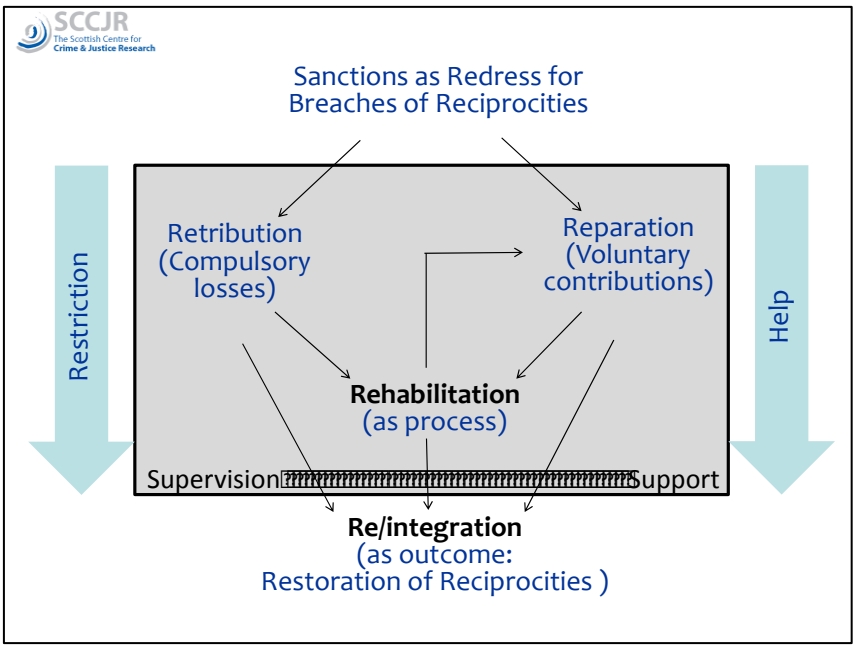
2 First principles: Probation and penal sanctions

The figure below provides context for all that follows. It sets out an essentially liberal retributive framework for sanctions, but one that has rehabilitation at its heart and one that aims at reintegration as its key outcome.

The primary purpose of sanctioning is to do justice. Criminal behaviour requires a response; that response must seek to restore (or help create) a just social order in which all citizens can flourish. Crimes and offences can be seen as breaches of a social contract of reciprocal obligations. The way that I respond to these breaches should reinforce and not undermine these obligations; the social contract requires the state to manage society such that people have a reasonable opportunity to live as good citizens. Even without reference to a social contract in any truly just and democratic society the purpose of a criminal justice system (CJS) should be to **respond effectively and justly to harms** (suffered by victims and communities) and rights violations which arise from criminal behaviour and do this **without unduly interfering with the rights, interests and life chances of offenders**. Each of these is equally important. Most societies strive to do the former, certainly in the four parts of the United Kingdom the CJS is increasingly victim focused by: calling offenders to account often through punishment; using restorative processes; and ensuring victims are properly treated. This is rightly important. However, the rights, interests, life chances and democratic entitlements of offenders are also important, especially if we strive to reduce future harms, though they tend to be less strongly supported. In many ways social and political support for the former is more likely to arise so the real test of a

just state lies in how well the latter is delivered. In Wales we need to ensure that offenders as well as victims are justly treated and that the life chances of each group is enhanced as far as possible.

In the model, the sanctioned person can provide redress in one of two ways, though in practice, these may be combined. (1) They can suffer **compulsory losses** (of liberty, autonomy, money, reputation, status, etc.) and/or (2) they can offer to make good through **voluntary reparation,** in a just society this may not be financial, it may be trough a genuine remorse. It follows that rehabilitative interventions have two roles. (1) They act to prepare a person who has suffered compulsory loss for reintegration (this is a duty that falls on the state that imposed the losses) and/or (2) they act to support a person to make reparation. Once again, in practice the same sorts of intervention might support some people to develop the skills and motivation required to make reparation **and** to support many people to stand a chance of successful reintegration after the losses that punishment imposes. Importantly, **not all people need help** to make reparation and to reintegrate; and amongst those that do, there are widely varying degrees of need.



On the left-hand side of the model, reference is made to **restrictions** on the person's citizenship that are imposed in and through sanctions. In the case of probation **supervision**, the primary losses are those of autonomy and privacy. On the right-hand sight, reference is made to the **help and support** that sanctions must nonetheless offer in support of reintegration. The state may therefore expect to be permitted to restrict a person's liberty in certain ways but it also has a responsibility to use that restriction to ensure the individual has greater (or at least no less) law abiding life chances following the punishment.

Offers of reparation and acceptance of help and support should be **voluntary as far as possible**. But if a person does not volunteer to make good, then the state has the power (and the duty) to impose compulsory losses (though these must always be kept to a minimum and take into account the disadvantages suffered by the offender). Similarly, if a person refuses help (for

example, help that might reduce the risk of serious offending as well as supporting reintegration), then the state has the power (and some would say the duty) to impose restrictions on them (seeking to secure public safety).

In sum, **the role of probation is (or should be) to implement court-imposed sanctions in such a way as to work for a just social order by seeking to reintegrate people who have offended.** That requires probation to:

- properly apply court-imposed restrictions (and the punishments they constitute and entail)
- creatively support constructive reparation
- effectively provide resources and services to encourage and support probationers' rehabilitation
- work to improve the law abiding life opportunities of the offender.

3 Targeting probation's efforts

A liberal retributive framework requires that – at the point of sentencing and in the implementation of sentences – the principles of **proportionality and parsimony** are applied. Recognising that supervision necessarily imposes deprivations (of autonomy and privacy) and therefore degradations (of citizenship status), **supervision should only ever be imposed where this can be justified (1) by the seriousness of the offence(s) and/or (2) in the interests of public safety.**

Although **there need be (and should be) no such limits (of proportionality or parsimony) on the *offer* of help and support** to people in need, need alone should never provide the basis for imposing the *compulsory* restriction that penal supervision entails.

Distinguishing clearly between (compulsory) supervision/restriction and (the offer of) support/help is important in targeting probation's rehabilitative efforts. Those efforts should be directed on the basis of (1) the **extent and nature of the need** for support in order to make reparation and/or secure reintegration and (2) **willingness and ability to benefit** from such support. This makes sense both in light of the normative principles discussed above, and in relation to the most efficient use of limited resources.

Taking the **extent and nature of need** first, it is essential that the Welsh system takes a more realistic and nuanced idea of risk. The figure below illustrates how risk is needs to be properly understood, taking account of a number of dimensions[1]:

[1] Professionals would normally talk in terms of low-medium-high risk on each dimension (likelihood of offending /risk of harm) which would produce a nine-box matrix but for the purpose of this discussion we have simplified it into four groups juxtaposing high and low for each category, the medium would clearly fall between these and be open for professional judgement.

	Low risk of serious harm	High risk of serious harm
Low risk of reoffending	1	2
High risk of reoffending	3	4

The concept of risk of serious harm centres on the gravity of the consequences of a serious further offence (usually violent or sexual offending). By contrast, risk of reoffending centres on a probabilistic judgment about the likelihood of any offence, even a relatively minor one. So, in the figure above:

1. People in **Quadrant 1** (**Low-Low**) are unlikely to reoffend and, even if they do, the harms produced are not likely to be serious. An example here might be a young adult who goes off the rails briefly but is quickly and effectively set back on course by family support and the availability and attractiveness of legitimate opportunities to pursue a good life.
2. People in **Quadrant 2** (**Low-High**) are unlikely to reoffend but, if they do, the harms produced could be serious. An example here might be someone convicted of a violent crime, but one that happened in very particular circumstances which are very unlikely to recur.
3. People in **Quadrant 3** (**High-Low**) are highly likely to offend but, if they do, the harms produced will not be serious. An example here might be a person who offends persistently to fund a drug habit, perhaps by shoplifting.
4. People in **Quadrant 4** (**High-High**) are highly likely to offend and, if they do, the harms produced are likely to be very serious. An example here would be someone committed to violence for ideological reasons, or someone with a sadistic and psychopathic personality traits.

In thinking about these four groups, the principles above (and pragmatism) suggest the following responses:

1. **Quadrant 1 (Low-Low)**: Many of those in this quadrant have no need of any rehabilitative support. It may well be that no intervention is needed and any punishment should be held in abeyance to give them the opportunity to prove their pro-social life-style. If a community sentence must be imposed (presumably on punitive, retributive grounds – though this may not be just) or post-release supervision is legally necessary, then this should be implemented as **'mere supervision'**. Community sentence or release licence conditions should be limited to those that serve the sentence's punitive or retributive purpose. Help can be offered, but there should be no legal consequence if it is rejected. The person should only be required to meet the terms of their order or licence

(so that justice is served) and that is all and the terms of any punishment should be minimal.

2. **Quadrant 2 (Low-High):** All people with this profile will be being supervised post-release because of the gravity of their crimes. They may have served relatively long sentences and may therefore require considerable, intensive reintegration support, even if the risk of reoffending is low. Because the consequences of reoffending could be serious, they will require to be subject to skilled and careful assessment and management until it is clear that reintegration has been achieved (or until their release licence expires). If they are reintegrated into a pro-social life any supervision/probation could and possibly should be suspended if they continue to live a law-abiding life.
3. **Quadrant 3 (High-Low):** People in this quadrant tend to have very complex needs and often chaotic lives. Supporting them to change and to reintegrate is highly skilled, demanding and challenging work. It is also labour intensive. Though their offending is not serious on a case-by-case basis, its cumulative effects on a community's sense of safety and wellbeing is considerable. Hence, managing this group poorly risks bringing the criminal justice system into disrepute, undermining its public legitimacy. Pragmatically, investing resources in supporting this group of people also makes sense because their persistent offending generates very high criminal justice processing costs. There are therefore major reputational and financial gains that can be secured here. Helpfully, most people in this group are also open to receiving help, even if they often struggle to comply (because of their chaotic lives and multiple problems with supervision. Their failures to comply should be treated leniently if it is clear that they are trying to co-operate and that their lives are slowly improving. To minimise the risk of breach and recall, it would make sense to minimise the compulsory elements of *supervision* for this group and instead focus services on developing and sustaining appropriate *support* even after the order is completed (perhaps provided by the voluntary sector). This minimizes the risk of non-compliance and maximizes the possibility of supporting them to turn their lives around.
4. **Quadrant 4 (High-High):** People in this quadrant often also have complex needs and very careful management, which may often involve very significant levels of supervision and restriction given the risks involved. However, in the longer term, the best way to secure a reduction in risk is to work with this population to secure change (for example, via de-radicalisation). Again, this is likely to be very intensive, highly skilled and specialized work.

Under TR, the NPS has been focused mainly on groups 2 and 4. The CRCs have responsibility for groups 1 and 3. **The main problem currently is with group 3**. Although working effectively with group 3 offers the greatest possible long-term returns on public investment (and the best use of probation skills and resources), these are also the most challenging cases and the hardest to move forward in the short and medium term.

The contracting for TR unfortunately seems to have led to a situation where the CRCs are incentivized to pursue profit (or minimize losses) through 'efficiencies' rather than effectiveness; they seek financial returns through volume of business rather than delivery of rehabilitative support for reparative and reintegration outcomes. Instead, they focus primarily (and in some cases exclusively) on ensuring compliance with court orders or post release licences. While this might be appropriate for group 1 (although they neither need nor deserve probation supervision at all), it is a wholly inadequate response to group 3. Recent inspection reports provide evidence

of this problem as reflected in high caseloads offered inadequate levels and forms of contact and intervention, although there are a few exceptions where innovative and well-focused practices are apparent.

A second problem with TR (and indeed with the 4-quadrant model above) is that, in reality, **risks and needs are fluid**. People do not fit neatly into these boxes, and nor do they stay in one. Putting organizational boundaries between risk types and levels was therefore always going to be problematic. The evidence also shows that it is very hard to effectively construct and regulate an effective market in probation and the attempt to do this has been damaging to both the lives of individuals and to the voluntary sector.

A devolved system of probation frees Wales to **re-nationalising probation.** Doing this allows Wales to set robust independent evaluations of (1) quality of practice and (2) reintegration outcomes to replace or supplement the blunt measure of 'reoffending rates'. I return to the question of performance measurement below.

Returning to the question of **willingness and ability to benefit,** across all 4 groups, services should be designed and delivered so as to motivate people to opt-in to rehabilitative support and help. Group 1 should be free to opt-out without any consequences. With groups 2-4, opting out of rehabilitative support may mean that greater degrees of restriction can be justified in the public interest.

To summarise this section, supervision and the restrictions it creates should be imposed and implemented in ways that reflect proportionality and parsimony. The constructive efforts of probation services (and their resources) should be directed at those who need and can benefit from the forms of rehabilitative help and support that will allow them to make reparation and/or secure reintegration. Others may need (and deserve) more restrictive forms of supervision, but even they should be encouraged and supported towards reintegration. TR should not be part of any devolved service and probation should be well-coordinated national system. To ensure high quality services which are delivered effectively.

4 Devolution, Localism and Accountability

Justice must be national, set in Wales, and might be different from that in England. However, it must be the same throughout Wales because the system needs to be consistent and fair, offering the same due process protections and the same levels of service to all citizens. But **reintegration must be local** because people live and find (or fail to find) a sense of belonging in localities, and because needs and resources vary greatly in different communities (for example, urban and rural). Responding to local needs also requires national coordination to allow for geographic redistribution of material resources where necessary.

For these reasons, I would support a **Welsh national framework of strategy and standards** (and workforce development), but **local flexibility in terms of governance, management,**

local commissioning and delivery within the parameters of national strategy and standards. Any inspectorate would need to respect both the national standards and the flexibility encouraged at a local level.

The key partners **at the national level** would be the Welsh equivalent of HMPPS, the CPS, Police Services, the NHS, Home Office, Employment Services, education and umbrella organisations of the VCS working in criminal justice (e.g. working with Clinks to ensure that small, medium and large organisations are heard).

At the local level, close collaboration would also be required with local authorities, sentencers, police, health boards, employers and employment agencies, and a wide range of VSOs (see the discussion of IOM above).

At both national and local levels, engagement with the relevant judiciary is essential for good accountability - both because they are key stakeholders and consumers of the Service's work but also for reasons of legitimacy. The history of probation attests that, for it to succeed in enhancing the delivery of justice, engagement with judges is crucial.

A framework of joint accountability across these bodies at both national and local levels would help to secure their buy-in. More broadly, **efforts should be made to more clearly articulate the responsibilities of the state (and all its arms, devolved and non-devolved), of civil society institutions and of all citizens in supporting reintegration.** As well as distributing material resources, they should **send the right signals** about supporting reintegration; Singapore 'Yellow Ribbon' project is an interesting exemplar of this (see: http://www.yellowribbon.org.sg).

5 The Role of the Voluntary and Community Sector

An important rationale for the introduction of TR was the 'harnessing' of the special qualities of Voluntary Sector Organisations (VSOs), including their use of 'innovative' approaches and their ability to engage clients in trusting relationships. However, most indications suggest that this hasn't happened to the desired degree and that the TR commissioning structure generally has harmed rather than helped the VCS, particularly smaller local VSOs (as noted in the recent Lammy Review). If probation is devolved it should be reunited into a Wales national system and TR should stop.

As well as a national system there should be an expectation that **a fixed proportion of probation allocated budgets to be used to subcontract services from the VCS** to support integration. (Such a rule was applied to Probation Boards in the 1990s and early 2000s, when a minimum of 7% of the total budget had to be used in this way. This was effective in including innovative practices in probation)

But this should **not** be organized, as with the current arrangement, in ways which favour large, national quasi-commercial VSOs. As **Justice is necessarily national but reintegration is fundamentally local**. It follows that Wales needs to order probation delivery so that resources are invested in those local, grassroots community organisations that build collective efficacy and social cohesion – thus helping to create **'desistance-supporting' communities**. The state's role is to redistribute resources to support reintegration, but it cannot and should not be the agent of reintegration. This is why probation needs to re-create networks of **local partnerships with VSOs, local authorities and civil society more generally** through which it can mediate and support reintegration

6 Integrated Offender Management and Partnership Working

Another key form of partnership is between probation, prisons, police and health services. A very promising model is that of 'Integrated Offender Management' (IOM), a partnership (usually chaired by police or probation) with the ultimate aim of reducing reoffending, but also focused on achieving 'intermediate outcomes' for offenders (particularly those with prolific records and serious social or individual problems), such as improvements on health, housing, employment, family life and well-being. This works particularly well in Wales, where there is a national IOM (IOM Cymru), overseeing a number of regional and local 'branches'. Tis system should be encouraged to continue and even grow if probation is devolved.

IOM brings together local agencies (statutory, local criminal justice, sentencers, local authority, health, local VSOs and other social agencies) to work together to design and deliver coordinated packages of support and interventions to encourage and assist people towards positive change. Where IOMs work well they ensure coherent joint work which is locally relevant and uses local resources to ensure that those who cause significant local problems are supported to change. IOM builds on (but does not replace) good practices developed in related initiatives such as the Prolific and Priority Offender (PPO) work.

To succeed, IOM needs to embody genuine partnership with all agencies contributing resources and sharing information with others, and with agreement on a single lead professional for each person being supported, so as to ensure continuity. That lead individual is supported by many other agencies/services to provide 360° work to help an individual to change. The real strengths are that the focus is on the person and not just on the offence; all partners are equally involved and trusted; partners jointly make decisions about both the work and the funding for it; this prevents overlaps in work and ensures that gaps are plugged; crucially, the work is focused on the individuals who most need it, not those who will be easy to work with.

This partnership based working has been effective in Wales and should be at the core of a Welsh strategy.

7 Good probation practice

I have already suggested that good probation practice needs to be very carefully targeted at people whose offending and/or risk justifies significant intrusion into their lives and who can benefit from support. I have also explained why, with groups 2, 3 and 4, **probation practice**

requires highly skilled and reflective professionals, requires a Welsh national probation service. These professionals need not only to be able to work effectively with individuals on their caseloads, they also need to work in close collaboration with a range of other agencies, especially the local voluntary sector, and with communities to support desistance; they need to be people who can support individual change and mediate social reintegration; and, in serious cases they need to work closely with those who risk manage certain groups or behaviours (e.g. Multi Agency Public Protection Arrangements, Domestic Violence Multi Agency Risk Assessment Conferences). Good quality probation is essential because poor quality practice can be unhelpful and indeed can make things worse (which is why workers need to be fully trained and professional).

In working with individuals, good probation practices does 3 things: (1) it **motivates** people to change, (2) it builds their **capabilities** to act and live differently; (3) it seeks and secures **opportunities** for them to do so and uses both individual measures and accredited programmes to achieve change.

Reintegration into society requires **desistance from offending.** Criminologists in recent decades have made significant advances in understanding how and why people stop offending and what helps them in this process. Much of this research is based on studies involving people in group 3 above; i.e. people involved in persistent (but not necessarily serious) offending. In sum, we understand their desistance to be linked to (1) age and maturation (growing older, becoming less impulsive and more able to think about the consequences of our actions, for better or worse); (2) the development of social bonds (to social institutions like the family, employment, education, etc.); (3) shifts in a person's narrative or identity (support them to alter their behviours and living circumstances (e.g. housing, substance misuse and health) as well as their attitudes, well-being and self-identity; and (4) socio-situational (learning and adapting behavior accepted in pro-social settings) changes reflected in different routine activities.

The **desistance process** (which probation should seek to support) often involves the following steps:

1. A positive or negative event in the person's life triggers a wish to change.
2. This leads to a (negative) re-appraisal of one's self and one's current situation.
3. This stimulates action in pursuit of change.
4. That effort soon encounters obstacles which constitute a temptation or provocation to give up the change effort.
5. If the obstacle is overcome, then reinforcement of the change process occurs. Otherwise, the person may relapse to offending, until the next trigger event.
6. With enough reinforcement, and enough obstacles overcome, the person secures desistance.

Crucially, the outcome at step 5 is profoundly influenced (if not determined) by the individual's **personal resources** and by their **social resources** or capital. This is why good probation

practice must build motivation and capabilities (personal resources) and opportunities (social capital).

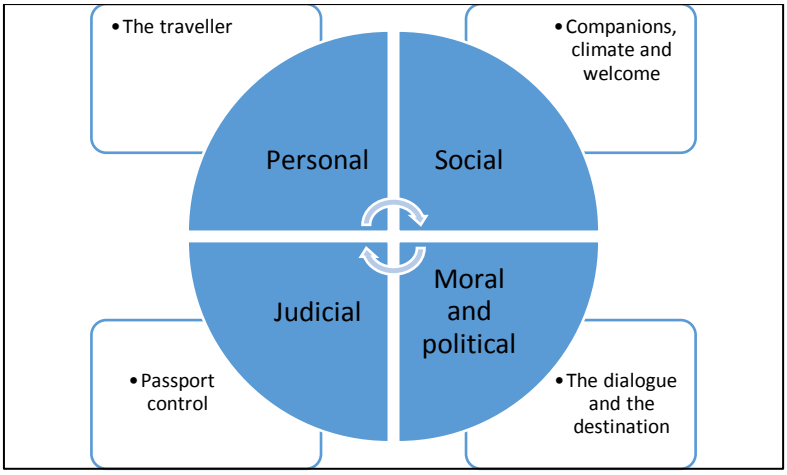
More specifically, models of **desistance-based probation** stress the need to:

- Recognise and address the complexity of the process through highly individualized practice delivering tailored support
- Build motivation, hope and a sense of agency (or self-determination)
- Create or reinforce strong pro-social relationships (with the probation worker and with others in the person's own social networks)
- Identify and develop forward looking approaches based on strengths and capabilities but also taking account of risks, needs and resources
- Build social capital
- Provide practical help in overcoming obstacles
- Recognise, reinforce and celebrate progress

Desistance theorists generally prefer **strengths-based approaches** (working with people to maximize on their strengths and motivate them to change) because they support changes in attitudes, behaviour and personal narratives that reinforce agency (i.e. the person taking responsibility for and control of their future); and they can counteract negative labeling by allowing the person to be seen as more than someone who offends. Some have criticized **needs based approaches** for reinforcing dependency and undermining agency, and have argued that **risk based approaches** can reinforce negative identities. There is emerging evidence that risk discourses alienate prisoners and supervisees and undermine legitimacy in the system – and there is evidence of their more positive response to strengths-based approaches. That said, the differences can be overstated. A person can have a need to develop a strength or a need for an opportunity to exercise it (e.g. in work, family life, or volunteering); and doing so can and does reduce risk.

Whilst strengths based approaches are important they should not be used in isolation. The best probation work is forward-looking and future focused. It is heavily linked to strengths but also takes account of risks, needs and capabilities. It should build capacity for a pro-social life. In particular, while it should not dominate other concerns, risk cannot be ignored in good probation work. The service needs to work in partnership with risk management bodies, especially for those in high risk categories (boxes 2 and 4 above). Therefore, probation needs to work closely with the police, social services and others via MAPPA, DV MARACS etc. to manage risk by motivating and supporting change – and by imposing restrictions where necessary.

Four forms of reintegration



More broadly, thinking of desistance as a journey towards reintegration has inspired the model (above) of **4 inter-related forms of rehabilitation** (on which probation should focus):

- **Personal rehabilitation** supporting human development by the capabilities necessary for a good life. Much of the literature on 'What Works?' (i.e. to reduce reoffending) informs practice in this domain. For example, the 'RNR' (Risk-Need-Responsivity) model stresses the need to work on those needs directly linked to prior offending, to work intensively with those most at risk of reoffending, and to work in ways that are responsive to people's learning styles and abilities. The 'GLM' (Good Lives Model) focuses on helping people develop the capabilities they need to achieve their legitimate goals and realise their aspirations so that they no longer need to pursue these goals illicitly. The analogy is of a traveler on a journey to building a more positive life, suggesting an understanding that this will take time and it is unlikely to be a smooth or always positive experience. Change will happen gradually and setbacks are likely and must be effectively managed.

- **Judicial or legal rehabilitation** is about securing the person's return to full citizenship status, with all the attendant rights and responsibilities. A major problem in this area is how Wales should handle issues in relation to the disclosure of criminal convictions. We need to design a system of 'passport control' to recognize but see beyond past behavior, preventing the stigmatization and exclusion that can undermine rehabilitation. Instead, Wales needs to make sure that rehabilitated people can access the opportunities and benefits of 'legitimate' society; they are accepted back into communities and given another chance.

- **Moral and political rehabilitation** is closely linked to redress and reparation. It is directly concerned with the re-negotiation of the social contract; with the moral and political terms of one's return to the community. In practical terms, this sometimes requires mediation or restorative work with victims, their families or communities in order to make reintegration viable. Personal rehabilitation is largely private and focused on the person who has offended. By contrast, moral and political rehabilitation requires a dialogue, often with the local community and victims, about *how* to ensure people can reintegrate.

- **Social rehabilitation** is a less formal process, linked to finding acceptance and belonging in a community. This is however, crucial to secure or longer term desistance since it is the development of precisely these kinds of social ties that can sustain change long after

supervision has ended. This implies the need to rebuild a social ecology of family, friends and contacts who can help to sustain a positive life-style.

- All of this means that in order for rehabilitation to be effective **individuals need to be reintegrated back into society**. Reintegration is a two way street. Offenders need to learn new ways but **society needs** to alter in order to **accept them**. Wales need to work to ensure that both aspects of this succeed.

8 Fair and respectful probation practice

The previous section focused mainly on the kinds of help and support that people need to support them towards reintegration. But, remembering that probation operates within a framework of legal authority, and that it involves the exercise of state power over citizens, it is also crucially important to consider questions of fairness and legitimacy in the use of that power.

Generally, research suggests that certain professional (and systemic) values and dispositions – linked to **legitimacy and procedural justice** – are vital for drawing people towards normative compliance; i.e. towards internalized commitment to the order or licence and, more generally, to the law.

Probation staff (and systems) need to model the values and virtues they want supervisees to adopt. If they don't – and if the wider system lacks legitimacy in the eyes of supervisees – then it loses the right to influence and persuade.

There is a vast body of research on legitimacy and procedural justice (mostly in relation to policing and prisons). For present purposes, I can say that, if I want supervisees to engage effectively and develop compliance, then staff and systems need to show:

- Respect for persons, for human dignity and for human rights
- Fair and consistent treatment that is responsive to people's different situations and needs
- Ensuring people's views are heard and heeded in relation to supervision
- Ensuring people feel that the probation officer is working with them to change

This means, for example, having a say in sentence planning processes and in developing agreements about what is needed to support desistance; giving the offender a say and listening to the offender even if one cannot always agree with what they think they want. It also means the very careful management of issues of compliance and enforcement.

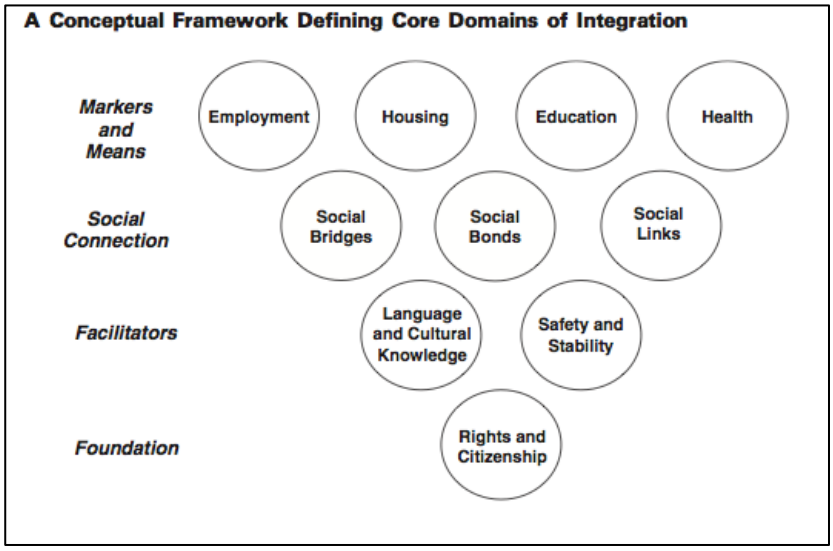
But **practical forms of help** (benefits, housing, etc.) are also crucial here –because unmet material needs and blocked opportunities can drive offending, because it can also drive non-compliance with orders and because meeting material needs signals respect for persons, concern and compassion, and thus builds legitimacy. Working closely with local VSOs can be very effective in meeting some of these needs.

Fairness is also linked to probation's support for reparation. This provides opportunities to ask people **how they want to contribute** to the wellbeing of others (in their families and communities, in the CJS); that can have both a dignifying and motivating effect. For example, there is strong evidence that as people age they develop greater concern for the well-being of others and even for the improvement of society. This is one reason why many 'ex-offenders' are motivated to become mentors and supporters of other people facing similar struggles to their own.

9 Assessing and measuring success

The present standard measure of success – reductions in one year proven reoffending rates - is a relatively poor measure of the quality and effectiveness of probation (and of sanctions more generally). Nonetheless, I accept that the measure should continue to play a role in assessing delivery until something more suitable is developed (in which case the two could be used to complement each other).

In line with the model set out at the beginning of this paper, in the long term, evidence of successful **re/integration is the best measure of the outcome of a just sanctioning process**. As yet, criminologists have not paid much attention to how this might be best articulated, but I can learn from efforts in cognate areas. For example, the following model of integration was developed from research with migrants and asylum seekers:



(from Ager and Strang, 2008)

This model bears some similarities to work on 'intermediate outcomes' towards reducing reoffending commissioned some time ago by NOMS. Though I would argue that it is reduced reoffending that is the by-product of effective reintegration, that model focuses attention on the right sorts of integration related outcomes. For example, the 'Intermediate Outcomes Measurement Instrument' (IOMI) measures changes in respect of motivation, optimism, resilience, and well-being, which help sustain efforts to change. It also measures progress in tackling practical problems in areas such as employment, housing, substance misuse, etc. Whilst the instrument has not been officially accepted it is being fairly widely used. (Note: HMPPS has not yet released this work for publication but Wales could adopt it as part of a new assessment system).

As well as measuring evidence of the **'distance travelled' towards re/integration** and ultimately a more fulfilling and crime-free life, probation services should measure the **quality of service** delivered and **user satisfaction** with it. Again, NOMS did commission work in these areas some years ago, but I am not sure what has been done with that work. In broad terms a robust evaluation framework would assess all four areas, allowing examination of the relationships between them that would guide service development:

- Distance travelled towards re/integration
- Quality of service
- User satisfaction
- Compliance (with orders and licences), proven reoffending ((officially recorded)

It is also crucial, in light of section 3 above, to collect evidence about the appropriate targeting of probation.

Assessments of this sort would require **a new inspectorate** or an inspectorate that would be willing to assess Wales against different standards from those used in England.

Kate Williams
Professor of Criminology
University of South Wales