"Contrasts in Tolerance?": A cross-sectoral analysis of punitiveness in the adult and youth criminal justice systems of Ireland, Scotland and the Netherlands 1990 – 2015

Siobhán Buckley, LL.B, B.L

Supervisor: Professor Claire Hamilton

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School of Law and Criminology, Maynooth University

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Plagiarism Declaration

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of Ph.D. is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of this work.

Abstract

Criminological research on the increase in punitiveness or harshness in both adult justice (Feeley and Simon 1992, 1994; Garland, 2002; Pratt et al., 2005; Simon, 2007) and youth justice (Goldson and Muncie, 2006; Muncie, 2008; Bateman, 2015; Hamilton et al., 2016; Cunneen et al., 2018) in the latter decades of the twentieth century has been extensive. One aspect of the debate which has arguably been under-explored in this regard is cross-sectoral variation *within* jurisdictions, namely, divergence of approach between the adult and youth justice systems in some jurisdictions and a more consistent approach across the two sectors in others. This raises important questions about cross-sectoral 'contrasts in tolerance' (Downes, 1988) and the determinants of these policies, including intriguing questions about the historical, cultural, economic, and social factors preserving (or not) a distinct approach to youth justice in certain jurisdictions. This research sought to answer such questions by conducting a cross-sectoral analysis of punitiveness or harshness in the adult and youth criminal justice systems of Ireland, Scotland and the Netherlands over a twenty-five year period from 1990-2015.

Towards this aim, the research examined: the differences and similarities between the adult and youth justice systems in the three jurisdictions; the key drivers behind these differences/similarities; and what, if any, transitional arrangements are in place for young adults in the three justice systems and the reasons why these arrangements differ. This was done by means of a case-within-a-case comparative study which allowed for elements to be revealed that may have otherwise been overlooked in theory generalisation (Paterson, 2012). As befits a case study design, a triangulated approach to data collection was employed, incorporating documentary analysis (country reviews), quantitative (statistical data) and qualitative (interviews) methods.

Overall, this thesis argues that a cross-sectoral approach to penality, viewed through the lens of path dependency, can provide fresh perspectives on the operation of the adult and youth justice systems and their relationship with one another. It can also reveal apparent differences in approach within and between justice systems, as well as key determinants ('risk' and 'protective' factors) of penal policies (Tonry, 2007). In this respect, the findings of this thesis point to the need to move away from a dualistic approach to penality towards a cross-sectoral approach.

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Abbreviations

ACJRD	Association for Criminal Justice Research and Development
ACL	Adolescent Criminal Law Act 2014 (*adolescentenstrafrecht)*
ASBO	Anti-Social Behaviour Order
ASBFPNS	Anti-social behaviour fixed penalty notices
CBS	Centraal Bureau voor de Statistiek
CHS	Children's Hearing System
CIPS	Committee of Inquiry into the Penal System
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRISS	Committee on Reformatory and Industrial Schools Systems
CYCJ	Children and Young People's Centre for Justice
DJI	Correctional Institutions Service (*Dienst Justitiële Inrichtingen*)
EEI	Early and Effective Intervention
GJDP	Garda Juvenile Diversion Programme
HMICS	HM Inspectorate of Constabulary in Scotland
HMIPS	HM Chief Inspector of Prisons for Scotland
IPRT	Irish Penal Reform Trust

JCFJ	Jesuit Centre for Faith and Justice
JJI	Juvenile Justice Institutions (*Justitiële jeugdinrichtingen*)
JLO	Juvenile Liaison Officer
PIJ	*PIJ-maatrege* (custodial treatment order)
PPS	Public Prosecution Service
SCRA	Scottish Children's Reporter Administration
SPA	Scottish Police Authority
SPS	Scottish Prison Service
UNCRC	The United Nations Convention on the Rights of the Child
US	The United States
WODC	Research and Documentation Centre (*Wetenschappelijk Onderzoek- en Documentatiecentrum*)
WSA	Whole System Approach
YCIA	Youth Custodial Institutions Act (*Beginselenwet justitiële jeugdinrichtingen*)
YOI	Young Offenders Institution

PART I

Chapter 1 - Introduction

1.1 Introduction

Almost without exception, jurisdictions across the world make provision for a separate youth justice system for young people in conflict with the law, as seen through the United Nations Convention on the Rights of the Child ('UNCRC') country reports. Such systems, while highly variable and frequently 'beset by issues of contradiction and compromise' (Muncie, 2008: 1), point to a commonly held belief that young people should be treated differently from adult offenders. Despite this, a closer look at trends in western criminal justice systems in recent decades reveals a much more complex picture, with stability appearing to characterise some systems and change, or politicisation of youth justice, taking hold in others. This raises important questions about cross-sectoral convergence or divergence, the drivers behind same and the relationship between the adult and youth criminal justice systems (Doob and Tonry, 2004). From the 1980s to the present time there has been a wealth of research on the developments in youth justice (see, most recently, Goldson et al., 2021), yet few studies have examined 'contrasts in tolerance' (Downes, 1988) *within* the justice system itself. This study aims to address this lacuna through comparative research into the adult and youth justice systems in Ireland, Scotland and the Netherlands over a twenty-five year period from 1990-2015.

This chapter introduces the current study. It starts by briefly exploring the background and context of this study. From this, the rationale for the aims and research questions of this study is provided, followed by a discussion on how this thesis will advance the current scholarly literature. This chapter ends by outlining the structure of the thesis.

1.2 Background and Context

For a number of decades now, there has been considerable commentary on the subject of punitiveness (Feeley and Simon, 1992, 1994; Bottoms, 1995; Garland, 2001; Simon, 2007). Sparking this discussion was the unprecedented rise in punitiveness in the United States ('US'), where there has been an eightfold increase in imprisonment rates since the 1970s and other punitive developments such as mandatory sentencing laws, boot camps and supermax prisons (Hamilton, 2014). This rise in punitiveness was seen in other western jurisdictions,

for example England and Wales, that also experienced an increase in imprisonment rates (Garland, 2001; Newburn, 2007). Beginning in the early 1990s, therefore, discussion by scholars on the 'extent, intensity and distinctive nature of penality… has been at the top of the research agenda' (Garland, 2013: 476).

While the most obvious explanation for increasing imprisonment rates is crime rates, as scholars such as Tonry (2007) have pointed out, the relationship is far from straightforward and in many countries crime and punishment appeared to operate relatively independently of one another. For example, whilst in the US the relations between crime and imprisonment seemed self-evident with a rise in imprisonment in the 1970s following a rise in crime in the 1960s, this was not experienced in other English-speaking countries, such as in neighbouring Canada. In other countries, whilst crime also rose from the 1960s, the 'inexorable increase in imprisonment' did not follow (Tonry, 2007: 2). The different reactions of countries to similar crime rates, points to the significance of 'penality'. There is a need to 'historicize penal questions and to situate them in terms of their sociological and political connections and surrounding conditions' (Sparks, 2001: 205), rather than their relationship with crime rates. According to Garland (1985: x; 2013: 246) penality forms the subject matter of the field of the sociology of punishment. It 'refers to the whole of the penal complex, including its laws, sanctions, institutions, and practices and its discourses, symbols, rituals, and performances'. Garland emphasises its usefulness in emphasising the sociological and the political and avoiding the connotations of terms such as 'penal system' or 'punishment' (see further Garland, 2013).

Punitive turn theorists or scholars of penality have aimed to explain these developments in punitiveness through different interpretative reference frames and historical explanations (Garland, 2013; Hamilton, 2014). This literature contending the arrival of a 'new penology' (Feeley and Simon, 1992; 1994) or 'culture of control' (Garland, 2001) and other accounts will be discussed in detail in Chapter Two. In particular, Garland's influential *Culture of Control* (2001), firmly established punitiveness or harshness as one of the major debates within the sociology of punishment and one that still forms the basis for contemporary discussions of punishment in 'late modernity' (Newburn, 2017). Importantly, it also acted as a stimulus for comparative penology and the factors impacting different penal cultures (Hamilton, 2014: 16; Nelken, 2011; Downes, 2011).

The emerging literature on penality in criminal justice systems extended its focus on adult criminal justice systems to youth justice, with numerous published commentaries presenting

an ‘unequivocal’ support of the ‘punitive turn’ thesis (Muncie, 2008: 108; Goldson, 2002; Junger-Tas, 2006). The manifestation of punitiveness within youth justice is discussed in detail in Chapter Two. In the US, England and Wales and throughout much of Western Europe, commentaries suggested that punitive values (such as retribution, incapacitation, individual responsibility and offender accountability) achieved political legitimacy in youth justice systems. This was achieved in detriment to the traditional welfare principles of youth support and protection (Muncie, 2008: 110). As stated by Junger-Tas (2006: 505), over recent decades the ‘main trend in juvenile justice in a number of countries has been more repressive but not necessarily more effective’.

As discussed above, jurisdictions have reacted to rising crime rates in diverse ways. In addition, not all jurisdictions experienced a substantial rise in imprisonment rates and penal polices were not becoming harsher everywhere (Tonry, 2007: 1). In this regard, scholars sought to explain why punitiveness has occurred in one country but not in another, with helpful frameworks being developed (Tonry, 2007; Lappi-Seppälä, 2011; Lijphart, 1999; Lacey, 2008; Green, 2009). It appears, however, that not only is there a divergence *between* jurisdictions in relation to the increase in punitiveness, but a deeper look reveals there has been a divergence *within* some jurisdiction’s criminal justice systems. In jurisdictions such as the US and England and Wales, when the adult justice system experienced an increase in punitiveness, so did its corresponding youth justice system. In the face of a punitive adult system, however, other jurisdictions appear to have retained a distinct approach to youth justice, such as Scotland and New Zealand. These examples will be explored briefly below, and are explored in more detail in Chapter Two.

Since the 1970s the US, as discussed above, has experienced an increase in punitiveness and mass incarceration resulting in it having the highest incarceration rate in the world (Tonry, 2017). Similarly, its youth justice system ‘witnessed unprecedented levels of incarceration, adult prosecution, and youth receiving life depriving sentences’ (Goshe, 2015: 42). In England and Wales, the imprisonment rates increased by two-thirds in the 1990s (Cavadino and Dignan, 2006) and several punitive developments ensued including the Crime (Sentences) Act, 1997, Crime and Disorder Act, 1998 and tougher punishments including the increased use of custodial sentences (Newburn, 2007). Again, similar to the adult justice system, the youth justice system also experienced punitive developments, as demonstrated by the 90 per cent increase in custodial sentences imposed on children between 1992 and 2001 (Nacro 2003, 2005 in Goldson et al., 2021). There was also an increased emphasis on ‘risk factors’ serving to legitimise early forms of intervention framed in the criminalisation and

responsibilization context (ibid). In both jurisdictions therefore, it is clear there is a pattern of convergence or homogeneity across the two sectors of the criminal justice systems.

In Scotland, the adult justice system experienced an increase in punitiveness resulting in having one of the highest imprisonment rates in Europe (Hamilton, 2014) but yet maintained a soft rhetoric with penal welfarism dominating its policy in the last three decades. This policy is particularly visible in Scotland's youth justice system, the Children's Hearing System, which has been described as 'distinctive' (Cavadino and Dignan, 2006: 232) and a 'system of justice for children in which their welfare is the primary concern' (Asquith and Docherty, 1999: 245). The youth justice system retained its welfare orientated and minimal intervention approach despite such high imprisonment rates and changes in its adult counterpart. Similarly, in New Zealand, the criminal justice system displayed a punitive adult justice system alongside a tolerant and welfare based youth justice system (Lynch, 2013). The adult justice system experienced an increase in imprisonment rates, imposition of punitive sentences and volatile and reactive law-making (ibid). Over the same period, the youth justice system had low detention rates, experienced stability in law and policy and youth crime and offending was depoliticized (Cavadino and Dignan, 2006; Lynch, 2013). In both of the jurisdictions therefore, there was a pattern of divergence or heterogeneity across the two sectors of the criminal justice systems.

In sum, therefore, the pattern towards homogeneity across the two sectors in some jurisdictions in recent decades and heterogeneity in others, invites important questions about the factors driving difference and the determinants of these policies. Research by Lynch (2013) and Hamilton (2014) suggests that these differences within countries should hold much interest for penal scholars, given the ostensibly different approaches pursued within the same system. Such differences raise intriguing questions about the historical, cultural, economic and social factors preserving (or not) a distinct approach to youth justice in certain jurisdictions. These intriguing questions formed the basis for the cross-sectoral approach to punitiveness taken in this thesis.

In addition to analysing differences or similarities between the two sectors, and the reasons underlying same, the thesis examines the transitional arrangements between the two justice sectors as they apply to young adults (aged 18 to 25) within the three jurisdictions. Most jurisdictions have exit points (to borrow the term from Goldson et al., 2021) that activate when a young person reaches the age of 18. Crucially, there has been international recognition (UNCRC, 2019) that young adulthood is a pivotal period in the course of

criminal careers and that brain development (specifically planning and impulse control) continues up until the age of 25 (Pruin and Dünkel, 2015) reinforcing the importance of a distinct response to young adults in the criminal justice system. As stated by Dame Owers (2012: 2): 'Blowing out the candles on an 18th birthday cake does not magically transform anyone into a fully functioning and mature adult – even without the life disadvantages many young people in criminal justice have experienced'.

Some countries have therefore made changes to raise the upper age limit or exit point of the youth justice system to better accommodate adolescents in the transition from childhood to adulthood (Schmidt et al., 2020) such as the Netherlands. Yet other countries have no transitional arrangements in place between their adult and youth justice sectors which results in an abrupt and arbitrary 'export' of young people from the youth justice system to the 'conventionally less-forgiving realm' of adult criminal justice systems (Goldson et al., 2021: 195). This raises interesting questions as to why some countries have recognised and adopted a distinct and flexible approach to young adult offenders, but others have not.

1.3 Research aim and questions

Against the above background, the overall aim of this research is to conduct a cross-sectoral analysis of punitiveness[1] or harshness in the adult, young adult and youth criminal justice systems of Ireland, Scotland and the Netherlands over a twenty-five year period from 1990-2015. Towards this aim, three research questions were adopted in this thesis:

1. What are the differences and similarities between the youth and adult justice systems in each of the three jurisdictions?
2. What are the key drivers behind these differences and similarities between the youth and adult justice systems in each of the three jurisdictions?
3. What, if any, transitional arrangements are in place for young adults in the three justice systems and why do these arrangements differ?

To answer these questions, this study adopted a 'case-within-a-case' case study design to allow for elements to be revealed that may otherwise have been overlooked in theory generalisation (which to date has focussed on inter- rather than intra-state differences)

[1] Punitiveness for the purpose of this thesis means 'state punitiveness'. Consideration was not given to the term 'punitivity' which refers to punitive attitudes in the public (see further Kury, 2009; Adriaenssen and Aertsen, 2015). 'Punitiveness' and 'penality' are used interchangeably throughout this thesis, given their similar connotations (Hamilton, 2014).

(Paterson, 2012). In order to arrive at variables to measure punitiveness, the concept of 'punitiveness' or harshness was operationalised in order to define and explain what is being examined. The conceptualisation of punitiveness for this study takes a 'long' or systemic view from the point of arrest/caution, through conviction and sentencing, onto detention and release (Cunneen et al, 2018). Having considered previous research and adopting a data reduction strategy due to the number of subcases (N=3 in each jurisdiction), five/six (depending on the sector) clusters of variables or indices were selected for the purpose of operationalising cross-sectoral punitiveness: imprisonment/detention, sentencing, policing, alternative disposals (including diversion) and prison/detention conditions. For two subcases, youth justice and young adult sectors, the additional index of 'human rights compliance' is included. This is justified on the basis that international conventions, such as the UNCRC, have established a near global consensus on core principles such as the 'best interests' of the child and use of custody as a last resort (Muncie, 2008; Cunneen et al., 2018; Hamilton et al., 2016). As befits a case study approach, the methods chosen for this research are triangulated to enhance the validity and reliability of the findings (Bryman, 2011) and comprise documentary analysis (country reviews), collection of existing data (quantitative) and interviews (qualitative). Further discussion on the methodology is outlined in Chapter Three.

1.4 Advancing the Current Scholarly Literature

Given the tendency in much of the criminological literature to examine adult and youth justice systems separately and in isolation of one other, this research demonstrates the valuable insights to be gained from examining both of these sectors *within* a jurisdiction. As stated by Lynch (2013: 217): 'both studies of punitiveness and tolerance have relied on analysis of single jurisdictions across time, or comparatively across jurisdictions'. While some studies have examined the adult and youth criminal justice systems within a jurisdiction, (see for example Lynch (2013) and Zimring (2000)), none have carried out this exercise comparatively. By adopting a comparative cross-sectoral approach to penality this thesis has therefore contributed to the existing literature in a number of ways, as outlined below.

Firstly, in taking a broad comparative approach to the adult and youth justice sectors within a criminal justice system it has drawn attention to the significance of their relationship with one another. In particular, more detailed scrutiny of the formal and informal boundaries between the two justice sectors and the degree to which they mutually legitimatise or constitute one

another contributes to the existing literature (discussed in Chapter Seven). This has received relatively little attention in criminology to date (outside of Fagan's (2008) research in the US). This thesis has shown that examination of these boundaries between the two justice systems can provide a deeper understanding of how these justice sectors operate.

A second contribution to the literature can be found in the way that this thesis adopted Tonry's risk and protective factor model (2007) and drew on the path dependency framework from the historical institutionalism field to explain why there was a divergence or convergence between the two justice sectors in each of the jurisdictions. In taking this approach, it allowed the specific factors preserving continuity in one criminal justice sector (youth justice) over another (adult justice) *within* a jurisdiction to be identified (discussed in Chapter Eight). Given the sociology of punishment literature's tendency to focus on change rather than the absence of change, this was an important advancement. In addition, by utilising this framework comparatively, it was particularly useful in explaining variation between *and within* jurisdictions in respect of their approaches to adult and youth justice.

Finally, this research contributes to the literature by providing insights into the treatment of young adults in the criminal justice system in the three jurisdictions. Existing research on young adults discusses the current practice within one jurisdiction (Schmidt et. al., 2020) or provide an overview of the current law and policy within jurisdictions for young adult offenders (Transition to Adulthood Alliance, 2009; Pruin and Dünkel, 2015). This study goes a step further by adopting a comparative approach and specifically asking *why* the Netherlands have adopted a distinct approach to young adults, but Ireland and Scotland have not. In addition, this thesis also highlights several key challenges in adopting a distinct approach to the young adult cohort, based on past failed attempts (young adult wing in Wheatfield prison in Ireland) and current practice (such as the disappointing judicial uptake of the flexible system in the Netherlands). Given the topicality of this issue, it is hoped that this research can ultimately assist in any future attempts at reform.

1.5 Outline of Thesis

This thesis is comprised of ten chapters and contains three key parts. Firstly, Part One comprises the literature review and methodology of this thesis. Secondly, Part Two contains three country review chapters relating to each of the selected country case studies. And finally, Part Three contains the three finding chapters and the conclusion to this thesis. Chapter Two examines the development of the concept of punitiveness in the adult criminal

justice system and its specific manifestation in the youth justice system. It begins by examining the origins of the 'punitive turn' (Pratt et al., 2005) and its development in adult and youth justice systems, taking account of the criticisms that have been levelled at this literature. The chapter goes on to explore the literature on the identification of determinants of penal policy that seeks to explain why punitiveness has occurred in one jurisdiction but not in another. Linked with this is a discussion on the path dependency literature which can assist in explaining not only moments of change in criminal justice systems, but also the absence of change and the reasons underlying this. The chapter then turns to examine the development of the literature on the measurement of punitiveness. It closes with a discussion of variation within criminal justice systems and examples of both cross-sectorally homogenous jurisdictions and heterogenous jurisdictions, outlining the need for a fresh approach to this area.

Chapter Three outlines the methodological approach chosen for this study. The chapter outlines the chosen research design of this study, which can be identified as a case-within-a-case comparative case study forming around the adult, young adult and youth criminal justice sectors of a jurisdiction. The reasoning for the selection of the 'cases' for this study, namely Ireland, Scotland and the Netherlands is then discussed, followed by discussion of the methods that were used in this study, as outlined above, and triangulation of same. The process of data analysis undertaken as part of this research is then outlined, with both inductive and deductive approaches applied. The chapter finishes by outlining the ethical considerations and acknowledging the limitations of this study.

There are three country review chapters, namely Chapters Four, Five and Six. These chapters provide an extensive review of criminal law and policy within the adult and youth criminal justice systems of the selected jurisdictions for the period from 1990 until 2015. Each of the chapters are divided into two parts with the first part providing a chronological review of law and policy in both justice sectors over the twenty-five year period. The chapters then go on to assess cross-sectoral punitiveness in the three justice sectors, namely the adult, young adult and youth criminal justice systems, according to the five/six indices that were outlined in Chapter Three and listed above.

The final section of the thesis (Chapters Seven to Nine) presents the findings and analysis of this study, with each of these chapters corresponding to one of the research questions. Chapter Seven considers the findings of the first research question, namely, what are the differences and similarities between the youth and adult justice systems in each of the three

jurisdictions. In answering this first research question, the chapter is divided into three parts. The first part discusses the differences between the two justice sectors in the three jurisdictions drawing on the empirical data collected for this thesis. The 'contingent leniency' present in the youth justice systems in each jurisdiction is then explored from a variety of perspectives (geographical, dispositional, etc.). Finally, the formal and informal boundaries between the adult and youth justice sectors are discussed with an argument advanced that the two sectors may in certain circumstances serve to mutually constitute or legitimise each other.

Chapter Eight considers the findings relating to the second research question, namely, what are the key drivers behind these differences and similarities between the youth and adult justice systems in each of the three jurisdictions. Given the historically and culturally embedded nature of the factors influencing policy paths in this area, this chapter is divided into three sections with each section discussing one of the selected jurisdictions. The jurisdictions have been characterised following the findings in Chapter Seven with Ireland and Scotland displaying (contingent) divergence between their two justice sectors and the Dutch justice sectors displaying (relative) convergence. The drivers behind these characterisations are explored through the lens of path dependency in conjunction with the risk and protective framework devised by Tonry (2007).

Chapter Nine considers the findings relating to the third research question, concerning the presence or absence of transitional arrangements in place for young adults in the three justice systems. Despite interdisciplinary research stressing the need for a distinct approach to young adults (Farrington et al., 2012; Transition to Adulthood Alliance, 2009; Irish Penal Reform Trust, 2015; Pruin and Dünkel, 2015) only one of the three selected jurisdictions for this study have transitional arrangements in place for this cohort (the Netherlands). This chapter explores why each of the jurisdictions adopted their respective approach towards young adult offenders and transitional arrangements together with examining the data trends in respect of young adults.

Lastly, the concluding chapter, Chapter Ten focuses on the key themes that emerged from the findings in relation to the three research questions. It goes on to discuss the overall relevance, significance and implications of this thesis. It concludes by arguing the benefits of a cross-sectoral approach to penality.

Chapter 2 - The Punitive Turn, its Legacy and Cross-sectoral Punitiveness

2.1 Introduction

As discussed in Chapter One, the origins, effects and utility of the punitiveness concept have been extensively debated within criminology. Some of the earlier attempts to explain the 'punitive turn' in western societies since the 1970s contended that we had witnessed a 'new penology' focusing on risk management (Feeley and Simon, 1992, 1994), a 'culture of control' (Garland, 2001) or the rise of 'governing through crime' (Simon, 2007). Subsequent literature began to examine whether this 'punitive turn' had also taken place in the youth justice systems with many contending it mirrored its adult counterpart (Muncie, 2008; Goldson and Muncie, 2009). It is the aim of this chapter to critically examine the origins and development of the 'punitive turn' (Pratt et al., 2005) in the adult criminal justice system and its specific manifestation in the youth justice system. In addition to criticisms of this work, the emerging body of research on the determinants of penal policies will be explored, with a view to identifying gaps in our knowledge relating to cross-sectoral variation between the adult and youth justice systems. The chapter will then go on to examine the problems relating to the measurement of the punitiveness concept, followed by a discussion of the literature focussed on the multidimensional nature of punitiveness. Finally, it will discuss variations in the levels of punitiveness *within* the adult and youth justice systems of various jurisdictions proffering an argument that such cross-sectoral differences and similarities are worthy of further analysis, and utilising a path dependency framework may assist in such analysis.

2.2 The Punitive Turn and its legacy

The following section looks at the development of the concept of the 'punitive turn' in certain jurisdictions; focussed initially on the adult criminal justice system and then subsequently on the youth justice system. It has been argued that this drive towards increased punitiveness or harshness in some criminal justice systems has left behind a 'punitive legacy'. This legacy, however, is complex and has manifested itself in diverse ways; firstly, it has taken very different forms in different jurisdictions and secondly, even within jurisdictions, it is subject to considerable variation within the criminal justice system itself. Whist it is acknowledged that the 'punitive turn' has subsided in certain jurisdictions, such as the US, it is still a useful

frame of analysis given the recent arguments advanced in respect of the presence of punitive legacy which will be explored below.

As noted, the dramatic increase in the level of incarceration in the US (and to a lesser degree in England and Wales) gave rise to a number of attempts by criminologists to explain and theorise these developments. One of the earliest accounts was that put forward by Malcolm Feeley and Jonathon Simon (1992, 1994) who together argued for the emergence of a 'new penology'. By this they meant a shift from a focus on rehabilitation to crime control and risk in the criminal justice system, resulting in the targeting of subpopulations and categories as opposed to individuals. The new penology concerned itself with a managerial process i.e. the identifying and managing of unruly 'dangerous' groups and was also informed by risk calculation techniques used in the insurance industry ('actuarial justice'). For them, the 'old penology' was backward-looking and focused on the individual whereas the new penology is 'forward-looking', focusing on risk management at a collective level. In a practical sense, this resulted in important changes in prison and probation policy, identifying and managing groups sorted by dangerousness, without any real aspirations towards their rehabilitation or reintegration. In this system, recidivism, paradoxically, becomes a symbol of success or accurate risk prediction, rather than, as in the 'old penology' a mark of failure.

These arguments were built on by Garland in his landmark text *The Culture of Control* (2001) where he argues that there has been a cultural change in crime control, noting the aforementioned trends relating to risk and a more emotive type of criminal justice policy. This new culture is responsible for promoting harsher sentences, curfews, increased use of imprisonment and surveillance etc. Garland contends that two social forces can account for the increased punitiveness in the US and the UK since the 1970s; firstly, dramatic social changes such as changes in family structure and secondly, the free market conservative politics adopted by successive governments. With the state facing stubbornly high crime rates and feeling an inability to do anything about them, Garland contends that the reaction of the state largely derives from a crisis at the level of state sovereignty. Two subsequent policies were therefore developed: an adaptive strategy and an expressive/punitive segregation strategy. These two policies form in Garland's view the 'culture of control' within which we see a shift from a rehabilitative to an economic style of reasoning.

The first strategy, the adaptive strategy, stresses prevention and partnership and promotes an adaptive realistic approach seeking to respond to the high crime rate predicament e.g. diversion of minor offences. The attempt to 'responsibilise' individuals, agencies and

organisations that operate outside of the criminal justice system in the community to exert social power and enhance crime control has also been an important part of this project. The second, more expressive sovereign state strategy takes the form of both the *denial* of the limited power of the sovereign state to control crime and *acting out* whereby the state 'engages in a form of impulsive and unreflective action, avoiding realistic recognition of underlying problems.' (2001: 132, 133) Similarly, policies such as the three-strike rule, mandatory sentences and paedophile registers should be understood as an example of acting out to denounce the crime and reassure the public. Garland concludes that a 'new crime control culture has emerged that embodies a reworked conception of penal-welfarism, a new criminology of control, and an economic style of decision-making' (2001: xi).

In addition, Simon (2007) contributing to the discussion in his book *Governing Through Crime*, though presented as an American study, examines how crime is used as a way of governing; through justifying policies that have other motivations and replacing previous forms of governance in the US such as the welfare state or New Deal political order. Simon explains how from the late 1960s, Americans built a new civic and political order structured around the problem of violent crime resulting in the American elite 'governing through crime'. The newfound appeal of a 'war on crime' and victim-centred politics, Simon argued, prompted vote-seeking politicians to use crime control and its techniques as a model template for government in areas as diverse as education, family policy, workplace relations and housing. Crime has therefore now become a means of governing social conduct resulting in harmful consequences for civic society and the penal system. While in the 1960s, when responding to various forms of resistance, generally crime/punishment and the violence it authorises was the state's last response, now it has become the first response. This form of 'governing through crime' fuels a culture of fear and control which Simon contends has 'resulted in a shift aptly described as a transformation from 'welfare state' to 'penal state'' (2007: 4).

The above literature represents some of the most significant attempts to theorise and explain the alleged 'punitive turn' in some western societies since the 1970s. Spurred on by dramatic increases in imprisonment rates, criminologists advanced arguments concerning a 'new penology', 'culture of control' and 'governing through crime' as a way of understanding the change in penal policies. In all these accounts, risk management focusing on categories of 'risky populations' as opposed to individuals appears to be a key indicator of the 'punitive turn'. As will be observed below, however, these accounts have not escaped criticism and to some degree have been overtaken by events.

2.2.1 Limitations

Since the emergence of the debate on the 'punitive turn', its concept, development and characterisation, many sceptical voices have come forward questioning the extent of the transformation in criminal justice systems. Matthews (2005), for example, argues that while the term punitiveness has been widely used there has been 'little attempt to define or deconstruct it', (2005: 178) leaving a general vagueness surrounding it. He argues that there needs to be a conceptual framework mapping the increasingly complex and growing array of penal sanctions as they simply cannot be lumped together. Punitive strategies, Matthews argues, have historically been an endemic feature of crime control policies, thus there is a need to explain what is new. While Matthews makes important points about the conceptualisation of punitiveness, it is worth noting that the term 'punitiveness' has been subsequently operationalised and a framework has been proposed for its effective measurement (Tonry, 2007; Hamilton, 2014). Indeed, one may argue that the limitations identified by Matthews can be addressed through the conducting of a systemic analysis, including one that examines different sectors (adult, youth, etc.) of the criminal justice system (Cunneen et al., 2018; Hinds, 2005; Gordon, 1989).

In addition to Matthews, work by both Lucia Zedner and Pat O'Malley has been to the forefront of this critical literature. O'Malley (2000) argues that, rather than the limits of the sovereign state or emergence of postmodernity, we are simply witnessing a prolonged period of inconsistency and volatility in penality owing to changing models of government and warns against the 'criminologies of catastrophe'. Zedner (2002) similarly offered a warning against the 'dangers of dystopias' in a review of Garland's *Culture of Control* and commented that it was a book so pessimistic in its analysis of recent trends and future prospects cannot help but attract political attention. Further, Zedner draws attention to important continuities such as the use of fines as well as more recent, progressive changes in penal policy, such as restorative justice. As Hamilton (2014) correctly contends, however, whilst Matthews, O'Malley and Zedner offer valid criticisms on the generalising tendencies in the literature on punitiveness, nowhere do these writers describe how this lack of clarity can be addressed or why *their* indices (e.g. rise of restorative justice) should be privileged. As with Matthews, a large part of these criticisms would appear to go to a lack of consistent treatment and operationalisation of the topic to date, rather than to the merits of the concept itself.

More recently the dynamic and variable nature of penal cultures can be seen in the reduced imprisonment rates in some jurisdictions particularly in England and Wales and US. Such variation in these imprisonment rates indicates that penal cultures need to be analysed over a period of time and should be taken into account when developing a framework in this area. In addition, the geographical limitations of the above discussed work should be considered, e.g. Garland's *Culture of Control* (2001) thesis was based on two jurisdictions therefore it cannot be indicative of what is happening everywhere. Indeed, Downes (2011) has warned against the danger of dragging the world in the wake of mass imprisonment in the US following Garland's thesis on the *Culture of Control.*

Spatial limitations to the new punitiveness have important implications for the aforementioned literature. Garland (2011) contended that a 'cultural turn' has occurred in the sociology of punishment literature since the publication of the *Culture of Control.* One of the most well-known accounts in respect of this turn is Savelsberg's (1999, 2002, 2004) study of the differences between the US and Germany in punishment practices. Savelsberg identifies two factors which have mediated Germany's culture of control and created a distinct reaction to same which can be seen in the steady imprisonment rate. First, the German institutional arrangements link decision makers close to the state apparatus while insulating them from public opinion. Secondly, stemming from the experience of the Nazi regime this led to a post-war secularisation of traditional Protestant concepts of forgiveness and rehabilitation (2002: 969). In seeking to explain variation in penal severity, institutional structures as well as 'foundation cultures' and major historical events should be considered as seen from the German experience. In American governance, Savelsberg contents that the high level of accountability of the American governmental structure and dispersed nature of governmental power together with the stronger Protestant beliefs sheds some light on the stronger culture of control dominant in the US. The implications of culturalist critiques to the work of Garland and others suggest that there is a shift from '*culture* of control in contemporary *society* to *cultures* of control in contemporary *societies*' (Savelsberg, 2004: 707).

Downes (2011) proposes that the key question many works are seeking to address which stemmed from Garland's thesis is 'how far, and why, the world of late modernity has generated the 'punitive turn' which condemns far more offenders, increasingly and self-righteously, to longer terms of imprisonment than was either previously the case or than is justifiable in terms of social defence or common humanity' (2011: 29). It is also clear that, regardless of whether one agrees with Garland's thesis or not, it has become the starting point for discussions on contemporary punishment. As pointed out by Newburn (2017: 360):

> ‘although there have been some trenchant criticisms of David Garland's culture of control thesis... it has now firmly established itself as the basis of, and often the framework for all thoughtful discussions of crime control under conditions of late modernity.’

Moreover, it is a concept with continued relevance in contemporary times. ‘Penal populism’ is a cognate term for ‘populist punitiveness’, first coined by Anthony Bottoms 25 years ago and arises when 'politicians tap into, and use for their own purposes, what they believe to be the public's generally punitive stance' (Bottoms 1995: 40). In more recent years there has been a ‘populist explosion’ (Judis, 2016) internationally, commencing with Brexit and the election of Donal Trump and continuing with a string of electoral successes for populist right wing parties in Europe (and elsewhere). It is worth noting that penal populism ‘has returned with a vengeance’ (Bell, 2022: 1077) in this context. Bell cites the toughening up of criminal justice policy that has followed Boris Johnson’s time in office, and this focus on crime has been emulated by both Donald Trump (through his focus on migrant crime) and by populist parties in jurisdictions as varied as Belgium, France, Poland, Hungary, the Philippines, and Israel (Hamilton, 2022b).

In light of the above, rather than suggesting one monolithic culture of control exists it is argued that several cultures of control exist. As Tonry (2007) asserts, penal polices not becoming harsher everywhere and imprisonment rates are not substantially rising everywhere in the number of decades. Some jurisdictions have experienced most or some of their penal policies becoming more severe. This increase in severity is not due to rising crime rates, conditions of late modernity, increased awareness of risk or globalisation but rather Tonry explains is due to ‘distinctive cultural, historical, constitutional and political conditions’ (2007: 1) with determinants and characteristics of penal policy remaining local. Therefore, Tonry argues that in determining differences between jurisdictions in terms of how their penal polices are shaped we will have to have a more nuanced account of what happened and more imaginative efforts to explain why. It is argued this is also applies to differences *within* two sectors of a country’s criminal justice system in terms of their penal policies are shaped. With the emergence of increased criminological literature in the 1990s and 2000s Tonry gives much credit to Garland’s *Culture of Control* which attracted attention and provoked many commentators to respond to his analysis.

2.2.2 Youth Justice

Following the emergence of literature on punitiveness in the adult system, a parallel discussion began on punitiveness within the youth justice systems of various jurisdictions. Literature has explored youth justice at both a local and international level, importantly taking stock of the influence (or lack thereof) of international human rights and conventions on youth justice. In international youth justice, Muncie (2008) stated that it is clear punitive values throughout Western Europe have achieved 'political legitimacy to the detriment of traditional principles of juvenile protection and support' (2008: 110). Based on two indices, Muncie examined the 'punitive turn' in Western Europe and the USA. The first index is in respect of the degree of compliance with International Rights Conventions, most notably, the UN Convention on the Rights of the Child (UNCRC). Muncie noted the lack of formal sanctions for breaches of the UNCRC being particularly relevant given that it is the most ratified but most violated international human rights instrument.

The second index is in relation to comparative juvenile custody rates. While Muncie was able to compile comparative data using UNICEF data, he also acknowledges the lack of reliable data on how many children are in custody in various jurisdictions stating it is 'probably symptomatic of the relative lack of importance given to the issue' (2008: 114). In addition, any data that is available on juvenile detention may be of limited use given the differing meaning of 'child', 'juvenile' or 'young person' within different jurisdictions. Muncie also commented that when data are provided by a state it is not clear what the data are based on e.g. under 18s or under 21s, total custodial populations or those under sentence or those in prisons, or total based in any welfare institutions in quasi welfare systems. Such discrepancies and lack of 'common measuring instruments, and of common methodology makes comparisons between countries very hazardous' (European Sourcebook, 2006: 21). Muncie supported the view that penal custody should not be the sole measure of punitiveness and contended that the widely diverse resort to penal custody across Western Europe needed further analysis and explanation. Such diversity begs the questions whether it is suggestive of a more tolerant penal climate in Europe.

Muncie concludes by seeking to explain the vast diversity in Western Europe. Whilst there is an acknowledgement that individual states can and do react differently to young people, paradoxically there is the assumption that there is greater criminal justice intervention in Europe (2008: 117). Muncie acknowledges the limits of his examination, noting that it may not confirm or deny the 'punitive turn', but nevertheless allows us to 'unravel some of the

complexities in understanding the nature and meaning of contemporary shifts in international juvenile justice' (2008: 110).

Indeed, there is little doubt that youth justice discourse is of a complex and hybridized nature (Goshe, 2015) and this is evident from the literature examining the effects of the 'punitive turn' in youth justice. In this regard, Goldson and Muncie (2006) commented that the pace of youth justice reform in England and Wales since the election of the first New Labour administration in 1997 has been unprecedented, supporting the contention that the new defining hallmark of contemporary youth justice is 'a new punitiveness' (2006: 92). Such reforms derive from a new politics of 'toughness' on the one hand and a range of 'what works' discourses on the other. Youth justice policies are becoming increasingly placed within a wider ideological context whereby social, political and economic problems should be *resolved* but are instead being *managed*. Goldson and Muncie argue this has characterised a broader movement 'in England and Wales, away from rehabilitative and transformative optimism towards greater surveillance, regulation and, ultimately, punishment' (2006: 99).

Whilst there may be indications that patterns in youth crime are stable and decreasing, the youth justice system has expanded from the early 1990s to 2008, characterised by developments at both the front-end (early intervention processes and powers) and the back-end (surveillance and custodial responses) of the system. Echoing Feeley and Simon (1992) and their emphasis on risk management within the criminal justice system, Goldson (2009) discusses the implications flowing from the concept of 'risk factors' related to offending, justifying early intervention at the 'shallow end' of the youth justice process and an overly punitive orientation expressed through child incarceration at the 'deeper end' of the youth justice process. While detention rates have declined in recent years − with 1,597 juveniles between ages of 15 and 17 in prison in 2011 compared to 613 in 2018 (Ministry of Justice, 2018). Goldson (2015) contends that the ebb and flow of child imprisonment rates are an adaption/response to political pressures rather than as a reaction to the nature and incidence of youth crime.

Similar views have been expressed in more recent work by Bateman (2015), Cunneen et al. (2018) and Case and Bateman (2020) in England and Wales, Goldson et al. (2021) in Australia and England and Wales and Goshe (2015) in the US. Taken together, they caution against the assumption that we are leaving the punitive era in youth justice. Bateman (2015), for example, argues that the seemingly more progressive shift in youth justice policies in England and Wales towards diversion and away from custody is pragmatic rather than

principled and aimed at alleviating pressures on overstretched services and overcrowding of the custodial estate. Thus, Bateman argues punitive overtones remain close to the surface of the system with the introduction of new measures such as extending the powers of the courts to enforce curfews and return to custody in the Crime and Disorder Act, 1998. Similarly, Cunneen et al., (2018) undertook a systemic analysis on human rights and youth justice reform in England and Wales. This analysis importantly confirmed that the culture of punitiveness has not gone away and that whilst punitiveness can decrease in one section of the system (i.e. detention rates) it can remain constant in another (e.g. human rights breaches in the manner in which children are policed), alluding to the importance of an inclusive and thorough analysis when researching this area. This arises as statistics have been released indicating a decrease in the number of juveniles detained and a decrease in crime rates. Faced with this, the question which has been asked is whether the culture of punitiveness has gone away in youth justice? The downsizing of child imprisonment witnessed post-2008 cannot, Cunneen et al argue, be taken to symbolise a 'maturing of human rights consciousness' (2018: 424).

Case and Bateman (2020) explored the transition from 'child' to 'offender' status (termed the 'offenderisation' of the child) which can result in children being treated more punitively as they progress through the youth justice system. These 'offenderising' transitions and status of children who offend, they argue, are socio-historically contingent on their behaviour, and political, socio-economic, societal, system and demographic factors. In particular the transition from child to offender has changed through different historical junctures in England and Wales and through adopting a socio-historical approach taken by Case and Bateman (2020: 478) it allows 'lessons to be learnt from youth justice past so that we can better understand the present (and potential future) of youth justice'. Case and Bateman (ibid) found two key features of youth justice in England and Wales from their historical analysis; firstly from the inception of the youth justice system it has been consistently marked by this process of 'offenderisation' in which 'children in trouble are accorded a different, and stigmatising, status to their peers'. Secondly, they found this process takes different forms at different times e.g. until the 1980s youth justice was concerned to reconcile competing tensions of welfare and justice, during the 1980s and early 90s practice movements were inclined towards diversion, and during the 'punitive turn' of 1990s it expanded the offenderisation of children and popularised 'youth offender' terminology. They conclude by applauding the decriminalisation of significant numbers of children over the past 12 years but caution this was instrumental and not driven by an informed approach towards managing

disadvantaged children and their behaviour. Further, the dynamic where children forfeit their innocence as they transition to offenders in still in place, echoing Bateman (2015) and Cunneen et al., (2018) that punitive overtones remain in the youth justice system.

Recent work by Goldson et al., (2021) also references the 'ample evidence' that there has been enduring punitiveness in the youth justice systems in Australia and England and Wales through the period of 2003 to 2018. While they acknowledge that this assumes different forms and at varying times, it stems 'from a risk-centric obsession and abiding sense of risk-aversion and intolerance' (ibid: 40). It was argued that this was seen particularly in Australia's punitive bail trends and increasing use of penal remands and in England and Wales's proliferation of ASBOs and the net-widening effects of policing targets, reflecting an examination of both front and back-end measures.

Similarly, with positive changes being made in youth justice in the US, Goshe (2015) warns of a premature optimism arising. After a wave of unprecedented levels of incarceration, juveniles being subject to adult prosecutions etc. the cap placed on harsher penalties by the US Supreme Court has been a welcome change in this sphere. The US Supreme Court moved away from 'the punitive rhetoric that claimed juveniles who committed "adult crimes" could do "adult time"' (Goshe 2015: 42). Contrary to the contentions of some commentators (Howell et al., 2013; Lipsey and Howell, 2012; Listwan et al., 2008) Goshe contends that these developments, whilst welcome, are not indicative of a new era of youth justice relying on the fact that key elements of the youth justice system remain the same, despite numerous waves of reform. Stubborn problems such as too much punishment and not enough meaningful support combined with too much discriminatory social control and exclusion of marginalised groups are referred to by Goshe as the 'punitive legacy' (2015: 42) of youth justice in the US.

Goshe identified three primary conditions that she argues need to be addressed in order to surpass the punitive legacy: the cultural ethos of callous self-sufficiency, continuous neglect of collective youth welfare and emphasis on risk management and cost-effectiveness. Goshe contends that the ideology of callous self-sufficiency, with long standing cultural roots, places excessive emphasis on personal responsibility for social problems and places a high value on punishment which continues to justify rational punitive practices e.g. the prosecution of youth as adults. In addition, it reframes abusive practices as 'therapeutic' ways to promote self-reliance. A cycle of neglect and failure stimulating more delinquency was set up for the broad scale neglect of youth welfare and inattention to human rights in the US. The

emphasis on risk management, efficiency and cost-effectiveness has resulted in a juvenile court defined by the exclusion of youth who are too high risk, those who are a waste of resources and are not amenable to juvenile court intervention (2015: 44). In addition, without the resource supports, it places pressures on rehabilitative programmes to track outcomes which may set them up failure.

The particular issues explored by Goshe grew in strength during the punitive era, and if left unexamined could continue the 'punitive legacy' into what is hoped to be a progressive new chapter in youth justice. The issues taken together could potentially undercut the progressive reforms prolonging the story of the punitive era with more punishment, harmful neglect and discriminatory social control which illustrates that the punitive culture in the US has not gone away. Thus, whilst there may be a growing sense of optimism, it is evident that in order to achieve real reforms in youth justice, persistent underlying problems in youth justice systems need to be examined.

Goshe is not alone in her cautioning of leaving a 'punitive legacy' with Zimring (2020) and Tonry (2017) echoing the same caution in the adult justice system. Zimring (2020) in his book *The Insidious Momentum of American Mass Incarceration* explores when, how and why the US became a world leader in respect of incarceration and how this has been sustained from 1970 to 2020. Zimring emphasises in this explanation the important roles of both the distribution of power and fiscal responsibility among the levels of government in the US and the deferral system. In a similar vein, Tonry (2017) discusses the understanding at a rhetorical level that mass incarceration in the US was a huge mistake with examples of gestures from President Obama announcing some small waves of release and Former Attorney General Eric Holder establishing a programme to review federal prisoner files. Yet as Tonry (2017: 443) states despite this change in rhetoric and gestures, 'not much has happened'. Even where there has been a small decline in the prison population (such as a 1.8 per cent decline between 2011 and 2012) it will take eighty-eight years for the rate to reach even the 1980 level (which was double the 1973 base rate) (Tonry, 2017). Therefore, it is no surprise that the prison population has failed to fall significantly with Tonry stating the changes needed for such a fall have not happened. Little will happen concerning the issue of mass incarceration unless 'powerful political groups want it to happen' and will in turn 'spend political capital to make it happen' (ibid: 494).

While it is acknowledged that there have been positive developments in criminal justice systems, coupled with the universal crime drop and a reduction in imprisonment rates in

some countries (McAra and McVie, 2019; Council of Europe, 2019), the above analysis cautions against moving away from the continued discussion on punitiveness in criminal justice systems.

2.3 Determinants of penal policy

As indicated above, elements of the 'punitive turn' continue to be present in both the adult and youth justice systems. Yet this 'punitive turn' is far from universal, with increases in imprisonment rates most apparent in the US and England and Wales. As Tonry has noted; 'faced with similar crime trends, different countries react in different ways' (Tonry, 2007:3) so that, for example, many countries in Northern and Eastern Europe were less affected by the 'punitive turn'. This begs the question *why* countries appear to be differentially affected by the 'punitive turn'. In this regard, scholars such as Tonry (2007) and Lappi-Seppälä (2011) have made considerable progress in identifying determinants of penal policy that seek to explain why punitiveness has occurred in one jurisdiction but not in another. Further in exploring why there is a diversity among countries in respect of the nature of the 'punitive turn' it raises interesting questions about the change that some criminal justice systems have experienced over a period of time compared to others that have experienced stability. In this regard, path dependency frameworks are useful in understanding both change and continuity in criminal justice systems and are explored in Section 2.4 below.

Tonry

Tonry (2007) searched for generalisations that help explain any national differences in penal policies and practices. To build upon what we already know Tonry set out a framework for understanding determinants of penal policies by identifying risk and protective factors which increase or decrease the likelihood of punitiveness respectively. Tonry explains that the risk and protective factors framework can be used to understand changes in punitiveness e.g. in England the media has shaped public opinion that conduce adoption of more punitive policies so therefore sensationalistic media can be seen as a risk factor. Tonry rightly stresses the probabilistic and dynamic nature of his risk and protective factor framework as a risk factor being present does not necessarily mean that the unwanted outcome is inevitable and the presence of a protective factor does not mean that the unwanted outcome will be avoided; the likelihood of both outcomes will be greater or reduced respectively (2007:15) In order to

change the likelihood of undesirable outcomes, risk and protective factors need to be identified. Every country experiences long-term developments (rising crime rates) and sensationalist incidents creating moral panic (James Bulger killing in England) however they respond in different ways which can be explained by different mixes of risk and protective actors.

For Tonry, the most prominent national risk factors include 'conflict political systems, elected judges and prosecutors, particular forms of sensationalist journalism, Anglo-Saxon political cultures, and a predominant view that criminal justice policy falls appropriately within the province of public opinion and partisan politics' (2007: 17–18). Tonry views the fact that the US and England and Wales have many of these characteristics which in turn forms part of the explanation for their punitive policies and high prison populations. In respect of protective factors they include 'consensus political systems, non-partisan judges and prosecutors, Francophonic political cultures, and a predominant view that criminal justice policy falls appropriately within the province of expert knowledge and professional expertise' (2007: 34) For him the existence of several protective factors in European countries goes part of the way to explaining milder penal policies in place in Europe than in the US.

Lappi-Seppälä

It is notable that many of the factors identified by Tonry as key in explaining penal policies are also present in the work of Lappi-Seppälä (2011, 2014). Lappi-Seppälä identified influences over penal policy in different countries by exploring the linkages between the imprisonment use in thirty countries in Europe and analysing explanatory factors for variations in the ranges in the measure of punitiveness including crime levels, social indicators, and variations in political structure and forms of democracy. His findings were that characteristics such as a consensual and corporatist political culture, strong welfare state and political legitimacy have direct and indirect influence in countries with moderate penal policies, and less so in countries with more punitive policies. Lappi-Seppälä is optimistic in his message; penal practice is not determined by structural factors such as neoliberalism, even if it is constrained by it. Similar to Tonry above, Lappi-Seppälä is careful and takes a similar approach in emphasising the probabilistic dynamic of his framework, reasoning it is not proposed to be a final causal model explaining differences in penal severity but rather an aid to explain the shape of penal policies in Western Europe.

Lijphart

It has been suggested that drivers of penal policy may also take the form of political culture which has been defined in Lijphart's (1999) distinction between conflict and consensus democracies and his exploration of the nature and consequences of such models. Consensus-style democracies seek to share and disperse power and protect minorities taking many views into account. Whereas conflict style democracies are based on a 'winner takes it all' philosophy with the will of the majority dictating the choices made by policymakers. Lijphart sought to determine whether political traditions and government structures which operate to consensus policy processes are more likely to achieve democratic policy outcomes than conflict-model governments. Lijphart concluded that consensus governments achieve more humane criminal justice policies than conflict-models do. Lijphart's models however are not static and the fact that political systems and cultures over time experience change needs to be considered. Indeed, Tonry (2007) discussed a consensus political culture being a protective factor in making penal polices in a country less likely to occur. In countries which have consensus-based processes crime control has not become a recurring political issue and, as opposed to the US and England and Wales, there would be no need to address perceived public anger by means of adopting tough-on-crime policies (Tonry, 2007: 34).

Lacey

Lacey's work has two main strands: socioeconomic and political. *The Prisoners' Dilemna* (2008) looked to Continental European countries pursuing a more moderate path in penal policy to see what Britain can learn. Lacey drew a distinction between 'liberal' and 'co-ordinated' economies. Countries falling into the liberal economies category were more likely to inflict harsher criminal penalties (Sparks, 2011). As she argues 'co-ordinated systems which favour long-term relationships… have been able to resist the powerfully excluding and stigmatising aspects of punishment' in contrast to 'liberal market systems more orientated to flexibility and mobility have turned inexorably to punishment as a means of managing a population consistently excluded from the post-Fordist economy' (2008: 109). Therefore, Lacey contends the 'culture of control… is a product of the dynamics of the liberal market economies' (2008: 110). Lacey related the political economy to the type of political culture in which criminal justice is embedded and electoral arrangements. What makes it more or less difficult for governments to respond in a punitive way to popular anxiety about crime is the institutional features of political systems. As with Tonry and Lappi-Seppälä, Lacey chose to

adopt Lijphart's typology based on consensus and conflict democracies. In respect of criminal justice policy Lacey argues that particular conditions present in liberal market economies with majoritarian electoral systems' unmediated responsiveness to popular opinion in politics makes it harder for governments to resist increasing penal severity. Such conditions present in the adversarial context of the two-part system include relatively low trust in politicians, relatively low deference to the expertise of criminal justice professionals and political parties ideological divide weakening.

Green

Addressing political culture and penal policy Green (2009) looks to explain a country's propensity to penal populism. Green's argument is also based on the Lijphartian distinction between majoritarian and consensus democracy in respect of incentives to exploit crime for political gain or penal populism. Green defined penal populism as the presumption of harsh public attitudes driving and justifying harsh criminal justice policies. Penal populism is not experienced in the same ways everywhere however due to the appeal of tough talk being stronger in some places than others and as such it is argued by Green that some countries have cultural predispositions to punitiveness.

Green sought to explain two countries' responses to child-on-child homicides using the concept of 'political culture' or 'ways of doing politics'. In England in 1993, the public reaction to the killing of 2 year old James Bulger by two 10 year old boys was punitive and unforgiving compared to the compassionate and 'muted' public response in Norway in 1994 to the killing of 5 year old Silje Marie Redergård by three 6 year old boys. In England, the media and public responded with disgust to the Bolger killing and the boys were tried and convicted as adults and both served eight years in prison before being released with new identities for their own protection. In Norway, there was only grief and no mass outpouring of public anger either in the media or streets in response to Silje's killing. The boys were never punished and they were swiftly and carefully reintegrated into the community (Green, 2009).

Numerous factors were offered by Green to explain the different reactions by both countries such as the ages of the killers, crime rates, cultural conceptions of childhood and complex interactions of the politics and the media. Ultimately, Green referred back to the Lijphartian distinction in which the majoritarian style of English political culture meant that there were

considerable incentives to exploit the Bulger murder. Whereas there were far fewer incentives facing Norwegian politicians due to their consensus style democracy

2.4 Path Dependency

As can be seen from the above analysis countries react in different ways to the 'punitive turn' with scholars proffering various explanations as to why that is the case. Linked with this is the question of why some countries have experienced continuity or stasis in their reaction to the 'punitive turn', while others have experienced change. This can be seen in the above example drawn on by Green (2009) with Norway experiencing continuity or stasis but England experiencing change in response to a child-on-child homicide in their respective countries. Focusing on the factors preserving continuity in a criminal justice system, therefore, appears to be important given that the sociology of punishment literature has tended to focus more on moments of change rather than stasis or the absence of change. One way of addressing this imbalance is through path dependence frameworks, which identify 'the ways in which early conditions can create lasting and important consequences for a given institution's course of change or stasis' (Rubin, 2021: 4). These frameworks examine both stasis and change, mechanisms of inertia such as 'feedback effects' (downstream consequences) and exogenous shocks (sudden external events) triggering change (Mahoney and Thelen, 2009).

As Rubin (2021: 6) has written of the path dependency literature: 'path dependence research recenters the analysis to the periods before and after change', by asking questions such as 'when do we not see change?' and 'how is a period of non-change (stability) sustained?'. This is in contrast to most of the attention on penal change asking 'where/when does it begin, where/when does it end?' (ibid). The following brief analysis will explore the path dependency contributions relevant to this study which will demonstrate how they may prove useful in a framework of understanding and explaining cross-sectoral punitiveness.

The basic argument that underlies path dependency is the analysis of inertia i.e. the theory that once an organisation or policy is formed will continue until something stops it which results in the question of what explains this continuity (Rubin, 2021). The importance of initial conditions or critical junctures has been proffered as an explanation for such inertia referring to moments of change where a decision becomes locked in and is difficult to undo (Mahoney, 2000; Rubin, 2021). Path dependence frameworks argue that until an organisation or society experiences exogenous shocks (sudden external events), it will remain on the same

path or persistent policy (Rubin, 2021). Notably this has been used in penal change with Garland (1990) arguing once there is a significant change in society, whether cultural, political or economic, change in punishment will follow.

Initial conditions and exogenous shocks, however, do not assist in explaining fully how a path is maintained therefore the mechanism of feedback effects can be used as a means of 'locking in' a particular policy or practice (Rubin, 2021). As Dagan and Teles (2014: 267) outline, feedback effects involve understanding 'how a policy creates conditions that shape its own future'. Some scholars have distinguished between positive and negative feedback effects (Weaver, 2010). Positive feedback effects keep a society on a particular path via increasing returns whereas negative feedback effects make that path or policy untenable (ibid). Initial conditions are still important in this frame of path dependency, not because they are frozen in time and remain unaltered but they set into motion a change of events (Mahoney, 2000; Rubin, 2021). However, feedback effects allow punishment studies to benefit from the powerful insight: 'whatever started the change is not necessarily what keeps it going' (Stinchcombe, 1968; Mahoney, 2000; Thelen, 2003; Rubin 2021).

Mahoney and Thelen (2009: 2) further developed the gradual institutional change theory in seeking to explain the gradual evolution of institutions once they have been established. In particular 'institutional layering' is a useful model of gradual institutional change (Thelen, 2003). This model recognises how institutions almost constantly adapt to new conditions, change or 'evolve' internally, moving away from a focus on major exogenous shocks or inertia (Rubin, 2021). This model is also described as occurring 'when new rules are attached to existing ones, thereby changing the ways in which the original rules structure behaviour' (Mahoney and Thelen, 2009: 16). This model in turn was used as a basis for Rubin's (2016, 2021: 16) 'penal layering' theory in which:

> 'reform movements that fail to abolish or replace a particular type of punishment (e.g., capital punishment) with another (e.g., incarceration) instead produce an expanded array of available punishments (e.g., capital punishment and incarceration). Metaphorically, we can see different depths and textures in these layers across different jurisdictions, but each punishment continues to coexist (layered atop one another) rather than one replacing the other.'

Thelen's (2003) institutional layering model is consistent with Goodman et al. (2017) theory of penal change relating to the agonistic perspective. Goodman et al. (2017) highlight contestation within the penal field and argue 'penal change is not simply a cycle of consensus

and upheaval' but it is a 'constant struggle in multiple contexts among actors with conflicting opinions, beliefs, and preferences within the constraints and opportunities posed by changes in crime rates, racial politics, the economy, and other social forces' (Rubin and Phelps, 2017: 428). This perspective argues that this struggle or conflict across this group of multiple actors and groups is the 'primary mechanism of penal change' (ibid: 8). This conflict is 'perpetual' or 'invisible' which only occasionally leads to large-scale change as it is hidden beneath the surface by the appearance of significant change or intermittent ruptures (Rubin, 2023). Like 'plate tectonics, in which the plates' constant movement is only apparent on the surface when earthquakes hit or volcanos erupt, our punishment system is constantly contested. This contestation lays the groundwork for the apparent "moments" of significant change' (ibid: 279).

Rubin and Phelps (2017) draw on this agonistic perspective (Goodman et al., 2015, 2017) to develop their fractured penal state analysis. They argue the need to *fracture* the penal state into its amalgamation of political, legal and bureaucratic actors ('constituent parts'), that all have their own interests and perspectives. The term *fracture*, therefore, is used by Rubin and Phelps (2017: 428 - 429) in reference to 'the complex relationships and contestation among the actors and agencies that constitute the penal state' as outlined above. Fracturing the penal state into these 'constituent parts' can assist in explaining micro- and macro-level accounts of penal change and drivers for reform (Rubin and Phelps, 2017: 434). Thus, it is argued that in *fracturing* the penal state into the adult and youth justice sectors we can also understand penal change and reform.

Ultimately, in using a path dependency framework it not only provides a refreshing view on the study of punitiveness, but perhaps most importantly it shifts our gaze from 'the beginning and end of the story to the underexplored middle' (Rubin, 2021: 6). This framework can arguably be extended to assist in not only explaining comparative differences in punitiveness but also cross-sectoral differences in punitiveness.

Addressing the question of why countries have reacted to the 'punitive turn' in diverse ways, Tonry and Lappi-Seppälä set out a very helpful framework of risk and protective factors which identifies influences over penal policies in different countries and which can help to explain the shape of penal policies comparatively. In addition, whilst Lacey and Green both tend to focus on political cultures as an explanatory factor, this begs questions as to how this can produce different effects in different sectors of the criminal justice system. Path dependency frameworks also offer an interesting perspective as to why some countries may

experience change in the face of a 'punitive turn' but others experience stability. One crucial omission in the analysis that they all undertook, however, is the failure to account for cross-sectoral differences within the same system, leaving important questions unanswered about jurisdictions where two sectors of one criminal justice system, such as the adult and youth system, appear to have been differentially affected by a 'punitive turn'. Indeed, the divergence between two justice sectors raises questions on how one justice sector can remain stable or experience continuity with another justice sector experiencing change over the same time period.

Against the backdrop above, which looked at the development of the concept of punitiveness in the adult and youth justice systems more broadly and the emerging literature on the determinants of penal policies, the following section of the chapter will examine the problems relating to the measurement of the punitiveness concept. This will be followed by a discussion of the literature focused on the multidimensional nature of punitiveness. Finally, the variations in the levels of punitiveness *within* the adult and youth justice systems of various jurisdictions will then be addressed.

2.5 Crime control signatures

In the early literature on punitiveness imprisonment rates 'gained the status of the conventionally accepted form of presentation without having received the appropriate analytic attention' (Pease, 1994: 116) which, as argued by Pease (1994: 166), was 'fraught with possibilities for misinterpretation'. In an early effort to address these inadequacies, Pease examined punitiveness by looking at the data in a variety of ways incorporating data on arrests, prosecutions, convictions and sentencing in addition to imprisonment in various jurisdictions. Pease (1994) was not alone in his criticism of the use of imprisonment rates with many sceptical voices questioning this and the extent of the criminal justice system's transformation. Matthews (2005) was, in particular, a strong critique of the concept itself commenting on the lack of conceptual framework and criticising the reliance by scholars on imprisonment rates. As argued above, some of these criticisms focused on the lack of consistent treatment of the concept and operationalisation of punitiveness. For example, Zedner (2002) warns of the 'dangers of dystopias' (2002: 341) which overstate the reach of the 'punitive turn' and its coherence, particularly in the context of comparative studies challenging its empirical clarity. In addition, Zedner argues that perhaps it was easier for

some researchers to resort to the use of imprisonment rates given the unprecedented complexity and diversity of current crime control measures.

While few criminologists have given sustained attention to issues around the measurement of punitiveness (Hamilton, 2014), two notable exceptions are Diane Gordon (1989) and Lynn Hinds (2005) who examined policies expressing penal severity not only at the back-end of the criminal justice system, e.g. custody rates but also looking at the operation of the front-end of the system e.g. police rates/procedural 'harshness'. Their findings offer strong support for the argument that we should conduct a broad systemic analysis of criminal justice systems to take into account variation *within* jurisdictions.

Gordon (1989) contended that there was no 'single dimension of toughness' running through criminal justice policy in recent decades but rather there appears to have been several quite distinct policy approaches, the discovery of which raises important questions about the future of criminal justice policy. Gordon conducted a cross-state analysis in the US for three main reasons: to clarify whether states reflect a common approach to criminal justice policy, to determine whether different groups of states have followed different patterns in criminal justice policy using a number of measurables, and finally in order to ascertain the degree of homogeneity in criminal justice policy amongst states. Gordon (1989: 187) proposed four different '*crime control signatures'* arising from the results of factor analysis on 'get-tough' policies in the US, namely, universal program, modern and traditional, distinctive administrative rhythms and idiosyncratic policy behaviour.

The first hypothesis or signature that Gordon discusses is 'the universal program'. Such signature reflects much of the prevailing literature which would lead one to expect that a single factor of policy 'toughness' would emerge to account for a large part of the policy variation from a factor analysis. This single common pattern of variation would demonstrate that if a state exhibits aggressiveness in one area of criminal justice policy that it would be likely to exhibit similar aggression in another area. If each state had a factor score it could then demonstrate the development of the get-tough movement among the states. Such a result would suggest that a get-tough approach was sweeping the US and that differing jurisdictions differ simply because of their participation in the quantitative degree of the get-tough movement. The second signature referred to by Gordon is 'modern and traditional' which relates to different jurisdictions reflecting qualitatively different approaches to policy imperatives confronting the criminal justice system. These qualitative differences reflect an important distinction between modern and traditional modes of policy formation and

implementation. Gordon argues this indicates a duality in the get-tough programme; the existence of two different factors highlighting common variation amongst policy indicators- one reflecting relatively larger bureaucratic systems and the other focusing on symbolic expressions of toughness towards criminals.

The third signature is referred to as 'distinctive administrative rhythms'. In contrast to the first two explanations, in this manifestation Gordon suggests that criminal justice policy approaches are dominated by a distinctive administrative rhythm e.g. in a system with indeterminate sentencing courts may impose longer sentences therefore parole release may reflect a less punitive approach. On this interpretation it is argued that by generalising certain patterns such as parole release etc. it would be more likely to find discrete factors highlighting variation among jurisdictions associated with each of their separable administrative sectors within the criminal justice system. This would be as opposed to a common pattern of variation affecting all these sectors alike. Against the backdrop of the first three alternative signatures offered by Gordon is the final null hypothesis, 'idiosyncratic policy behaviour', or the failure to highlight any particular salient common dimensions of variation among jurisdictions in indicators of criminal justice characteristics and trends. For example, if a state happened to have high imprisonment rates it would not be likely to display other characteristics of the get-tough policy approach associated in the literature, and as such would require a separate analysis on the sources of variation for each dimension of criminal justice policy (Gordon, 1989: 188).

In order to test the above analytic expectations, Gordon constructed a data set to encompass as many different policy dimensions of the criminal justice system as possible. The set comprised of 32 variables for 51 observations in 50 US States and in the District of Columbia with data coming from official and unofficial primary and secondary sources (Gordon, 1989). The variables included sentencing, parole and probation, defendants' rights, investigation and adjudication, population in custody and criminal justice resources. Gordon concluded from her research that there was not a single dimension of toughness in criminal justice policy but in fact two distinct policy approaches, namely, custody and symbolic punishment, which appeared to confirm the second signature 'modern and traditional' of duality in the 'get tough' approach. Thus, different jurisdictions adopt qualitatively different approaches to policy requirements confronting the criminal justice system, some choosing to focus on symbolic punishments such as the death penalty, while imprisoning relatively few offenders, and others choosing to reject symbolism and incarcerate large numbers of prisoners.

Hinds (2005), building on Gordon's work, conducted a comparative study on crime control and measured developments at the front-end of the criminal justice system (police rates) to determine the level of punitiveness as opposed to only analysing the back-end of the criminal justice system (custody rates). Hinds contended that using a singular framework of punitiveness such as custody rates as its measure has 'limited utility in crime control developments' (2005: 47). Hinds collected criminal justice data relating to the period 1970 to 2000 for states within the US, Australia and Europe and found two primary contrasting trends: variation over time in custody and greater stability in police rates over time. Some countries are more focussed on the back-end of the criminal justice system as a control mechanism i.e. reliance on imprisonment, whereas other countries are more focussed on spending in the front-end of the system i.e. police rates as a means of control.

The findings showed that US states' use of custody was consistently higher across time compared to states in Australia and Europe. When analysing the US, Hinds grouped the states into four regions of South, West, Midwest and Northeast. In respect of custody rates (rate per 100,000 population) over time Hinds found significant regional differences in the US, with, for example, the South's custody rates increasing from 1.78 in 1970 to 8.34 in 2000 compared to an increase from 0.81 to 4.09 in the Northeast over the same period. Hinds was struck by the dramatic increases in custody use, between 1970 and 2000, in the US compared to Europe and Australia with their rates being similar in custody use over time. In respect of police rates, on the other hand, the increases were smaller and 'comparatively homogenous' (Hinds, 2005: 55) in states in the US, Europe and Australia over time. The police rates in States in the US were more alike in 2000 than in 1970 however there was greater diversity among the States in custody rates in 2000 than there was in 1970. The strong stability in police rates in Europe and Australia suggest that they have continued to focus on the front-end of the criminal justice system, that is, on policing over custody use.

Hinds argued that the findings suggested states could be characterised by their place on a 'crime control continuum' (Hinds, 2005: 58) with the front-end of the continuum focusing on social control (policing activities) and the back-end focusing on custodial control. Hinds placed Europe and Australia on the 'social control' end and states in the US on the 'custodial control' end with Southern States at the extreme of custodial control and Northwest, Midwest and West states lying midway. These findings, Hinds argues, assist with our understanding of crime control over the last few decades given that states that have maintained their sovereign investment in policing were not as punitive as states that have invested more heavily at the 'back-end' of the system.

Similarly, Tierney (2013) has argued that the crime decline in New York over the last two decades has resulted from more money being spent on policing. In New York, the crime decline was much steeper and more prolonged than elsewhere in the US, falling more than 75%. In addition to the expansion of the police force in New York being proffered as a reason there was the reduction in crime rates, Tierney points to a shift in policing strategies from a merely reactive form of policing to the use of hot-spot policing (focusing on the place rather than an individual criminal). This focus on policing at the social control front-end in New York supports Hinds' (2005) argument that jurisdictions/states who invest in this are not as punitive as those who focus on the custodial back-end of the criminal justice system. Therefore, whilst Hinds' research is not specifically focussed on differences in the adult and youth justice systems, it nevertheless strengthens the case for a broader, systemic analysis, incorporating various sectors involved in the delivery of criminal justice i.e., police, prisons, etc. in order to obtain a more accurate and nuanced picture of the trends in punitiveness and crime control over recent decades.

2.6 Multidimensional Punishment

Gordon's work has in turn been drawn on by Kutateladze (2009) who has argued for a more multidimensional concept of punitiveness, across various sectors of the criminal justice system. Kutateladze argues that whilst the US's incarceration rates demonstrate a harsh punitive picture, it may not be as harsh as this picture suggests. Kutateladze contends that there has been no extensive definition of punitiveness or usage of punitiveness to suggest the 'true multidimensionality of the concept' (Kutateladze 2009: 3). Acknowledging that imprisonment rates are most commonly used for punitiveness, Kutateladze draws heavily on the work of Tonry (2001) and Whitman (2003) who had begun to develop multidimensional measures of punitiveness. Whilst exploring their work, Kutateladze noted that both approaches exclude many aspects of penal harshness in addition to bias potentially being a factor when selecting criteria for punitiveness. Hoping to combat such issues and seeking to explore variations in penal harshness among US states, Kutateladze undertook a multidimensional systemic analysis of state punitiveness which, using 44 variables, attempted to understand state practices from the moment someone is identified as a suspect to their death across 50 US States. The 44 variables used were categorised into five sub-categories: (A) Political and Symbolic Punishment, (B) Incarceration, (C) Punishing 'Immorality', (D) Conditions of Confinement and (E) Juvenile Justice (2009: 7). Each of the 44 variables used generated five criterion punitiveness scores (CPSs) ranging from 0 - minimal or non-

punitiveness, 1 - low or less then moderate punitiveness, 2- moderate punitiveness, 3- high or more than moderate punitiveness and 4 - extreme punitiveness (2009: 8). Each state then generated an overall punitive score averaging the 44 CPSs i.e. a mean score of the 44 CPSs.

The findings of his study supported the assertion that being punitive in one dimension does not automatically result in high punitiveness scores across other dimensions of state punitiveness (Kutateladze 2009: 10). Kutateladze used a punitive ladder placing states on the ladder depending on what their CPS was from the 44 variables used as described above. The ladder would demonstrate where on the scale the state was placed ranging from 'non-punitive' to 'highly punitive'. Kutateladze's analysis showed state punitiveness is in fact a multidimensional concept with many states moving up and down the punitive ladder depending on the variable deployed. For example, Maine was identified as the least punitive state across the criteria in categories A, C, D and E. However, when measuring category B, imprisonment (average imposed and served prison sentences, prison release trends), this state transformed into one of the most punitive states (2009: 9-10). Whilst Kutateladze's instrument does not exhaust all of the possible criteria for state punitiveness, it showed the importance of including as many as possible variables in such an instrument as it captures the multi-level and contradictory nature of state punitiveness. Using a multidimensional instrument of measurement, he argues offers a much deeper understanding of variation in punishment policies across the US suggesting it is important for both within nation and between nation comparisons.

Hamilton (2014) notes a thread in Kutateladze's work is the recognition that sentencing is only one aspect of the criminal justice system and it occurs at the end of a lengthier process. Such recognition again highlights the importance of a systemic analysis when measuring punitiveness. Hamilton (2014), building on Kutateladze's work, sought to refocus attention on the best ways in which to measure punitiveness. The principal argument proffered by Hamilton was that measuring punitiveness should take the form of a multidimensional test (MDT), incorporating a large number of variables across several sectors of the criminal justice system as it is superior to tests with fewer variables that focus on a few selected points along the system. A crucial way in which punitiveness was reconceptualised for the purposes of Hamilton's study relates to the holistic, multifaceted approach taken to the concept. This approach was preferred not only in light of previous literature demonstrating the various ways in which a state can be punitive but also the need to bring the lens to bear more closely on the experience of the offender. Such analysis therefore takes into account not only sentencing but also 'front-end' punitiveness including police powers and procedural

protections. Hamilton examined three jurisdictions, Ireland, Scotland and New Zealand, over a thirty year period using three alternative measures of punitiveness in each country. The first was using a unidimensional measure which was imprisonment rates. The second was a broader measure encompassing more variables proposed by Tonry (2007). The final measure was a full multidimensional measure using 34 variables and taking into account front and back-end punitiveness. Hamilton found that the three jurisdictions examined changed rankings on the punitiveness scale depending on the measurement test employed. For example, Ireland attained its highest punitive scores in respect of two indices (imprisonment use and prison conditions) but the other five indices measured relatively low scores. This finding Hamilton argued highlights the importance of including a maximum number of variables and supports the use of an MDT. This suggests the need for greater social-scientific attention to the measurement of the punitiveness concept and also illustrates the multidimensional nature of the concept itself.

In recent years, the decline in the prison population in a number of countries in the global North has led to further elaboration and development of the measurement of state punitiveness (Brandariz, 2021; Hamilton, 2023). As discussed above there has been a recent shift in attention in the punitiveness literature from penal to political populism, with it finding new referents in the form of migrants (Pratt and Miao, 2017; Pratt, 2020; Hamilton, 2022b). As a result 'immigration enforcement practices are increasingly attracting the attention of criminology and punishment and society studies' so including this perspective 'breathes fresh air into the debate on punitiveness indicators' (Brandariz, 2021: 356). This perspective has been developed by Díez-Ripollés and García-España (2020) in the form of a multidimensional measure of social exclusion (RIMES instrument) which focuses on how crime control systems exercise social exclusion and inclusion on those who come into contact with criminal justice systems (Hamilton, 2023). The RIMES instrument comprises 39 indicators across nice indices including legal safeguards, harshest penalties, and youth criminal justice (Díez-Ripollés and García-España, 2020). Thus, demonstrating a recent development taking a multidimensional approach when measuring state punitiveness.

2.7 Variation between the adult and youth justice systems

The above analysis demonstrates that in studying punitiveness a systemic analysis should be adopted using as many variables as possible, taking the form of small comparative studies where possible. Building on this literature, it is proposed that comparative research

incorporating cross-sectoral variation between the adult and youth criminal justice systems is long overdue. One notable exception is the work done by Zimring (2000) in comparing the trends of incarceration for juveniles (14 to 17 year olds) and young adults (18 to 24 year olds) in the US in 1971, 1991 and 1995. Zimring found that after 1971 the trends between the juveniles and young adults began to diverge, as the most substantial growth in the scale of imprisonment in the US began i.e. the 'punitive turn'. By 1991, the difference of incarceration between the two groups was more than two to one with the juvenile confinement rate increasing by 21% and the young adult incarceration rate more than doubling over that period. These figures, Zimring (2000: 2493) argues, are 'one of the most dramatic demonstrations I have ever seen of how two separate courts can pursue quite different crime control policies over a sustained period of time'. Zimring argues the fact that the growth in young adult incarceration was much greater than juveniles suggests that the diversionary objective of the youth justice system insulated delinquents from experiencing the impact of the expansion in the adult justice system.

Goldson et al.'s (2021) recent work also points up 'the shifting forms that youth justice and penality assumes over time, both *between* and *within* national jurisdictions' (ibid: 188). The adult and youth justice sectors are not compared in Goldson et al.'s (2021) study, however, they explore the complexities of youth penality and variations that can occur across youth justice systems both nationally and comparatively between Australia and England and Wales. They discuss how Australia's youth penal detention rates which have remained stable if not declined since 1981 stand in sharp contrast to the consistently growing adult imprisonment rates in Australia.

Zimring's (2000) and Goldson et al.'s (2021) research together with the above analysis demonstrates the need to conduct cross-sectoral research in criminal justice systems. As stated earlier, almost without exception, jurisdictions across the world have provisions which create a separate youth justice system for youth. But in some jurisdictions (e.g. US, England and Wales) it has been seen that if punitiveness affects and increases in the adult criminal justice then the youth justice system is also affected, while the contrary is the case in other jurisdictions. This issue will be further explored below.

2.7.1 Cross-sectoral homogeneity

In England and Wales, the shift towards more punitive policies was visible since the early 1990s with a two-thirds increase in the prison population in little over a decade (Newburn:

2007: 426). This is as a result of the toughening of punishments such as longer sentences, more likelihood of custodial sentences and rigorous community penalties (Newburn, 2007). The shocking murder of James Bulger in 1993 prompted politicians to urge tougher approaches to crime (Newburn, 2007). This was in conjunction with the appointment of Michael Howard as Home Secretary in 1993 which ushered in a decade of populist and punitive policy with Howard embracing the increased use of custodial sentencing declaring in 1993: 'Let us be clear. Prison works.' (Newburn, 2007: 438). In the years following, several acts were introduced such as the Crime (Sentences) Act, 1997 and the Blair's government's Crime and Disorder Act, 1998 which reflected a more crime control and punitive orientated attitude. This punitive attitude was also present in the youth justice system with sentencing reforms, the abolition of the presumption of *doli incapax* and the establishment of antisocial behaviour orders, leading Goldson and Muncie (2006: 92) to argue that the defining hallmark of contemporary youth justice in England and Wales is a 'new punitiveness' and the jurisdiction being described as 'one of the most punitive youth justice sites in the western world' (Goldson, 2010: 170).

A similar picture can be painted of the US, where the increase in punitiveness and trends of mass incarceration experienced since the 1970s in the adult justice system also manifested in the youth justice system.. This can be seen in the increase in juvenile incarceration, the creation of mandatory minimum custody sentences, the juvenile waiver system and the great weight American courts give to punishment as an end in itself (Muncie, 2009: 3). As the juvenile crime rates rose in the late 1980s and early 1990s policymakers pushed for harsher treatment of juveniles and there was a revision of the juvenile (transfer) waiver laws and policies which place youth younger than 18 in the jurisdiction of the adult court. Such policies flourished as this system was seen to be a potential remedy to reduce crime and provide harsher sentences for serious juvenile offenders (Myers, 2003).

Therefore, the pattern in these two jurisdictions can be seen to be convergent in that when punitiveness affected one sector (the adult system) it similarly affected the other (youth justice). Whilst in both England and Wales and the US there have been moves towards 'tentative depenalisation' (Case and Bateman, 2020) in recent years, according to several scholars, punitive overtones remain close to the surface (Bateman, 2015; Goshe, 2015).

2.7.2 Cross-sectoral heterogeneity

New Zealand and Scotland, on the other hand, are jurisdictions of many contradictions in a penal sense and appear to have retained a different approach to youth justice in the face of a punitive adult system. Over two decades from 1989, New Zealand hosted a punitive adult justice system alongside a progressive and tolerant youth justice system (particularly seen in its use of diversionary measures). Lynch (2013) considered three factors which contributed to the promotion of tolerance or punitiveness in each system namely: mode of legislative policy and development, participation of victims of crime in the criminal process and policy implementation by professional decision makers. Lynch considered the question of how and why a small jurisdiction with a population of less than five million people could host two such different systems, with her case study facilitating a finer analysis of factors promoting tolerance.[2] She argues that in New Zealand the perfect breeding conditions exist for punitiveness such as neoliberalism, political structure, populist lobby groups and indeed created a punitive and reactive adult system. However, the youth justice remained immune to these pressures and remained tolerant. The factors discussed by Lynch below were considered as fundamental in promoting tolerance in the youth justice system.

Lynch first discussed the modes of legislative and policy development which in the adult justice system has been developed through populist measures creating a volatile and reactive legislative period but did not appear to spread and affect the youth justice system. The driver of such a volatile period was a public initiated referendum in 1999 in the adult system which concerned greater emphasis on victims' rights and imposing minimum sentences and hard labour for all serious offenders which were voted by the public in the affirmative. This led to a politicisation of victimisation which was driven by the Sensible Sentencing Trust and others in the adult system, but this did not find its way into the youth justice system (2006: 222). Secondly, Lynch discussed the participation of the victim in the criminal process; denoting that such participation acted as a *driver of punitiveness* in the adult system but as a *driver of tolerance* in the youth justice system. Finally, after discussing two factors which operated differently in both systems to promote tolerance or punitiveness, Lynch discussed a factor that has allowed the youth justice system to remain 'immune' from punitiveness acting as a more protective factor (Lynch, 2006: 225). Lynch contends that the foundation of tolerance in the youth justice system in New Zealand is not so much the *design*, but rather the *implementation* of legislation. The behaviour of practitioners is particularly key in this due to

[2] Lynch defines tolerance, since there is no accepted definition, as an autonym for punitiveness i.e. denoting lower rates of imprisonment and the use of non-custodial measures etc.

how they use their discretion in decision-making. Three particular areas where practitioner behaviour promoting tolerance is evident is in restorative justice, police diversion and judicial innovation are largely derived from practice, not statute with Lynch maintaining that practitioners will use their discretion to promote tolerant practices if they are invested in the idea of tolerance (2006: 228).

Another example of such tensions within a criminal justice system is Scotland. Scotland has not only one of the highest homicide rates but also one of the highest imprisonment rates in Europe (Hamilton, 2014: 58). Scotland's imprisonment rate was 143 per 100,000 of the national population in 2018 compared to England and Wales which had a rate of 140 in 2018. Yet the policy in the last three decades of the 20th Century in Scotland was dominated by penal welfarism which is seen in the unique care and justice system for children and young people namely the Children's Hearing System (McAlister and Carr, 2014). Scotland, as McAra noted, deserves close attention due to its unique and distinctive history in respect of 'crime control, penal policy and criminological scholarship' (2008: 481) and as explained below due to its contrasting sectors of the criminal justice system.

Scotland's youth justice system or Children's Hearing System can be classified as a 'minimum intervention model' (Cavadino and Dignam, 2006: 205) and has been described as having a 'unique nature' due to the implementation of such a radical minimum intervention model in practice (Cavadino and Dignam, 2006: 207). In the late 1960s the former juvenile court structure was dismantled and replaced by a new system of children's hearings which operate entirely within the civil jurisdiction. One of the most distinctive features of the Scottish system is the 'welfare of the child' is the paramount consideration whether dealing with either cases of offences or care. Section 16(3) of the Children (Scotland) Act, 1995 states that a court should not make any order or requirement of any kind unless it would be better for the child not to do so and the hearings themselves are conducted by lay panels. If a criminal offence is brought before such panels and is accepted or proved the paramount consideration for the panel members is the 'child's welfare *needs* rather than his or her criminal *deeds'* (Cavadino and Dignam, 2006: 223).

The Scottish youth system appears to have been largely protected from the upheaval and changes brought by different governments in adult criminal justice since devolution in Scotland (with a brief exception period of attempt to bring more punitive tenancies such as fast-track courts (McAra, 2008)). Scotland has seen contrasting approaches to criminal justice from a 'liberal' approach taken before and (briefly) after devolution to a more punitive and

populist approach from 2003-2007 by the Labour led coalition administration and the subsequent 'retartanisation' with the emergence of the SNP government. Adult imprisonment rates consistently rose before and after devolution in Scotland (Mooney et al, 2015) and have only started to fall in recent years. Whilst this may be the result of a new commitment to parsimony in the use of imprisonment (Scotland's Choice report published 2008) the Scottish adult imprisonment and crime rates are still high by international standards, even outdoing England and Wales. During this period of change in the adult justice system in Scotland, the youth justice system remains welfare-orientated with its unique Children's Hearing System. As such, Scotland, as aptly described by Young, has gained a reputation internationally for both 'penal harshness and innovation' (Young, 1997:116)

2.8 Conclusion

As examined above, there has been much discussion on the increase in punitiveness or harshness in the criminal justice systems of western jurisdictions within criminology (Feeley and Simon 1992, Garland 2002, Pratt et al., 2005, Simon 2007). The discussion on the 'punitive turn' within criminal justice systems gained much ground and multiple accounts have been offered on the origins and development of same (Feeley and Simon 1992, Garland 2002, Simon 2007). In the same vein, however, there has been a body of criticisms on this work particularly in respect of Garland's thesis of a culture of control. Whilst these criticisms have been considered and it is acknowledged that this culture is not monolithic, it is contended that there are in fact *cultures* of control and Garland's framework in this regard retains some utility in discussing levels of punitiveness and further identifying determinants of penal policy. One important gap that has been identified in the literature, however, is that in seeking to understand the diverse reaction amongst jurisdictions to the 'punitive turn', existing frameworks (Tonry, 2007, Lappi-Seppälä, 2011) fail to take into account the diverse reaction to the 'punitive turn' *within* jurisdictions.

Indeed, some jurisdictions such as the US and England and Wales, appear to have a more consistent approach across all sectors of the criminal justice system with change in both the adult and youth justice systems. In contrast, in other jurisdictions such as Scotland and New Zealand, there is divergence between the two sectors and the youth justice system appears to have been protected from a more punitive approach in the adult system. This raises important questions about cross-sectoral 'contrasts in tolerance' (Downes, 1988) within the criminal justice system and the determinants of these policies.

While dynamic (clearly jurisdictions situations and ethos may change over time) such differences between the adult and youth sectors beg the following questions: how do we explain such divergence between two sectors within one criminal justice system? What are the key factors impacting the levels of punitiveness in these sectors? To what degree are the policies in one sector insulated from policies in the other? Comparative study of these issues will allow us to begin to isolate some of the key determinants of such differences/similarities and identify whether the same impulses which drive the adult system impact the youth system and vice versa. Such research is also important for the light which it sheds on the interaction of these two sectors within the broader criminal justice system. The next chapter examines how these questions will be addressed.

Chapter 3 - Methodology

3.1 Introduction and Research Questions

As discussed in the previous chapters, criminological research on the putative 'punitive turn', while extensive, has failed to consider cross-sectoral variation/consistency in different jurisdictions, particularly as it relates to the adult and youth justice system. This study will seek to address how and why differences and similarities between the adult and youth justice systems exist in three jurisdictions. Specifically, it will examine the key factors impacting the levels of punitiveness or tolerance displayed in the two sectors in each of the comparator jurisdictions as well as the extent to which policies in one sector are insulated from policies in the other. It will also examine the presence or absence of transitional arrangements in place for young adults in the comparator jurisdictions. The aim of this chapter is to outline the methodological approach chosen to answer these research questions. It begins with the conceptualisation and operationalisation of the concept of punitiveness, particularly cross-sectoral punitiveness, including the variables that will be used to measure punitiveness in the three jurisdictions. The multiple case study design will then be discussed followed by a justification of the chosen jurisdictions for this work. The chapter will conclude with a discussion of the chosen research methods, approach to data analysis, the limitations of the study and the ethical considerations for this research.

3.2 Conceptualisation and Operationalisation

The punitiveness concept has been the subject of some scrutiny with Matthews (2005), not convinced by the 'punitive turn' phenomenon, commenting on the lack of conceptual clarity surrounding the term itself. One source of confusion has been use of the term 'punitiveness' by criminological scholars to refer both to public/individual attitudes towards punishment (Kury, et al., 2009; Kury, 2008) and state punitiveness. It should be noted that state punitiveness exclusively forms the subject of this research and is understood as 'states' willingness to use penal power' (Lappi-Seppälä, 2008: 314). This therefore means that punitive attitudes amongst the public will not be examined which is often referred to in the

term ‘punitivity’ (Kury, et al., 2009; Adriaenssen and Aertsen, 2015). Another challenge, however, relates to the conceptualising of ‘a phenomenon as multifaceted and complex as punitiveness as it operates in the “real” world’ (Hamilton, 2014: 8). Taking this into consideration, it should be noted that in conceptualising and operationalising cross-sectoral punitiveness, the test for punitiveness is being used as a heuristic device or tool for the purpose of analysis rather than treated as an objective phenomena which unproblematically reflects the ‘real’ world (ibid: 8).

As Green (2009: 520) notes ‘relative levels of punitiveness are used to compare the harshness or leniency of penal policies and practices, either intra-jurisdictionally over time or inter-jurisdictionally over time or space’. While punitiveness has been applied by scholars to examine harshness in one or multiple jurisdictions, or in specific sectors such as youth justice cross-jurisdictionally, it has not yet been developed to compare adult and youth justice systems *within* one criminal justice system, what is described in this chapter as ‘cross-sectoral punitiveness’. Since this concept is yet to be developed, approaches to conceptualisation have been considered and adapted from the works of Kutateladze (2009), Cunneen, et al. (2018) and Hinds (2005).

3.2.1 Conceptualisation

Both Kutateladze (2009: 6) and Cunneen et al. (2018) take a broad, ‘long’ or systemic view of punitiveness, reflecting the journey of the offender through the criminal justice system and the view that the process itself can be the punishment (Feeley, 1979). Kutateladze (2009: 13) takes a broad approach by defining state punitiveness as ‘a combination of an official political state’s ideologies, policies and programmes of dealing with objects of the criminal justice system’. For the purposes of his study ‘objects’ included ‘those suspected of the commission of a crime, then charged or discharged, convicted or acquitted, incarcerated or punished in any other way, released from custody after finishing sentence or released on parole, and so on’ (ibid: 13). Similarly, in respect of youth justice reform, Cunneen et al. (2018: 408) adopted a systemic end-to-end analysis of the human rights and youth justice interface in order to present an analytic account of change and continuity. Whilst this research is not focussing exclusively on the relationship between human rights and youth justice like Cunneen et al (2018), a similar approach is adopted for the purpose of conceptualising punitiveness across the two criminal justice sectors in each jurisdiction. A

specific focus is the inclusion of indices relating to policing in line with Hind's (2002, 2005) research which found that the inclusion of front-end measures, in addition to back-end measures, can assist in identifying different 'crime control signatures' (Gordon, 1989).[3] Work by Harkin (2015: 45) furthers the argument for the inclusion of front-end measures contending that '"pains of policing" may usefully be compared with those of imprisonment'. Particularly for young people, Flacks (2018: 13) argues 'stop and search powers function as a form of punishment as well as, or instead of, legitimate forms of crime detection' in England and Wales. Therefore, in conceptualising cross-sectoral punitiveness it is imperative to take a 'long' view and encompass the experience of the offender through the criminal justice system from the front (such as policing, alternatives to prosecution) to the back (imprisonment/detention, prison conditions).

3.2.2 Operationalisation

In line with this research, a multidimensional or 'long view' of punitiveness will be adopted for this study. This will ensure that the journey of the offender through the criminal justice system is captured and aligns with the holistic approach being taken to the punitiveness concept. In order to operationalise the concept of cross-sectoral punitiveness we will examine the work of scholars such as Tonry (2007), Kutateladze (2009) and Hamilton (2014), who have all argued for the use of a wide variety of variables in an instrument measuring punitiveness.

Tonry

Tonry (2007) sought to explore the determinants of penal policy in order to understand why jurisdictions appear to have reacted differently to the 'punitive turn'. In recognising the need for comparative research to move beyond the narrow use of imprisonment rates, Tonry (2007) outlined a core set of measures that researchers of punitiveness should at a minimum incorporate, including policies (mandatory minimum sentencing laws, prison alternatives); practices and outcomes (patterns in the use of policies and adult and juvenile prison

[3] Lynch (2013) was limited in her comments on the conceptualisation of punitiveness other than identifying four variables to measure punitiveness and tolerance in the New Zealand criminal justice system: high rates of imprisonment, use of custodial measures, reactive based policy making and politicisation of criminal justice issues.

populations); and patterns of use of procedures (Table 3.1). Whilst this framework is helpful, as Hamilton (2014) has noted, it continues to focus on a number of select areas in the criminal justice system, omitting key indicators such as prison conditions.

Table 3.1 ***Tonry's indices of punitiveness***

Measures of Punitiveness
Policies:
1. Capital punishment (authorization) 2. Mandatory minimum sentence laws (enactment) 3. Laws increasing sentence lengths (enactment) 4. Pretrial/preventive detention (authorization) 5. Prison alternatives (creation) 6. Juvenile waiver to adult courts (authorization) 7. Weakened procedural protections (enactment)
Practices:
1. Patterns of use of policies 1–7 2. Adult prison population and admission rates over time a. Disaggregated for pretrial and sentenced prisoners b. Disaggregated by offense for sentence lengths and admission rates 3. Juvenile institutional population and admission rates over time a. Disaggregated for pretrial and sentenced juvenile offenders b. Disaggregated by offense for sentence lengths and admission rates
Procedures: Patterns of use of procedural protections

Source: Tonry (2007: 14)

In line with his broad or 'long' approach to punitiveness discussed above, Kutateladze (2009: 7) used 44 variables in analysing state punitiveness to demonstrate the importance of using as many variables as possible to offer a deeper understanding of variation in punishment policies. The 44 variables used were categorised into five sub-categories: (A) Political and Symbolic Punishment, (B) Incarceration, (C) Punishing 'Immorality', (D) Conditions of Confinement and (E) Juvenile Justice. Hamilton (2014), building on Kutateladze's work, sought to refocus attention on the best ways in which to measure punitiveness. As seen in Table 3.2 Hamilton measured punitiveness using a multidimensional test (MDT) and took a holistic, multifaceted approach to the concept of punitiveness which incorporated several policy dimensions of the criminal justice system from policing to post-release monitoring. As she notes, it is important for researchers to be transparent about the theoretical justifications for the inclusions of variables and methods employed to obtain data in order to address any questions being raised about the selectivity of criteria.

Table 3.2 ***Hamilton's indices of punitiveness***

Indices and variables of punitiveness included in the MDT (Multi dimension test)

Indices of punitiveness	**Variables**
A. Policing (n = 6)	Zero-tolerance policing, police expenditure, numerical strength of police service, police powers, number of police complaints, strength of the private security sector
B. Procedural Protections for Defendants (n = 5)	Right to silence, rule against double jeopardy, evidential exclusionary rules, use of civil law to control criminal behaviour, law relating to bail

C. Use of Imprisonment (n = 6)	Presumptive or mandatory sentences; use of alternatives to custody; imprisonment rates and convicted prisoner rates; prison admission rates and convicted prisoner admission rates; imprisonment rates using different types of crime as a base; length of prison sentences
D. Juvenile Justice (n = 4)	Age of criminal responsibility, compliance with human rights instruments, sanctions and alternatives to detention, detention rates
E. Prison Conditions (n = 6)	Respect for human rights, deaths in prison, size of institutions, overcrowding, rehabilitative programmes, medical services and food
F. Post-release Control (n = 5)	Sex/drug offender notification schemes, shaming schemes, post-release supervision, reintegration and expungement of criminal records
G. Death Penalty (n = 2)	Date of abolition, date of last execution

Source: Hamilton (2014: 8)

Youth Justice Indices

Youth justice raises distinct issues and as such has been seen to merit separate consideration in assessments of punitiveness (Tonry, 2007; Kutateladze, 2007; Hamilton, 2014). Muncie (2008) in his article on the 'punitive turn' in juvenile justice measures punitiveness through two indices: the degree of compliance with international rights conventions and comparative rates of juvenile custody. A slightly larger number of variables was used by Hamilton (2014) such as age of criminal responsibility, compliance with human rights instruments, sanctions and alternatives to detention and detention rates. More recently scholars have adopted a human rights framework in conducting a systemic analysis of youth justice systems. Cunneen et al. (2018), for example, undertook a systemic analysis of youth justice reform in England and Wales drawing on human rights instruments such as the *United Nations Convention on the Rights of the Child* (UNCRC) (United Nations, 1989) but also the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the 'Beijing Rules') (United Nations, 1985) and *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the 'Havana Rules') (United Nations, 1990). The systemic analysis included seven key dimensions of the youth justice system: minimum age of criminal responsibility; policing (stop and search, arrest and strip-searching, detention in police custody and retention of DNA); freedom of movement and association; courts and judicial proceedings; privacy; criminal records and penal detention (detention as a last resort and for the shortest period of time and treatment and conditions in detention) (Cunneen et al, 2018).

3.2.3 Indices for this study

While the work of Tonry (2007), Hamilton (2014) and Kutateladze (2009) is useful in informing the indices for this study, crucially this research can be identified as a 'case-within-a-case' comparative case study with 'subcases' forming around the adult, youth and young adult sectors of a chosen jurisdiction's criminal justice system (see further below). The latter grouping was considered necessary in order to effectively analyse the transitional arrangements in place between the adult and youth sectors in the three jurisdictions, although it is acknowledged that not all of the jurisdictions have special arrangements in place for this category of offender. This inclusion is also in line with General Comment No. 24 on children's rights in the youth justice system adopted by the UNCRC Committee which acknowledges 'new knowledge about child and adolescent brain development' which has

exploded in academic scholarship and judicial observations. This recent General Comment commends states that allow the application of youth law to young adults (UNCRC, 2019: 1; Schmidt and Skelton, 2022). In this study, 'young adult' is taken to generally mean between 18 to 25 year olds due to the availability of data in the three jurisdictions. This definition is flexible in this study however as the disaggregation of data by age varied between the three jurisdictions. Whilst it was intended to obtain data for young adults aged between 18 to 25 year olds, this was not always possible. The disaggregation of data by age varied even within the three jurisdictions depending on the variable examined therefore any available data on young adults were used. Within the three jurisdictions a young adult was taken to mean between; 18 and 25 year olds in Ireland, 18 and 21 year olds in Scotland, and 18 and 23 year olds in the Netherlands. These definitions were also reflected in the corresponding lower age limit for the adult sector in each jurisdiction; 25 years old and upwards in Ireland, 21 years old and upwards in Scotland and 23 years old and upwards in the Netherlands.

The higher number of sub-cases (N= 3 in each jurisdiction) means that a data reduction strategy had to be implemented in order to focus on data which are most salient to the research question (Paterson, 2012). This consideration was therefore balanced against the need for a 'long' (Cunneen et al, 2018) or 'holistic, multifaceted approach to the concept' (Hamilton, 2014: 326). As can be seen below, five to six (depending on the sector) clusters of variables or indices have been selected for the purpose of operationalising cross-sectoral punitiveness. These reflect the experience of the offender beginning at the 'front' (policing, alternatives to prosecution) and 'back' (sentencing, detention/imprisonment, prison conditions) end of the criminal justice system in the adult and youth sectors (Hinds, 2005). It will be observed that for youth justice and young adults an additional index relating to human rights compliance was seen to warrant specific inclusion. This can be justified on the basis that international conventions such as the UNCRC have established a near global consensus on core principles such as the 'best interests' of the child, the dignity of the child and the use of custody as a last resort (Muncie, 2008; Cunneen et al, 2018; Hamilton et al, 2016).

Table 3.3 ***Indices of cross-sectoral punitiveness***

	Adult Criminal Justice Sector **(25 years old and upwards)**	**Youth Criminal Justice Sector** **(under 18 years old)**	**Young Adults in the criminal justice system** **(between 18 and 25 years old)**
A	Adult imprisonment	Youth detention/imprisonment	Imprisonment rates of 18 – 25 year olds
B	Sentencing	Sentencing	Sentencing
C	Policing	Policing	Policing
D	Alternative disposals	Alternative disposals	Alternative disposals
E	Prison conditions	Detention/prison conditions	Detention/prison conditions
F		Human rights compliance	Human rights compliance

3.2.4 Variables for this study

Following on from the above, Tables 3.4-3.6 below show the variables which will be used to measure punitiveness under the five/six indices selected.

Table 3.4 ***Indices and Variables of Adult Criminal Justice Sector (25 years old and upwards)***

	Indices	**Variables**

A	Adult imprisonment	Flow of prisoners, stock of prisoners, disaggregated by offence by sentence length and admission rates
B	Sentencing data	Use of alternatives to custody, enactment of mandatory/presumptive sentences/laws increasing sentence use; patterns of use of such policies.
C	Policing	Arrest rates, stop and search, police powers
D	Alternative disposals	Rates of diversion and cautions
E	Prison Conditions	Respect for human rights, size of institutions, overcrowding, rehabilitative/other programmes

Table 3.5 ***Indices and Variables of Youth Criminal Justice Sector (under 18 years old)***

	Indices	**Variables**
A	Youth detention	Population and admission rates over time, disaggregated by offence by sentence length and admission rates
B	Sentencing data	Use of alternatives to custody, outcomes of sentencing, enactment of mandatory/presumptive sentences/laws increasing sentence use; patterns of use of such policies
C	Policing	Arrest rates, stop and search, police powers
D	Alternative disposals	Rates of diversion, cautions, alternative disposals/referrals
E	Detention conditions	Respect for human rights specifically the Havana Rules, size of institutions, overcrowding, rehabilitative/other programmes

F	Human rights compliance	Age of criminal responsibility, modes of the criminal trial in compliance with Human Rights Instruments in respect of youth justice specifically the Beijing Rules and UNCRC (including detention as a last resort and for the shortest period of time).

Table 3.6 ***Indices and Variables of young adults in the criminal justice system (between 18 and 25 years old)***

	Indices	**Variables**
A	Imprisonment rates	Population and admission rates over time, disaggregated by offence by sentence length and admission rates
B	Sentencing data	Use of alternatives to custody, outcomes of sentencing, enactment of mandatory/presumptive sentences/laws increasing sentence use; patterns of use of such policies
C	Policing	Arrest rates, stop and search, police powers
D	Alternative disposals	Rates of diversion, cautions
E	Detention/prison conditions	Respect for human rights specifically the Havana Rules, size of institutions, overcrowding, rehabilitative/other programmes
F	Human rights compliance	Age of criminal responsibility, modes of the criminal trial in compliance with Human Rights Instruments in respect of youth justice specifically the Beijing Rules and UNCRC (including detention as a last resort and for the shortest period of time).

In line with previous research, variables examining the various ways imprisonment can be used are included in Index A, including the correlation of imprisonment rates with crime rates (Tonry, 2007; Hamilton, 2014; Lynch, 1988; Pease, 1994; Young and Brown, 1993). Also in line with the literature (Tonry, 2007) enactment of mandatory/presumptive sentences/laws increasing sentence length and the patterns of use of such policies will be examined in Index B. Policing in Index C is regarded as a key measure of punitiveness at the front-end of the criminal justice system as it can be used as important means of crime control (Hinds, 2005; Harkin 2015). Policing in youth justice is additionally important to measure due to the interaction between police and offenders also being seen as a punitive experience by some offenders (McAra and McVie, 2007; Cunneen et al, 2018; Flacks, 2018). In conjunction with this line of thought is the inclusion of alternative disposals in Index D i.e. rates of diversion[4] and cautions[5] or equivalent in the comparator jurisdictions which is also at the front-end of the criminal justice system. This is particularly important to measure given the literature arguing minimal intervention is likely to be effective in reducing offending (McAra and McVie, 2017) with youth justice systems like Ireland having diversion form the 'cornerstone' of its system (Convery and Seymour, 2016). In line with the literature, various measures of prison conditions, such as the size of institutions, safety, overcrowding, etc. are included in Index E, as they are also seen as critical to the offender's experience of punitiveness (Kutateladze, 2009; Hamilton, 2014). In respect of youth justice and young adults, compliance with the Havana Rules on the protection of juveniles deprived of their liberty (United Nations, 1990) is included which was used in Cunneen et al.'s (2018) research. Human rights compliance in youth justice is included in Index F due to 'the widely held commitment to act within the guidelines established by various children's rights conventions' (Muncie, 2008: 107). The use of this measure is furthered by Cunneen et al.'s (2018) determination that punitiveness may reduce in one dimension of the youth criminal justice system such as detention rates but remain in another such as human rights compliance. The two specific instruments selected for this index are the Beijing Rules on the minimum rules for the administration of youth justice (United Nations, 1985) and the UNCRC (United Nations, 1989) which was used in Muncie (2008) and Cunneen et al.'s (2018) research.

[4] For the purpose of this research, diversion refers to diversionary schemes or programmes (including referral possibilities) aimed to divert offenders away from offending and from the criminal justice system as soon as possible, without recourse to formal hearings (United Nations, 1985, 1990; Kilkelly, 2011; Richards, 2014).
[5] Cautions can be given by either police or prosecutors (formally or informally) in lieu of a prosecution.

3.3 Research Design

3.3.1 Case Study Research

In seeking to address the key research questions, this study adopts a case study research design given the opportunities it offers for 'gaining an in-depth, longitudinal understanding of a single phenomenon... within its natural context as it occurs over time' (Gondo, et al., 2012: 2), in the current case, state punitiveness. In addition, case studies are the preferred strategy 'when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context' (Yin, 2003: 1) and when the aim is 'to explore and depict a setting with a view to advancing understanding of it' (Cousin, 2005: 421). In devoting efforts to explore particular cases in one instance there is a greater opportunity to delve into more detail and discover things that may not otherwise have become apparent (Denscombe, 2014). Therefore, by adopting a case study research design it will crucially facilitate a longitudinally advanced understanding of cross-sectoral punitiveness. The logic behind concentrating efforts on one case is that there may be insights to be gained from looking at an individual case that can have wider implications. As Denscombe (2014: 54) states 'the aim is to illuminate the general by looking at the particular'.

In conducting case study research, the case is a complex entity located in its own special context or background (Stake, 2005), which in this study are the three respective jurisdictions. In addition, the sub-cases or subsections of cases 'have contexts… and go a long way toward making relationships understandable' (Stake, 2005: 131). This approach will therefore seek to assist in understanding why differing levels of punitiveness are present across criminal justice sectors in some jurisdictions and not others, and further assist in exploring the relationship or interaction between these sectors in these respective jurisdictions. This case study is designed as a case-within-a-case comparative study with the three selected cases (the jurisdictions) and three subcases within those respective jurisdictions (adult, young adult and youth criminal justice sectors). This design fits with the aims of the study which concerns cross-sectoral punitiveness and aims to allow for elements to be revealed that may have otherwise been overlooked in theory generalisation (Paterson, 2012).

A key consideration of a case study approach is addressing how reasonable it is to generalise from the findings of one case. Case studies do permit generalisations to be made but such generalisations are 'fuzzy' i.e. everything is a matter of degree, nothing is certain (Cousin, 2005: 426). As explained by Yin (2014) case studies are generalisable to theoretical

propositions but not to populations or universes. By undertaking case study research the goal is to expand and generalise theories (analytic generalisations) as opposed to extracting probabilities (statistical generalisations) as the case study does not represent a 'sample' (Yin, 2014). Further, the point of a case study is to 'analyse the situation and to arrive at certain concepts, propositions or hypotheses that might explain what is happening, and why, in the particular setting that has been investigated.' (Denscombe, 2014: 61). Therefore, from the above perspective case study findings are not regarded as final or absolute but can serve as a descriptive or explanatory foundation to assist with the development of theory (Denscombe, 2014).

As discussed by Denscombe (2014) there are a multitude of advantages in undertaking a case study approach in research. In particular, it allows the researcher to take a 'holistic view' rather than one based on isolated factors of a particular instance and look in depth at the subtleties and intricacies of complex social phenomenon. By taking a holistic view when considering cross-sectoral punitiveness it will allow a deeper understanding of how state punitiveness has manifested in the criminal justice system in different jurisdictions. In appreciating that relationships and processes within social settings are interconnected, in order to understand how the various facets of the setting are linked together it is necessary to explain why things happen when they do in a particular case study setting. This is why a case study approach works well, as rather than taking 'isolated factors' it takes an 'holistic view' of what is going on. In addition, this approach views the case in its entirety thus being able to determine how many parts affect one another (Denscombe, 2014) such as specific sectors of a criminal justice system. In addition, by using a case study approach it allows for the use of a variety of research methods, and multiple sources of data in order to capture the complex reality that is under scrutiny.

3.3.2 'Case-within-a-case' comparison

As averred above, this study can be identified as a case-within-a-case comparative case study. Gondo, et al. (2012: 2) suggest there are four broad steps in approaching a case-within-a-case study: identify a bounded system and the subcases for comparison, collect data and conduct data analysis. The bounded system refers to the phenomenon of interest and its boundaries limiting what will be studied. As stated, the phenomenon at hand is state punitiveness in the three selected jurisdictions. Further, this study is bounded by the three specific sub-cases and

their age limitations: the adult criminal justice sector concerns offenders over 25 years old, young adult criminal justice sector concerns offenders between the age of 18 and 25 years old and the youth criminal justice sector concerns those offenders below 18 years old. In addition, this research is bounded by the 25 year period selected between 1990 and 2015 for multiple reasons. Firstly, it is important to note that this selected period is the period during which the 'punitive turn' is alleged to have occurred in Western Europe (Garland, 2001; Muncie, 2008). While some commentators (Howell et al., 2013; Lipsey and Howell, 2012; Listwan et al., 2008) argue that we have left the punitive era, as discussed in the previous chapters, others are less certain and/or see the period leaving an important legacy (Bateman, 2015; Cunneen et al., 2018; Goshe, 2015). It was also important to include within the study period significant legislative changes such as the Children Act 2001 in Ireland; the introduction of the Adolescent Criminal Law Act ('*adolescentenstrafrecht'* and 'ACL') in 2014 in The Netherlands; and the Children (Scotland Act) 1995. The endpoint for this study is 2015 given the anticipated difficulty in obtaining more recent data (the study commenced in 2017).

In respect of the second step of identifying subcases for comparison, in the context of the current study these comprise the respective sectors of a chosen jurisdiction's criminal justice system, namely, the youth, young adult and adult criminal justice sectors. Gondo et al. (2012) suggest that it is usual for four to ten subcases to be selected. Such a number will allow for an in-depth study but is large enough to allow for meaningful comparison. The three subcases in the three cases (jurisdictions of Ireland, Scotland and the Netherlands) form a total of nine subcases for the purpose of this study which is in keeping with the numbers suggested by Gondo et al (2012). In correlation with the case study approach and taking a holistic approach to punitiveness this study adopted a multimethod approach, which will be discussed at a later stage of this chapter. These final stages of the data collection and methods of this case study encompassed: country reviews, quantitative data collection and interviews with key stakeholders in addition to discussion on the data analysis.

3.3.3 The selected cases: comparator jurisdictions

The 'cases' selected for this study are Ireland, Scotland and the Netherlands. In order to decide which jurisdictions to compare to Ireland a 'most similar' design (Pakes, 2015) was followed. The most similar design is defined by Hague et al. (1998: 281) as taking 'similar

countries for comparison on the assumption that the more similar the unit being compared, the more possible it should be to isolate the factors responsible for differences between them'. As discussed by Pakes (2015) studies based on the most similar designs can be easier to undertake, however, inevitably when conducting comparative research both similarities and differences will be explored to some degree (Dannemann, 2006). In this regard, several considerations were taken into account, both for pragmatic and non-pragmatic reasons such as state of development, population, language, political and legal system. Thus, all three jurisdictions are developed Western European democracies that are English speaking[6] and their official government documentation is readily available in English. They have similar population sizes ranging from approximately 5 million to 17 million and there is a mix of civil and common law jurisdictions among them. A key consideration was also the country's youth criminal justice system and its linkage (if any) with the adult criminal justice system. In this respect, the Netherlands was selected given its extension of juvenile law up to the age of 23 and the bridge this has made to the adult system. While a certain level of similarity was necessary for effective comparison, diversity in terms of their criminal justice arrangements was welcomed, in this case the relationship between the adult and youth criminal justice sectors. As Cavadino and Dignam (2006) have argued, if we are to make sense of contemporary penality we must understand both commonalities and discontinuities between countries and the reasons for them. Thus, broadly speaking, Scotland can be classified as a heterogenous country in respect of the tensions between the adult and youth justice sectors and the Netherlands can be classified as a homogenous country with more transitions and arrangements in place between the two sectors. Ireland is somewhere in between the two classifications with a moderate punitiveness in the adult system yet what appears to be a more lenient or tolerant youth justice system. This is expanded on in more detail below.

Ireland

Ireland was once characterised as a 'country not obsessed by crime' (Adler, 1983) which was seen in Ireland's historically low imprisonment rates by international standards (Kilcommins, et al., 2004). It appears on many fronts that Ireland resisted the 'punitive turn' or culture of control described by Garland (2001) so that, for example, rehabilitation and individuated justice remain core aims of the sentencing system, formal risk assessment tools are used less

[6] Dutch is the primary language of the Netherlands but English is one of the official languages.

than other jurisdictions in evidence and the penal system retains remnants of humanity (Kilcommins et al., 2004; O'Donnell and Jewkes, 2011; see also Healy, 2012; Vaughan and Kilcommins, 2008; Griffin and O'Donnell, 2012 on Hibernian exceptionalism). However, as with several other Western jurisdictions, Ireland experienced an increase in imprisonment rates in the late 1990s (Kilcommins et al., 2004) in addition to an increase in nominal sentence length and violent crime and erosion of defendants' rights (Hamilton, 2014). Such developments, particularly dramatic changes in the various ways imprisonment has been used, have led Hamilton (2014) to contend Ireland is a country with 'moderate punitiveness'.

As with the adult system, Irish youth justice has 'sidestepped some of the more punitive trends' of neighbouring European jurisdictions (Convery and Seymour, 2016: 250). A clear starting point in explaining why this is the case is the introduction of the Children Act 2001 which established the Children's Court[7], family conferencing and community-based sanctions in Irish youth justice. Further, a number of other factors appear relevant in explaining Ireland's sidestepping of more punitive trends, namely, its commitment to diversion. Diversion, arguably the cornerstone of the new approach to youth justice signalled in the Children Act 2001, has been present in the Irish youth justice system since 1963 (Seymour, 2008). The consistent commitment to and use of diversion in Irish youth justice raises intriguing questions as to why this is the case and why has it resonated so strongly in Ireland and not in other countries. It is possible that the distinct approach to youth justice may be explained by Ireland's susceptibility to European and international human rights standards at several critical junctures in youth justice policy (Tutt, 1997; Hamilton and Carr, 2013). Wider patterns of coercive confinement and its decline (O'Sullivan and O'Donnell, 2007, 2012), particularly the institutional abuse scandals of the 1990s may also have contributed to the specific historical context of Irish youth justice (Carr and McAllister, 2014). There has been a substantial decline in the population of children detained in Ireland since the mid-1990s with detention as a last resort now outlined very clearly in the Children Act, 2001. Seymour (2013) argues, however, in the absence of specific sentencing guidance, its implementation both in theory and practice has relied on the commitment of the judiciary and criminal justice practitioners to diversion. A further important consideration in the context of Irish youth justice recently is several calls being made for the extension of the existing youth justice approach to young adults aged 18 to 24 (Irish Penal Reform Trust, 2015; Jesuit Centre

[7] The official name of the Court is the Children Court but for the sake of fluency the term Children's Court is used in this thesis (Kilkelly, 2005).

for Faith and Justice, 2016; Kilkelly, 2017) in addition to some acknowledgements of young adults within in the criminal justice system (Spent Convictions Bill, 2018 and the Youth Justice Strategy 2021-2027).

Scotland

Scotland, as McAra (2008) has argued, deserves close attention due to the contrasting sectors within its criminal justice system. Scotland not only has one of the highest homicide rates but also one of the highest imprisonment rates in Europe (McAra, 2008: 488). Scotland's imprisonment rate was 152 per 100,000 of the national population in 2019 compared to England and Wales which had a rate of 140 in 2019 (Walmsley, 2019). This stands in contrast to its unique care and justice system for children and young people namely the Children's Hearing System (Carr and McAlister, 2014).

Despite high rates of violence between the late 1960s and early 1990s Scotland resisted a 'punitive turn' in criminal justice and penal policy which was occurring in neighbouring jurisdictions such as England and Wales and embraced penal welfare values (McAra: 2008). This period witnessed welfare values as a stable key feature of the youth and adult criminal justice systems, placed social work at the heart of the systems with the Social Work (Scotland) Act, 1968 and set in motion Scotland's Children Hearing System. When devolution took place in Scotland in the mid-1990s the first two governments (1999 to 2003 and 2003-2007) were dominated by a Labour Liberal Democrat coalition (Mooney et al 2015), the first of which continued and developed welfarist policies from the pre-devolution period. However, the second government signalled a retreat from welfare principles and adopted a more populist and punitive approach more in line with the New Labour England and Wales Government, South of the border. Punitive overtones began to enter political rhetoric and ministerial appetite for reform increased with civic culture in Scotland appearing to have gone into a period of drift (McAra. 2008) or, as McAra (2008) argues, a period of 'detartanisation'.

Following the 2007 Scottish Parliament elections and the formation of a minority government by the Scottish National Party (SNP) there was a perception of a change in criminal justice (Mooney et al, 2015) which could be seen in early actions such as the rejection of prison privatisation and the consistent target to recruit extra police officers. The SNP also went on to

secure a majority government in the 2011 elections, and a minority government in the 2016 elections. Major changes were implemented by the SNP in respect of criminal justice such as merging eight separate regional police forces into a single 'Police Scotland', reform in legal aid, new legislation in relation to witnesses and victims and new initiatives relating to serious, organised crime. Since gaining power it has been contended that the SNP has reversed the previous trends in a process of 'retartanisation' in Scotland (Mooney et al, 2015). McAra (2017: 773) recently referenced Scottish penal policy since 2007 as having a 'renewed emphasis on restorative and reparative principles'. Despite this, Scotland still has continued to maintain high imprisonment rates by international standards, especially in relation to 18 to 24 year old males (McAra, 2017b).

Scotland's youth justice system or Youth Hearing System can be classified as a 'minimum intervention model' (Cavadino and Dignam, 2006: 205) and has been described as having a 'unique nature' due to the implementation of a radical minimum intervention model in practice (Cavadino and Dignam, 2006: 207). Such hearings operate entirely within the civil jurisdiction and the 'welfare of the child' is the paramount consideration. Section 16(3) of the Children (Scotland) Act, 1995 states that a court should not make any order or requirement of any kind unless it would be better for the child not to do so and the hearings themselves are conducted by lay panels. If a criminal offence is brought before such panels and it is accepted or proven the paramount consideration for the panel members is the 'child's welfare *needs* rather than his or her criminal *deeds'* (Cavadino and Dignam, 2006: 223).

The Scottish youth system appears to have been protected from the upheaval and changes brought by different governments in adult criminal justice since devolution in Scotland. The imprisonment rates were constantly rising before and after devolution in Scotland (Mooney et al, 2015) with them only starting to fall in recent years. In 2008 the Scottish Prisons Commission released 'Scotland's Choice' (Scottish Prisons Commission, 2008) which was aimed at Scotland's high imprisonment rates and set out 'the choice the country faced between continuing to be a high imprisonment society or developing more constructive community justice polices' (Mooney et al, 2015: 21). Whilst the fall in imprisonment rates may be a result of the approach being led by the SNP government and Scotland's Choice (Scottish Prisons Commission, 2008) the Scottish adult imprisonment and crime rates are still by internationally standards high, even outdoing England and Wales. During this disruptive period in the adult justice system in Scotland, the youth justice system remains welfare-orientated with its unique Children's Hearing System. As such, Scotland, as aptly described

by Young (1997:116), has gained a reputation internationally for both ‘penal harshness and innovation’.

The Netherlands

The Netherlands’ criminal justice system was seen as ‘a beacon of tolerance dimmed’ (Downes, 2007: 109) when it experienced a dramatic increase in its prison population in 2006. Before this, post-war developments in Dutch penal policy had produced the most humane penal system in Europe with a sustained reduction in the scale of imprisonment between 1947 and 1974 (Downes and van Swaaningen, 2007). The Netherlands has long had an exemplary consensus-based political culture with the Dutch imprisonment rates in the early 1970s among the lowest in Europe (Downes and van Swaaningen, 2007). The dominant narrative on crime was maximum investment in rehabilitation and minimal resort to punishment (Downes, 2007).

Although beginning in the 1980s, governmental policy documents regularly indicated public anxieties about crime and dissatisfaction with the criminal justice system’s ‘leniency’ (Downes and van Swaaningen, 2007) between 1973 and 2004 the imprisonment rate rose steadily to 123 per 100,000 (Swaaningen, 2006), nearly a sevenfold increase. The striking thing about this development is that it occurred in the context of no new sentencing laws being enacted and also without crime becoming a major political issue. The characteristics of this more severe criminal justice system is seen in harsher decisions by practitioners such as police being more likely to refer cases for prosecution, it becoming more likely for prosecutors to insist on negotiated settlement or initiate court proceedings, and judges being more likely to impose longer prison sentences (Tak, 2001).

In the following ten years from the Netherland’s imprisonment rate ‘peak’ in 2006 however, there was a 46 per cent decrease in the prison population leading to the country now being characterised as ‘exceptionalist’ (Dünkel, 2017). The rates in 2017 have reduced back to 61 per 100,000 population (Walmsley, 2019). Due to the dramatic reduction in imprisonment rates in recent years, the Netherlands has closed a number of prisons and rented out prison premises to neighbouring European States such as Belgium and Norway (Council of Europe, 2017). The shift back to low imprisonment rates since 2006 is a marked one with it being attributed to factors such as: a change in the approach to law enforcement towards

rehabilitation rather than incarceration, the new digital age which sees young people spend more time on technology rather than in the streets committing crimes and an emphasis over other surveillance methods e.g. electronic tagging (Bilefsky, 2017).

The Netherlands youth justice system appears to have also experienced a sharp punitive 'peak' like the adult system with Muncie (2009) arguing we have witnessed an 'exceptional case of re-penalisation' or a distinct hardening of attitudes and criminal justice responses to young offending during the 1990s. During the 1990s policies for dealing with young offenders were toughened and waivers to the adult court were made easier (Junger-Tas, 2004). According to Council of Europe statistics (2003) the Netherlands reported significant increases in their daily counts of the number of under 18 year olds in detention from 900 in 1995 to 2,100 in 2000. Figures obtained from the International Centre of Prison Studies between 2004 and 2007 suggested increases in the Netherlands of plus 1,800 (Muncie, 2009). There has been, however, a decrease in the number of juveniles in detention from approximately 2007 dropping to 473 detained juveniles in 2013 and a further 11% reduction in 2017 to 420 detained juveniles (Dienst Justitiële Inrichtingen, 2018: 87).

There has been substantial change, moreover, in youth justice law with the announcement in 2010 by the Government of the introduction of *adolescentenstrafrecht* (Adolescent Criminal Law Act 2014) for young offenders aged 12 to 23 (Pruin and Dünkel, 2015). As of April 2014, when the changes were made to the law, the Netherlands might well supersede Germany as the European pioneer in providing a special approach to young adult offenders. The new *adolescentenstrafrecht* allows for youth justice provisions to be applied to young adults up to the age of 23 (Pruin and Dünkel, 2015). The move to dealing with this age group as young offenders has been as a result of neuroscientific research indicating important brain functions are not fully developed at 18 therefore youth justice sanctions are regarded as more appropriate as they allow for an individualised intervention (Pruin and Dünkel, 2015). The new law extends the law from 18 to 23 which means the sanctions from youth justice law can be imposed on young adults who have committed an offence before 23. No other country in Europe provides a legal basis to extend the use of youth justice provisions up to such a high age. It is worth noting also more recent developments since 2019 with two reports commissioned by the Research and Documentation Centre ('WODC') of the Dutch Ministry of Justice on whether the sentencing of young people is effective in response to a public petition (Asscher et al., 2020; Huls et al., 2022). This indicates turbulence in the Dutch youth

justice system and raises interesting questions about the effectiveness and implementation of the *adolescentenstrafrecht* for young offenders up to the age of 23.

To conclude, therefore, it seems that in the 1990s the Netherlands moved from its established beacon of tolerance to more punitive tendencies both in the adult and youth criminal justice systems. Whilst there is still more research to be done to ascertain why there was a sudden increase in severity in the Netherlands, what is apparent is that when the adult system began to display a more punitive tendency so did the youth system and this was mirrored in the late 2000s when detention rates again fell with imprisonment rates. In addition, it is an attractive country for cross-sectoral research owing to its decision to extend the use of its youth justice provisions into the adult system as seen in the *adolescentenstrafrecht* and how this law is working in practice, in light of recent punitive developments. Adding to its attractiveness for a comparator country, it is noted that certain aspects of the Dutch criminal justice system have often been compared with Scotland, in particular the centralising its police force in 2013 (Fyfe, 2016) and in the creation of fiscal fines (Duff, 1994; Steward Committee, 1983).

3.4 Methods

3.4.1 Triangulation research

The use of a single research method in social sciences can result in limitations associated with said method or the specific application of it. Triangulation refers to the use of more than one approach to the research question and therefore offers greater confidence in the findings that emerge as a result (Bryman, 2011). As stated by Webb et al (1966: 3) ‘once a proposition has been confirmed by two or more independent measurement processes, the uncertainty of its interpretation is greatly reduced’. The metaphor of the stability of a tripod is used to describe the triangulation approach as it involves the combination of varied approaches to move researchers towards a 'true' picture i.e. ‘the strengths of each contrasting approach more than cancel the weaknesses of their counterpart’ (Miller, 2011: 327). There are four different ways a research study can be triangulated: methodological triangulation (the use of more than one method to study the same phenomenon); data triangulation (the use of different sources of data which are distinct from different methods in the production of data); investigator triangulation (where multiple researchers are involved in the study) and theoretical triangulation (the use of different theories to interpret the phenomenon) (Flick, 2018; Mills et al., 2010; Miller, 2011).

This study applied methodological triangulation as a research strategy in using both quantitative and qualitative methods in order to maximise their strengths (Miller, 2011). Methodological triangulation can take two different forms: within-methods and between-methods. Within-method triangulation refers to using a variety of techniques within one single method. Between-method triangulation, which this study used, is where two or more distinct methods are employed to measure the same phenomenon but from different angles (Arksey and Knight, 1999). The strengths and weaknesses of both qualitative and quantitative research methods were explored by Miller (2011) who implies that the weaknesses of one approach are cancelled out by the strengths of the other approach. The main advantages of the qualitative research method are that it provides a holistic, detailed view, incorporating reactivity and naturalism. According to this approach, these advantages can cancel out the main disadvantages of quantitative research methods which are the limited scope of data and artificiality (otherwise known as the instrument effect) (Miller, 2011). The main advantages of quantitative data are representativeness, the possibility of impartial disproof and control which can also cancel out the main disadvantages of qualitative research method; the potential to be non-representative and lack of bias control (otherwise known as the interviewer effect) (Miller, 2011).

Therefore, by combining the two approaches for this study it ensures that the weaknesses of one approach will cancel out the other and will enable both 'objective' and 'subjective' dimensions of punitiveness (Nelken, 2015) to be explored. As Nelken (2015: 221) contends, we should not keep 'the objective and subjective aspects of punishment regimes distinct'. In examining subjective punitiveness by qualitative methods (interviews) it will provide insight into what local practitioners say they are trying to do (Hamilton, et al., 2016). By adopting a triangulated approach to this study, it will act as a heuristic device in attempting to capture a 'true picture' of punitiveness and how it operates within the respective case studies.

It has been argued that triangulation is necessary for claims about reality or social phenomena which should be scrutinized from different viewpoints, therefore capturing a more accurate analysis and explanation (Hassard and Wolfram Cox, 2013). As discussed above, the concept of punitiveness is complex and multifaceted, therefore it can be difficult to capture this phenomenon as it operates in the 'real world' (Hamilton, 2014: 8). By using a mixed method, this multidimensional concept will be captured and examined from different viewpoints. In trying to grasp such a concept, it is contended that the use of a singular research method in measuring punitiveness would not portray the 'true picture'. This is clear from previous

research, as already mentioned, which only used quantitative data such as imprisonment rates to measure punitiveness which as Pease (1994: 166) argued was 'fraught with possibilities for misinterpretation'. In using quantitative methods to measure punitiveness it will enable an unbiased representation to be obtained. However, by also including qualitative methods, it will further our understanding of the context in which crime occurs, criminal justice is administered and will flesh out the quantitative data (Noaks and Wincup, 2004).

For this study, multiple data sources deriving from multiple methods were used including documents, statistical data, and interviews. The use of multiple data sources to examine individual cases is the hallmark of case study research (Baxter and Jack, 2008). By employing differing methods and therefore utilising different data sources, it enhanced the reliability of the findings for this study, and as stated above, the weaknesses of one method or data source can be cancelled out by the strengths of another. Since, this study is a case-within-a-case comparative case study, the multimethod and triangulated approach was appropriate to employ.

This research's strategy was to employ the following methods in a particular order: document analysis (country reviews), collection of existing data (quantitative) and interviews (qualitative). By adopting such a strategy, the results obtained from the documentary analysis and collection of existing data were analysed and explanations were sought during the interview stage from the key stakeholders from the respective sectors/jurisdictions.

3.4.2 Country Reviews

The first stage of this research was to conduct in-depth reviews of the literature on the adult and youth justice systems of Ireland, Scotland and The Netherlands. The country overview chapters (namely Chapters Four, Five and Six) emerged from this review and are a chronological synopsis of the law and policy within the adult and youth justice systems in the three jurisdictions between the twenty-five year period chosen from 1990 to 2015. In addition, they assessed cross-sectoral punitiveness in the three justice sectors, namely, the adult, young adult and youth criminal justice systems, in the three jurisdictions according to the five/six indices outlined earlier in this chapter.

3.4.3 Quantitative – Existing Statistical Data

Following the literature review of the case studies, quantitative data were collected drawing on existing publicly available information on variables outlined above in respect of the operation of the adult, young adult and youth systems in each jurisdiction. In addition, data information requests were made for specific data from organisations such as the Department of Children and Youth Affairs in Ireland and similar institutions in Scotland (Statistics section of the Scottish Government website), and the Netherlands (Research and Document Centre (WODC)). When the data were collected from the outlined sources above, they were collated into a spreadsheet and annotated during the process. In addition, the spreadsheet was clearly divided into the three sectors for each jurisdiction i.e. data on under 18 year olds (youth sector), data on 18 to 25 year olds (young adult sector) and data on over 25 year olds (adult sector) where possible.

Following the collection of the relevant statistical data, the data for each sector in each jurisdiction were analysed and reviewed. In particular, the data trends were analysed in respect of the variables outlined above from the index year, 1990 (where possible) and any changes that occurred relative to this year. This was important given this research's interest in longitudinal punitiveness over the 25 year period, 1990 to 2015. This was done cross-sectorally within each jurisdiction which allowed (where possible) for the data trends from the index year in the adult, young adult and youth justice sectors to be compared in relation to the variables selected for this study. Following this, a descriptive analysis was conducted (Hamilton, 2019), the results of which were utilised in drafting the research instruments for the qualitative stage of the research. Whilst the documentary analysis and quantitative stage of this research produced results and in particular data trends, the use of qualitative methods was essential in order to flesh out these results and offer explanations, giving an insight into how punitiveness is operating in the 'real' world.

3.4.4 Qualitative- Interviews

Following the completion of the quantitative research, qualitative research was carried out, more specifically interviews were conducted with the key stakeholders within the criminal justice system of each jurisdiction. As Nelken (2019) contends punitiveness or leniency are not terms with stable or cross-cultural meanings, therefore in order to grasp the punitiveness

and leniency in different systems it is important to immerse oneself in local debates (Nelken, 2019: 197). Such immersion requires the exploration and deconstruction of various discourses by politicians, practitioners and others about criminal law, the crime problem etc. and show how they interpret and shape their cultures. Importantly, it is essential to understand the way 'insiders' compare their own system to other systems, as such interpretation, even if it is misinterpreted, shapes what they do at a domestic level (Nelken, 2019). By using qualitative methods, it can assist in our understanding of the context in which crime occurs and criminal justice is administered as it provides 'rich and detailed data to flesh out the bare skeleton provided by quantitative data' (Noaks and Wincup, 2004: 14). For this research, focus groups or group interviews were not selected as the preferred research method, as it was anticipated that interviewees would be more forthcoming about sensitive topics relating to punitiveness in a one-to-one interview setting.

Interviews were conducted with 12-15 interviewees in each of the respective jurisdictions resulting total of 40 interviewees. As relatively small numbers were selected for inclusion, purposive sampling (Newburn, 2007) was used to ensure interviews were conducted with key stakeholders with specific experiences within the criminal justice system, including those working at both the front (for example diversion/referral programme officials) and back-end (for example probation officers). Within the three jurisdictions, interviews were also conducted with academics, practitioners including judges, probation adult and youth officers, Justice Ministers, personnel working in adult and youth justice NGOs and key personnel working in the relevant detention/imprisonment institutions within each jurisdiction. Purposive sampling was also used to ensure interviews took place with key criminal justice stakeholders from both the adult and youth justice sectors. While most interviews were arranged via email and through purposive sampling, snowball sampling was used where interviewees recommended a colleague with experience which would assist the research. In line with the multidimensional, systemic 'long' view of the criminal justice system, the key stakeholders that were interviewed included those who work in both the front-end and back-end of the criminal justice systems. This ensured an accurate picture of punitiveness within the respective sectors was captured and that it encompassed the whole of the criminal justice system.

Initially, it was intended to conduct both field trip visits and interviews in person in the respective comparator jurisdictions. Due to the Covid-19 Pandemic which arose in March 2020, the original plans to travel to Scotland and the Netherlands, could not go ahead. The

intended purpose of these field trips was to conduct interviews with key criminal justice stakeholders and be immersed in the criminal justice culture of each jurisdiction, both adult and youth justice. From the beginning of the Pandemic, the University had an embargo on travel for research purposes. Unfortunately, due to the ongoing due to the ongoing nature of the Pandemic and the three periods of travel restrictions/lockdowns etc. that commenced in March 2020 and arose again at the end of December 2020 the travel embargo was not lifted by the University. Therefore, it was decided to proceed with the interviews online which commenced in March 2021. Notably, it has been found that interviews conducted via video call were not of a lesser quality than those conducted face-to-face (Cabaroglu, Basaran, and Roberts, 2010; Deakin and Wakefield, 2013).

In arranging the interviews, interviewees were contacted via email to enquire as to their willingness and availability to participate in this research. Access to certain participants within some of the criminal justice organisations i.e. those working in the Irish Probation Service or Scottish Prison Service were gained through their respective gatekeepers. These interviewees were required to have obtained ethical approval from their gatekeeper in order to take part in an interview. Where this was the case, the researcher contacted the relevant gatekeeper and completed a research request. Once this was approved by the gatekeeper and their board, the researcher was either put in contact with the interviewee or allowed to contact the interviewee regarding the interview via email. These research requests varied but generally required the researcher to provide an overview of the research, methodology, dissemination of research findings and a detailed overview of research ethics. These research requests would be accompanied with a copy of the information sheet on the interviews, a copy of the consent form and a copy of the confirmation of this research's ethical approval obtained from Maynooth University. Therefore, there was a potential power dynamic at play in the research process. However, as stated above, all interview participants chose freely to consent to take part and the principles of informed consent applied. In addition, these interview participants nominated by their employer were reassured that their responses during the interview were strictly confidential, would be anonymised and there will be no communication with their employer. Further, they were also able to decline to participate without their employer being notified and without any negative consequences.

In advance of the interviews, the interviewees were advised that the interviews would take place online via Microsoft Teams and that the interview would be recorded for transcript purposes. In the initial email to the interviewee they were informed whether they were being

interviewed in respect of the adult justice system or the youth justice system within that particular jurisdiction. The interviewee was also sent an information sheet on the research and a consent form to read over and sign and return prior to the interview taking place. It stated in this form that, aside from the identification of their profession or group of stakeholders to which they belong, no identifying information would be provided in the thesis or any publications arising. This was done to encourage an open and honest interview and to reduce any concerns that any comments, particularly those critical of the criminal justice system/their profession or body they are a part of, could be directly attributed to them. The interviews took place between March and August 2021 and the duration of the interviews ranged from 40 to 80 minutes.

It was decided that the interviews would use a semi-structured format. Semi-structured interviews can be used to explore interviewee's subjective experiences and allow researchers to explore, capture and clarify ambivalence and uncertainty (Schutz, 1970; Bryman, 2012). They can be flexible using open-ended questions and offer the chance to explore issues that arise spontaneously (Berg, 2009; Ryan et al., 2009; Doody and Noonan, 2013). In this research, semi-structured interviews were used to allow key criminal justice stakeholders within these three jurisdictions to voice their opinions and share their professional experiences, contributing to a wider understanding of how practices within the adult and youth criminal justice systems have changed and impacted each other over the years, and contributing to recommendations that would improve the functioning of these systems. It was also felt that an unstructured interview could result in the key topics not being discussed whereas, on the other hand, a structured interview would not allow for any issues raised by interviewees to be teased out and explored further, which could result in relevant information remaining undiscovered. While semi-structured interviews involve predetermined questions, they allow the researcher to seek clarification, vary the order and wording of the questions and ask additional questions if necessary (Corbetta, 2003; Doody and Noonan, 2013). A semi-structured interview format, therefore, was the most appropriate to adopt as it provided the structure to ensure all key topics were covered but also the flexibility to explore in greater detail any issues or topics that arose during the interview. The quantitative data, together with the chosen variables and documentary analysis, were used to assist in the drafting of the research instrument for the interviews with the relevant stakeholders. There were in total six research instruments drafted and used for the interviews. For each jurisdiction, there were two research instruments for the adult and youth justice sectors, depending on that interviewee's experience. All of the research instruments followed the same overall structure

namely there was three parts to be addressed: introduction and experience, that jurisdiction's approaches to adult/youth justice and transitional arrangements between the youth and adult criminal justice system. All interviewee guides comprised of approximately 15 questions.

All the interviews were recorded using the recording tool on Microsoft Teams (or Zoom); no participants declined to be recorded. They were then transcribed and anonymised by the researcher during the interview data collection phase between March and August 2021. All references to names, location or any content that would identify the interviewees were removed from the transcripts. All of the transcripts were numbered according to their jurisdiction i.e. Irish interviewee #1, Scottish interviewee #1 etc. On a separate document those numbers were associated with the name, profession and sector the interviewee worked in. This was to comply with data protection regulations and ensure if an interviewee wished to withdraw from the research that the researcher could identify the transcript of the interview and immediately delete it. The document with the identifying codes was encrypted and stored in a password protected folder on a secure password protected laptop that only the researcher had access to. This password protected external laptop was stored in a locked cabinet in the researcher's office, with only the researcher having access to the key. Upon completion of this research the anonymised transcripts were stored on this password protected secure laptop, where they will remain for a period of ten years after which they will be deleted.

3.5 Data Analysis

Following the completion of these interviews, analysing the data began. Generally inductive approaches are associated with qualitative research and deductive approaches are associated with quantitative research (Dahlberg and McCaig, 2015), however, most research involves cycles of inductive and deductive reasoning (O'Leary, 2007). The deductive approach is a top-down approach to research with a theory being used as a starting point (Dahlberg and McCaig, 2015). As concepts are the building blocks of hypotheses and theories, the first stage is to elaborate a set of principles or ideas that can be tested through empirical validation. Before this can take place, the underlying concepts must be operationalised so they can be observed to confirm if they occurred. Therefore, measures and indicators are created (Gray, 2018). In this regard, punitiveness was conceptualised and operationalised to create variables and indicators that will be used to measure punitiveness within the respective sectors within the jurisdictions.

An inductive approach on the other hand is a bottom-up approach to research which moves from fragmentary details to a connected view of a situation (Dahlberg and McCaig, 2015). When taking this approach, plans are made for data collection, and data are then analysed to see if any patterns emerge that suggests relationships between variables. From this, it may be possible to construct generalisations, relationships and theories (Gray, 2018). To ensure reliability when adopting this approach, it is common to have multiple cases or instances such as this study and the case study research design being adopted. This approach does not set out to corroborate or falsify a theory, but by gathering data it attempts to establish patterns, consistencies and meanings (Gray, 2018).

This research combined both inductive and deductive reasoning during the data analysis. The researcher initially conducted documentary analysis on the legal and policy developments that had taken place in the adult and youth justice sectors of the three jurisdictions from 1990 to 2015. The quantitative data were then analysed according to the five/six indices (and their respective variables) outlined earlier in this chapter. In particular, the data trends were analysed according to changes relative to the index point of this study, 1990 and context was also provided from the documentary analysis. This approach did not have a rigid hypothesis, but there were themes that the researcher was interested in that corresponded to the three research questions for this study. Therefore, this part of the data analysis was a ground-up inductive approach that was more structured in analysing the data according to specific indices (and variables) and being cognisant of the research questions.

As discussed earlier in this chapter, the quantitative data, chosen variables and documentary analysis assisted in the drafting of the research instruments for the semi-structured interviews with the relevant stakeholders. Once the interviews were complete, the researcher began to analyse and code the qualitative data (transcripts) using the qualitative data analysis software, NVivo. It was aimed to establish patterns and meanings following data collection in order to understand how punitiveness manifested within the respective case studies. To code the data into themes, the researcher utilised the research instrument structure for each jurisdiction. As the research instruments differed for each case study, three NVivo projects were created. The process outlined below was conducted on each case study project.

Once all interview data were imported into NVivo, the data were coded into the themes arising from the research instrument questions which was a deductive process. Each research instrument, for both adult and youth justice sector interviews, was divided into three parts,

each part corresponding to the three research questions, as outlined above. For example, in the first part of the research interview (introduction and experience), interviewees were asked if there were differences or similarities between the adult and youth justice sectors within their respective jurisdiction and why they thought this was the case. All of the responses to this question were contained in one broad code (titled the question) with sub-codes differentiating the responses such as 'different sectors' and 'similar sectors'. During this deductive coding process, each interview was read through and their responses to the research instrument questions were coded. This examination resulted in new themes emerging which formed new codes. This was an inductive process. For example, one such code entitled, 'social class issues' related to some Irish interviewees' discussion on issues with the operation of diversion in Ireland for young people (discussed further in Chapter Seven).

In addition, other tools on NVivo, such as the explore function, were utilised to fully analyse the data. To ensure all relevant data were coded, key codes that emerged during the coding process were searched in all of the data via the query function. For example, a code that emerged during the inductive process of the Dutch interview data was a PIJ or mandatory/compulsory custodial treatment order for juveniles. Therefore, these key terms were searched in all Dutch interview data using the query function which would show where these terms were mentioned. Another NVivo tool used under the explore function was the word frequency search on the data sets for each jurisdiction. This tool listed the most frequently used words (e.g. police) or stemmed words (e.g. policing) in all of the interviews for each case study. For example, frequently mentioned words in the data included: 'diversion' in Irish interviewees, 'different' in Scottish interviews and 'change' in Dutch interviews. Therefore, both deductive and inductive approaches were adopted in this analysis of qualitative data which allowed the data to speak to the researcher, while also coding it into themes. The combination of these approaches, therefore, allowed a flexible data analysis process. The qualitative data were triangulated with the quantitative data and documentary analysis forming the findings chapters of this research (Chapters Seven, Eight and Nine).

3.6 Ethical Considerations

The appropriate code of ethics governing this research is the British Society of Criminology code of ethics for researchers in the field of criminology. The researcher applied for and was

granted ethical approval from Maynooth University Ethics Committee in December 2019 in respect of empirical research that involves the participation of people. This ethics application set out the process that would be followed before, during and after the interviews in respect of how they would be organised, conducted and how the data would be analysed and stored after the interviews took place. It also highlighted a range of ethical considerations that may arise during the data collection and how they would be addressed. In relation to the interviews, while all personalised data were anonymised and treated confidentially, broad references have been made as to the category of profession an individual belongs to, or the government department/organisation which employs them. This simply took the form of referencing for example that 'youth probation officers within Young Persons Probation division of the Irish Probation Service…' or 'A District Court Judge within Ireland operating in this field believed that….'. No identifying information has been provided in the thesis or will be provided in subsequent publications. It was necessary for the purposes of this research project that the specific professions, departments and organisations in which the individuals work were identifiable so that the answers supplied by the interview subjects, who are in every other way anonymous, could be compared more clearly between the jurisdictions and provide necessary context. This was outlined in advance to the interview participants, and they freely chose to consent to take part. They also had the option to revoke their participation if they so chose. Particularly, in respect of interviews, the participants were all adults, not in a vulnerable position, they were provided with an information sheet on the research (see Appendix B), asked to sign a written consent form (see Appendix A), and consented to the interview being electronically recorded. Due to the nature of their profession (key stakeholders) it was not anticipated that any of the topics discussed during the interview would trigger an emotional reaction. In the unlikely event that the interview questions triggered an emotional reaction or distress in the interviewee, they would have been advised to seek help from appropriate counselling services. No other potential risks were anticipated.

3.7 Limitations of this study

This study is not without its limitations. Firstly, it is acknowledged that findings from this research cannot be taken to represent the entire jurisdiction in which it is analysing. In addition, there are geographical limitations of the study, given that a majority of interviews and data are conducted in the main cities of each jurisdiction, which are predominantly urban areas. In addition, this study is bounded by time and is examining a specific period from 1990

until 2015 inclusively, which was selected to adequately address the key research questions seen in the reasons expanded on previously.

There has been scepticism expressed in respect of the credibility of generalisations that can be made as a result of case study research (Denscombe, 2014). However, as discussed above, the individual case studies should not be seen to form part of a survey sample. As stated by Denscombe (2014: 61), the findings cannot be taken as representative of a larger whole: 'they are not a "slice of cake"' whose function is to reveal the contents of the whole cake. Instead, the findings from a case study are used for the *development of theory*. In respect of this research, the findings will assist in better identifying the determinants of penal policy and gaining a deeper understanding as to why different criminal justice sectors within different jurisdictions have adopted differing approaches.

3.8 Conclusion

In conceptualising punitiveness for this research, the works of Kutateladze (2009), Cunneen et al. (2018) and Hinds (2005) were all considered and adopted. It is argued that by conceptualising and operationalising cross-sectoral punitiveness it can be used as a heuristic device to assist in our understanding of the complexity of punitiveness as it operates within three criminal justice sectors within in three jurisdictions. The conceptualisation of punitiveness for this study takes a 'long' or systemic view of punitiveness, ensuring that both front-end and back-end measures are operationalised. In terms of design, this study can be identified as a case-within-a-case comparative case study forming around the adult, young adult and youth criminal justice sectors of a jurisdiction. Having considered previous research and in adopting a data reduction strategy due to the number of subcases (N=3 in each jurisdiction) five to six (depending on the sector) clusters of variables or indices were selected for the purpose of operationalising cross-sectoral punitiveness. These variables or indices reflect the experience of the offender from the front-end and back-end of the criminal justice system in the adult and youth sectors drawing on Hinds' (2005) research.

By adopting an in-depth case study research design it will allow us to begin to isolate some of the key drivers of punitiveness/tolerance within the adult and youth criminal justice systems of a jurisdiction and shed light on the interaction of the two internal sectors within the broader criminal justice system. The multimethod and triangulated approach is appropriate

for this study given the case-within-a-case case study approach being adopted. The methods employed for this research were country reviews, collection of existing statistical data, and conducting interviews with key stakeholders. It is hoped that by adopting a triangulation research strategy the validity of the research's findings were enhanced so that the weaknesses of one method can be compensated by the strengths of another method. Ethical considerations have been taken into account and the limitations of this study have also been discussed.

PART II

Chapter 4 – Cross-sectoral punitiveness in Ireland 1990-2015

4.1 Introduction

The jurisdictions under examination have been briefly introduced in the preceding chapters. It is the aim of the following three chapters to provide an extensive review of criminal law and policy within the adult and youth criminal justice systems of the selected jurisdictions for the period of 1990 to 2015. The following country review chapters will be divided into two parts: firstly, they will provide the reader with a chronological review of law and policy in both sectors over the twenty-five year period 1990-2015 and secondly, they will assess cross-sectoral punitiveness according to the five/six indices as outlined in Chapter Three.

4.2 Punitiveness in Ireland 1990-2015

4.2.1 Adult Criminal Justice in Ireland 1990-2015

Ireland has been described by Adler (1983) as a nation 'not obsessed by crime'. Similarly, the dominant terms that have been used to describe Irish penal history have been 'stagnation' and 'pragmatic' (O'Donnell, 2008; Rogan, 2011; Hamilton, 2014) and an 'exception' within Anglophone penal history (Brangan, 2021). As such, it has been stated when change occurs in the Irish criminal justice system it does not emerge from a deliberate process drawing on evidence or expertise but rather it is driven by events (O'Donnell, 2011). An example of this was the double murder of policeman Gerry McCabe and journalist Veronica Guerin in June 1996 which shocked the nation and saw law and order rise to the top of the political agenda in Ireland (Hamilton, 2014). Following this, the country saw an increase of 46 per cent in the daily prison population between 1996 and 2006 (O'Donnell, 2017: 1). This was exacerbated by the introduction of draconian criminal justice legislation in both 2006 and 2007 by Justice Minister Michael McDowell before he resigned in 2007. In reflecting the significance of these criminal justice events in Ireland, the following section is sub-divided into three time periods namely: 1990-1996, 1996-2007 and 2007-2015.

A. 1990-1996: Stagnation and Crime Crisis

Crime was not a significant factor in the Irish public's hierarchy of concerns before the 1990s (O'Donnell, 2008). However, 'crime crises' would every now and then shatter the general inertia in this area (O'Mahony, 1996; O'Connell, 1998 in Hamilton, 2014) as seen in the 'moral panic' over the sentencing of sexual offences following the 1992 Lavinia Kerwick case (Fennell, 1993: 12). Typical during this period was 'the pattern of knee-jerk policymaking and band-aid solutions' (Hamilton, 2014: 34) and the government 'legislating a response …with a degree of ease and consciousness which can indicate that either the changes are long overdue or unwarranted, or do not pose any fundamental problems in our collective consciences.' (Fennell, 1993: 12).

While stagnation, punctuated by crime crises, can be said to characterise the period prior to the 1990s in Ireland there was some indication that this was changing. Recorded crime began to increase in the early 1990s reaching its high point in 1995 (O'Donnell and O'Sullivan, 2003) in addition to overcrowded prisons and the system being brought into disrepute by the safety valve of temporary release (O'Donnell, 2004: 254). In 1994, the Department of Justice (1994) published a considered strategy statement acknowledging the considerable problems with the prison system at the time and planned for a modest expansion of prison numbers. This Report, 'the first of its kind' (O'Donnell, 2008: 126) can, however, be viewed in stark contrast to the approach taken post 1996.

B. 1996-2007: Politicisation of crime?

Whilst there was an increase in crime throughout the 1990s, it was not until January 1996 that concern about lawlessness begin to grow among the Irish public due to three rural killings (McCullagh, 1996). Shortly afterwards, on 7 June 1996 Garda Detective Jerry McCabe was shot dead by the IRA during an attempted robbery of a post office van in County Limerick. Three weeks later, Veronica Guerin, an investigative journalist, was shot dead in Naas while she was stationary at traffic lights. The killing of these two figures was a catalyst for a hardening of political attitudes (O'Donnell and O'Sullivan, 2003), a defining moment in the debate on law and order in Ireland (ibid) and the period following can 'be viewed as a watershed in Irish criminal justice policy' (Hamilton, 2014: 35). In the period following these killings 'crime control became a national priority and for a time it was almost as if a state of

national emergency had been declared. This was a textbook case of "moral panic"' (O'Donnell and O'Sullivan, 2003: 48). As seen by opinion poll results, public anger and anxiety were elevated and there was a swift reaction from the political establishment to these murders, setting in motion an array of legal and policy changes (ibid). The Dáil was recalled for a special debate on 25 July 1996, following intense media coverage of the crime issue. The government proposed an 'anti-crime package' in five pieces of legislation to improve the criminal justice system described by the Irish Bar Review (1996: 5 cited in Hamilton, 2014: 35) as 'the most radical single package of alterations to Irish criminal law and procedure ever put together'. As O'Donnell and O'Sullivan note (2001: 78) 'the response was swift, harsh, uncompromising and skewed towards punishment'.

During the 1997 general election campaign political scaremongering and a frenzied bidding war ensued between Fianna Fáil and Fine Gael (the two main Irish political parties) with the promise of more Gardaí (police), more prisons and less tolerance (O'Donnell and O'Sullivan, 2003: 49). In particular, Fianna Fáil (1997: 2), through their justice spokesperson John O'Donoghue, adopted the mantra of 'zero tolerance' for the 1997 election which claimed to eliminate police discretion (ibid: 5). Following Fianna Fáil's return to power in June 1997 it delivered on its election promises, with O'Donoghue at the helm at the Department of Justice, Equality and Reform, despite lower crime levels and calmer public attitudes. The consequence of this political rhetoric was the most extensive the prison building programme in the history of the state, changing patterns in policing activities which resulted in a marked increase in 'zero tolerance' prosecutions (O'Donnell and O'Sullivan, 2003: 49). Between 1997 and 2002 there was a tenfold increase in the scale of the proposed prison building programme and an increase of 31 per cent in the prison population (O'Donnell, 2001), at a time when the overall recorded level of crime had in fact began to drop (O'Donnell and O'Sullivan, 2001; O'Donnell, 2004). The public concern which had swept the country during the 1997 election quickly dissipated, however, as seen in comments by the chairman of the 1998 National Crime Forum (1998: 10): 'we were presented with reasoned and balanced views, which saw crime as a real problem in the community, but not a crime crisis'. In 2001, 14 per cent of those polled rated crime as a main issue in the upcoming 2002 general election therefore, crime was once again off the electoral agenda (Kilcommins et al., 2004: 139).

The tone of the criminal justice debate changed again with the appointment of Progressive Democrat Michael McDowell in 2002 as Justice Minister. Described as a 'highly active and motivated Minister' (Rogan, 2016: 442), he made clear from the outset both his intention to

be ‘tough on crime’ and to initiate change. Thus, despite crime concern appearing to have abated in the 2002 General Election, in 2004, it was announced that two ‘super-prisons’ were to be built in Cork and Dublin which again raised questions about the unprecedented expansion of the prison system at a time of falling crime and declining committals to prison (Kilcommins et al, 2004). McDowell also introduced two major bills of reform in the criminal justice system during his time as Minister. Initially brought in to extend Garda powers, the Criminal Justice Act, 2006 (‘the 2006 Act’) ‘provided a comprehensive package of anti-crime measures’ (Department of Justice and Equality, 2006) including against organised crime, sentencing, and antisocial behaviour. A few months later, the Criminal Justice Act 2007, (‘the 2007 Act’) was introduced which specifically aimed to target gangland crime but also provided for stiffer sentences for repeat offenders, longer detention periods for certain crimes, and changes to bail laws and right to silence. The General Election in the summer of 2007 resulted in the resignation of Michael McDowell as Tánaiste and Minister for Justice.

C. 2007-2015: A time of flux

Despite the introduction of draconian criminal justice legislation by McDowell in 2006 and 2007, crime and law and order tended to fluctuate in the public’s hierarchy of concerns with other matters such as house prices and health care causing more protracted anxiety (O’Donnell, 2011). Whilst there was a wavering commitment to the expansion of prisons and making resources available to An Garda Síochána, questions on crime and punishment did not occupy politicians in a sustained way (O’Donnell, 2011). As Rogan (2016: 445) contends the history of Irish prison policymaking ‘is one which periods of hyperactivity are interspersed with long periods of neglect’ and this can arguably be extended to the history of criminal policymaking in Ireland as a whole. However, in the years following McDowell’s resignation in 2007, it appears ‘policymaking processes are improving and policymakers are making efforts to create a more obvious strategic direction’ (Rogan, 2016: 446).

In 2011, following the general election and guidance of influential Minister for Justice Alan Shatter T.D. there was a raft of policy and reform announcements and concrete developments with Rogan (2016) arguing Shatter was less fearful of what the media or opposition made of his proposals for reform, due to him being in the latter stages of his political career. Penal

policy has long been subject to criticisms of failure to attend to research and its stop-start nature (O'Donnell, 2008; Rogan, 2011). Shatter, as Minister, established three commissions: a strategic review group of penal policy, a review group examining the question of mental health and the criminal justice system and a review group to examine the plans for Thornton Hall (proposed new prison by McDowell which was never built) (Rogan, 2016). The combination of the change in political responsibility in 2011 and 'seismic changes in the political landscape' among other factors meant a 'rare policy window opened up' for the Irish prison system (Rogan, 2016: 446).

In September 2014, the Report of the Strategic Review Group on Penal Policy was published and recommended, *inter alia,* a reduction in the prison population, the development and expansion of alternatives to custody and increasing the use of open prisons. During this time there was also a fall in imprisonment rates of 19 per cent between 2011 and 2016 which O'Donnell (2017: 5) states 'places Ireland in a very favourable position' compared to other European or common-law countries. These developments as Rogan (2016: 444) argues 'point to a new focus on developing a long-term and strategic direction for the penal system in the Republic'. Despite this, however, it should not be forgotten that young adults in the Irish criminal justice system are over-represented with 18 to 24 years olds comprising nine per cent of the total population but twenty-four per cent of those committed to prison in 2014 (IPRT, 2015: 1). This has resulted in several calls by Irish academics and NGOs (IPRT, 2015; JCFJ, 2016; Kilkelly, 2017) to extend the existing youth justice approach to young adults aged 18 to 24.

4.2.2 Youth Justice in Ireland 1990-2015

The Irish youth justice system combines both 'welfare' and 'justice' approaches to children in conflict with the law (Seymour, 2013: 65) and has been described as a 'hybrid' model that is substantially justice-based but which also takes the welfare of the child into account (Kilkelly, 2006: xvii). It has been argued that Irish youth justice has 'sidestepped some of the more punitive trends' of neighbouring European jurisdictions (Convery and Seymour, 2016: 250). The system's buffering of extreme punitiveness may be due to the political neglect of the youth justice agenda for almost one hundred years and the slow pace at which The Children Act 2001 ('The 2001 Act') was implemented (Seymour, 2006a). This reflects the 'stagnation' that occurred in the adult criminal justice system prior to 1992, but which

appears to have manifested itself in the youth justice system, in an arguably more extreme form. Thus, the 2001 Act was the first major reform of the statutory framework addressing offences by children in almost one hundred years since the Children Act, 1908 ('the 1908 Act'). The Irish Youth Justice Service ('IYJS') was only established in 2005 and was the first structure to co-ordinate youth justice service delivery in the Republic of Ireland. Similarly, many of the provisions under the 2001 Act did not fully commence until 2007. The period following 2007 saw progressive developments in the area of youth justice but also divergence between the legal framework in place and youth justice practice, owing to the delay in the 2001 Act's implementation (Kilkelly, 2014). In reflecting the significance of these changes in the Irish youth justice system, the following section is sub-divided into three time periods namely: 1990-2001, 2001-2007 and 2007-2015.

A. 1990-2001: Policy making in a vacuum?

Whilst the 1908 Act was seen as a progressive piece of legislation in its day it was criticised subsequently (Seymour, 2006a) for being antiquated and not in line with the development of thinking on youth justice. In order to explain the lack of legislative change since the 1908 Act Quinn (2002: 674) argues that there was a lack of focused political and public discussion on the prevention of youth crime and that the State had been an instrument in neglecting the youth justice system (Seymour, 2006a; Kilkelly, 2006). In the period prior to the 2001 Act there were a series of reports recommending fundamental youth justice reform (CRISS, 1970; Burke et al, 1981; CIPS, 1985) yet the majority of the recommendations from these reports were collectively ignored by successive governments (Kilkelly, 2006). The 1908 Act continued to be the primary legislation for vulnerable children in Ireland until it was amended by the Child Care Act 1991 which did not address youth justice.

Another reason offered for the lack of change in the Irish youth justice system was a dearth of research and lack of statistical data on crime (Seymour 2006), resulting in policy developing in a 'research vacuum' (O'Sullivan, 1996: 5). The noticeable lack of updated legislation led to the uniform acknowledgement of the essential need for change: 'considerable efforts will have to be taken to overturn the virtual neglect of the issue of juvenile justice since the foundation of the Irish State' (O'Sullivan, 1998: 341 in Seymour, 2006a: 120). There was also emphasis on reform from international rights bodies with some arguing this pressure

brought about the change in Irish youth justice (Seymour, 2006a; Quinn, 2002; Walsh, 2005). Kilkelly (2006: 32), however, argues that the reasoning and momentum for change leading up to the 2001 Act was more likely to be 'mundane' in that the legislation 'was outmoded and complicated to work with, could no longer be avoided'.

The incentive for change in youth justice began with the publication of the 1992 report 'Juvenile Crime - Its Causes and its Remedies' by the Dáil Select Committee on Crime (1992: 37) which emphasised that the 1908 legal framework was outdated and in need of a 'radical overhaul'. It was 1996, however, before the new Children Bill was published which lapsed in 1997 due to the dissolution of the Dáil. The Children Bill was then reintroduced to the Dáil in 1999 and it subsequently became the 2001 Act, repealing and replacing the 1908 Act and amending and extending the Childcare Act, 1991. The 1999 Bill was described as 'the blueprint for a new system of juvenile justice which will charter the course of that system for many years to come'[8].

B. 2001-2007: A watershed moment?

The 2001 Act is the primary statutory framework in Ireland for the youth justice system with key changes including: the increase of the age of criminal responsibility to 12 years old from seven; expansion of the Garda Síochána Juvenile cautioning programme; abolition of imprisonment for children; establishment of the Children's Court; provision to separate the care and justice system; and defining of a child as a person under the age of eighteen years old (Seymour, 2006a: 123). Enshrined in the legislation are the principles of detention as a measure of last resort and those of rehabilitation and not punishment, reflecting the United Nations Convention on the Rights of the Child ('UNCRC'). The 2001 Act has been described as 'justice-based' in its overall approach (Kilkelly, 2006) and aimed to provide a framework that would evolve in response to changing situations and that would have longevity[9]. Diversion forms the cornerstone of the 2001 Act (Convery and Seymour, 2016) with Part 4 providing a statutory footing for the Garda Juvenile Diversion Programme ('GJDP') and its practice described as 'overwhelmingly positive' (Kilkelly, 2006: 94) and as 'one of our most celebrated interventions' (O'Sullivan, 2015: 8).

[8] Dáil Éireann Debates, Vol. 517, Col 33-34 (29 March 2000).
[9] Dáil Éireann Debates, Vol. 517, Col 33-34 (29 March 2000).

At the time of the 2001 Act's introduction it was described as 'highly significant' (Kilkelly, 2006: 37), however, it was cautioned that 'the success of the Act in truly reforming this area depends largely on putting the necessary resources in place to achieve its effective implementation' (Kilkelly, 2002: 34-5) and concerns were expressed over the lack of infrastructure (Kilkelly, 2006; Carr, 2010). In order for the Act to be a success it was argued that there would have to be an integrated response to juvenile crime at both local and departmental level (O'Sullivan, 1996) and a genuine multi-agency approach (Kilkelly, 2002). These concerns were unfortunately to become a reality and the 2001 Act was subsequently criticised (Griffin, 2003; Seymour, 2006a; Kilkelly, 2006) for the significant delays in the implementation of parts of the Act which led to a reliance on outdated legislation giving '… further credence to the view that juvenile justice is not a high priority on the political landscape' (Seymour (2006a: 138). Another issue with implementation was the enactment of the Criminal Justice Act 2006 Act (discussed above) which made ninety-three amendments to the 2001 Act (Kilkelly, 2006). The 2006 Act: introduced Anti-Social Behaviour Orders ('ASBOs') for those between the ages 12-18; abolished the presumption of *doli incapax* and lowered the age of criminal responsibility to ten years (from 12 years) for specific serious crimes. The measures brought in under the 2006 Act can be seen to be regressive and were highlighted by Kilkelly (2006: 44) as threatening 'to undermine the [2001] Act's provisions and principles'.

In order to identify measures that would need to be adopted to ensure greater implementation of the 2001 Act, the Department of Justice, Equality and Law Reform carried out a review of the youth justice system in 2005. It emphasised the necessity of fully implementing the 2001 Act which subsequently became the full responsibility of the Office of the Minister for Children and Youth Affairs (Department of Justice, Equality and Law Reform, 2006). Following the 2005 Review and its recommendations, the Irish Youth Justice Service was established which brought together all the State's youth justice services in one place and provided strategic direction to the development of services (Kilkelly, 2014).

It took one hundred years for legislation concerning children and the law to be updated and introduced in Ireland and a further six years for this legislation to be implemented fully in 2007. The establishment of the Irish Youth Justice Service was a significant step in the commitment to the principles of youth justice, operation of the system and development of policy. However, the fact that many of the problems identified in the Youth Justice Review in

2005 were also identified in the 1980 Task Force Report on Child Care Services neatly illustrates the long term neglect of the Irish youth justice system (Kilkelly, 2006).

C. 2007-2015: A time of optimism?

The introduction of the 2001 Act has transported the issue of youth justice in Ireland 'from the political wilderness to a more visible position in Irish Society' (Seymour, 2006a: 138) and has provided a clear statutory framework. It has been said, however, that the lack of reliable data and empirical studies (Seymour, 2006a; Kilkelly, 2014) has created a barrier to a full understanding of the operation of youth justice in Ireland. Several publications have sought to bridge this gap and have provided some key insights in recent years (Walsh, 2005; Kilkelly, 2006, 2014; Seymour, 2006a). Furthermore, since its establishment in 2005 the IYJS has been central to the development of a policy framework.

In the years that followed the implementation of the 2001 Act, an Expert Group on Children Detention Schools (Irish Youth Justice Service, 2007) was established. It recommended the building of a new national detention centre for young offenders in Ireland and shared concerns over the holding of male offenders aged 16-21 in the 'punitive' St Patricks Institution, the source of national and international criticisms for decades (CIPS, 1985; CPT, 2011; IPRT, 2007; Inspector of Prisons, 2012). In 2013, work began on the National Children Detention Facility Project and it opened in June 2016, with St Patrick's Institution closing in 2017. This was a positive step in Irish youth justice yet, as reflective of its history, long overdue.

With the 2001 Act now being fully implemented, the importance of reviewing the operation of the Act in practice was pointed out by Kilkelly (2014) who identified instances where Irish youth justice practice diverged from the legal framework or took a highly selective approach through its provisions. This divergence was seen in the use of community sanctions and GJDP; the Children's Court not adhering to the 2001 Act requirements (Kilkelly, 2014); and the imposing of very few behavioural orders from the 2006 Act illustrating 'the unpredictable relationship between law, policy and practice' (Convery and Seymour, 2016: 250). Whilst a divergence between the law and practice has emerged, Hamilton et al. (2016) contend this practice is more welfare than justice orientated. It has been argued that decades of neglect and the absence of legislative or policy change have resulted in a relatively punitive Irish

youth justice system (Kilkelly, 2006), however, the progress made in recent years must also be acknowledged. The full implementation of the 2001 Act, closing of St. Patrick's Institution, opening of the new National Detention facility and commitment to diversion all point to a time of optimism in Irish youth justice.

4.2.3 Conclusion

Over the twenty-five year period criminal justice in Ireland has changed substantially, in both the adult and youth justice sectors. Both justice sectors experienced stagnation prior to the 1990s and a lack of sustained attention to the crime issue leading to long delays in reform. The resulting disjuncture between policy and practice also appears in both sectors, as seen in the lack of implementation of legislation (O'Donnell, 2008; Kilkelly, 2014). Change began for both sectors, however, at different times during the mid-late 1990s and the subsequent years led to a divergence between them. The adult justice sector appeared to experience periods of hyperactivity, driven by key events (e.g. the 1996 murders) and the influence of key individuals (Justice Ministers O'Donoghue, McDowell, Shatter and Prison Director Donnellan), interspersed with long periods of neglect (Rogan, 2016). The youth justice sector, on the other hand, experienced a more drawn out period of change centred around the long-overdue introduction of the 2001 Act. Since the establishment of the Irish Youth Justice Service and the full implementation of the 2001 Act in 2007, youth justice in Ireland has progressed substantially. Recently, therefore, both sectors have increasingly diverged from the other confirming that 'the Irish criminal justice system is a curious mix' (O'Donnell, 2011: 86).

4.3 Cross-sectoral Punitiveness in Ireland 1990-2015 by Index and Sector

The below discussion will examine cross-sectoral punitiveness in the three justice sectors in Ireland, namely, the adult, young adult and youth criminal justice systems. The indices for this study, as outlined in the previous chapter, are as follows: imprisonment/detention; sentencing; policing; alternative disposals; prison/detention conditions and human rights compliance (for the youth and youth adult justice sectors only) reflecting both the front and back-end of the criminal justice system. For the purposes of the criminal justice sectors for Ireland, the adult criminal justice sector is aged 25 and above, young adult criminal justice

sector is 18 to 25 years old and the youth criminal justice sector is under the age of 18 years old. The age limits were adjusted due to the availability and age breakdown of data in Ireland.

Index A: Imprisonment/Detention

Adult Criminal Justice Sector

Ireland's imprisonment rate has historically been low in comparative terms as highlighted in the literature (O'Donnell 2004, 2008 and Hamilton, 2014) and remained so in 2015 with a rate of 79 prisoners per 100,000 population. Indeed, Ireland's rate in 2015 is more similar to countries such as Norway (72) and Germany (76) than its neighbours of England and Wales (148) or Scotland (144) (Walmsley, 2018). This low international ranking (Council of Europe, 2019), however, does not provide the complete picture on Ireland's use of imprisonment as: (i) the rate of imprisonment has increased significantly in recent decades at a rate which has been much higher than most of its European neighbours (O'Donnell, 2004); and (ii) it appears much more punitive when prison entries are examined. As seen in Figure 4.1 the prison population has grown from a rate of 60 per 100,000 population in 1990 to 96 per 100,000 population in 2011. Since then, however, there has been a downward turn to reach 79 per 100,000 population in 2015.

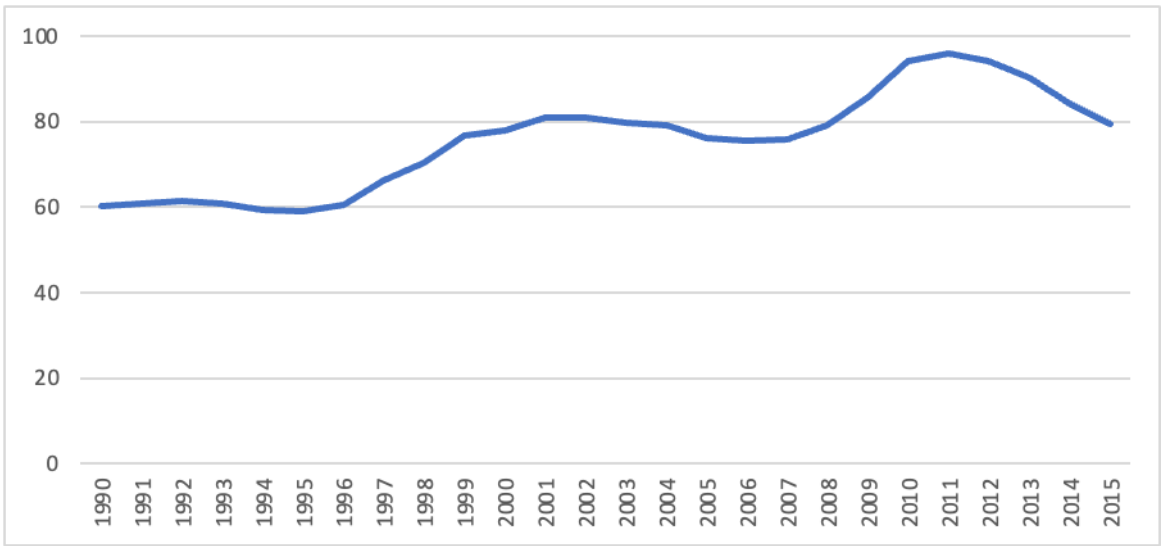

Figure 4.1 Prison population rate per 100,000 population in Ireland 1990-2015

Sources : O'Donnell et al. (2005) and Irish Prison Service, Annual Reports, various years.

The prison population in Ireland began to increase from the mid-1990s (O'Donnell, 2004) and can be seen to increase in 1997, when 'zero tolerance' measures were introduced along with a tenfold increase in the scale of the proposed prison-building programme as discussed above. O'Malley (2006) argues a number of other factors led to this continued increase such as judges using imprisonment heavily (O'Donnell, 2001; Hamilton, 2014), an increase in the numbers sentenced for serious crimes (O'Malley, 2006) and a 'general trend of longer sentences, which has been discerned in recent years' (Irish Prison Service, 2006: 11). Further, there was a reduction in the use of temporary release which is likely to have impacted on the average time served (O'Donnell, 2004) and presumptive and mandatory sentences were introduced for offences such as drug trafficking and drug dealing.

Since the 2011 peak in the rise in prison population there has been a downturn with O'Donnell (2017: 2) stating, whilst several of the above factors are still present, other factors can be used to explain the decrease. O'Donnell (2017) focuses on specific prisoner groups (reduction in children and immigration detainees in prison), the introduction of innovative early release policies in 2011, and the re-examination of committals when excluding fine defaulters (discussed further below) in explaining the downturn rates. O'Donnell (2017: 2) states that the ten years between 2007 and 2017 was a 'time of considerable flux'.

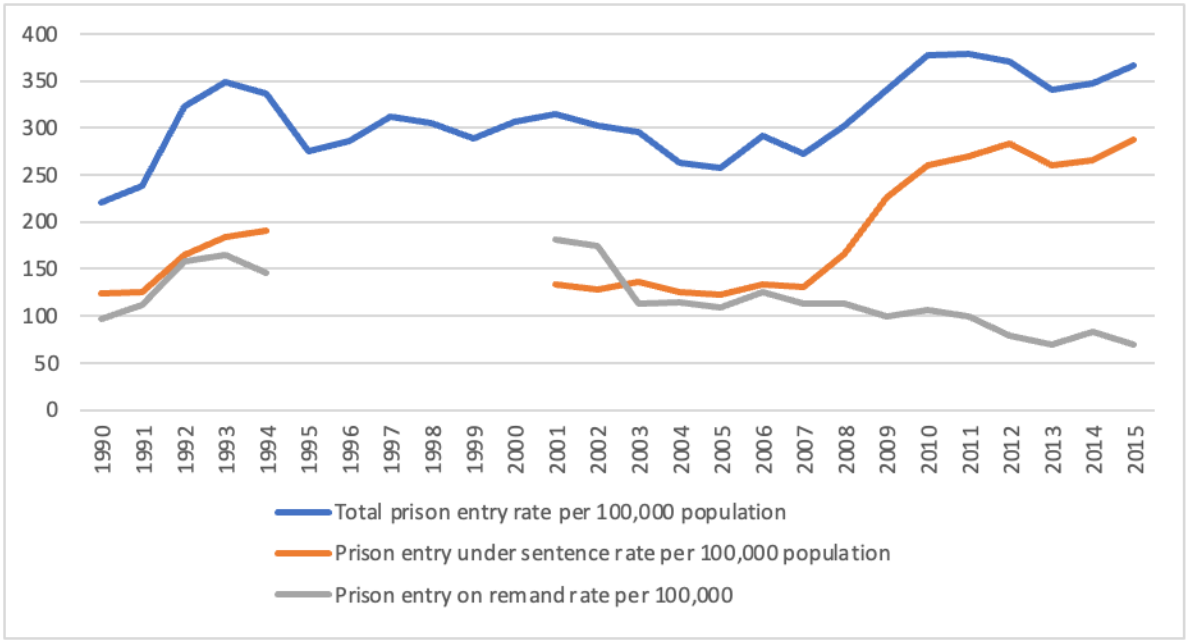

Figure 4.2 Total prison entry rates, prison entry under sentence rates and prison entry on remand rates per 100,000 population in Ireland 1990-2015

Sources: Irish Prisons Service, Annual Reports, various years (as presented on retrieved archived National Crime Council website https://web.archive.org/web/20090418163817/http://www.crimecouncil.gov.ie/statistics_cri_prison_table1.html)

When analysing the prison entry rate or 'flow' of prisoners through the system, Ireland no longer appears on the low range scale but on the high-range scale[10] (Council of Europe, 2019). As seen in Figure 4.2, the rate of committals[11] has increased considerably since 2007, largely driven by increases in committals under sentence. These have more than doubled from 133 per 100,000 population in 2006 to 288 per 100,000 population in 2015 largely owing to the use of imprisonment to enforce the non-payment of fines (O'Donnell, 2017). The number of fine defaulter committals grew from 1,283 in 2006 to 9,883 in 2015 (Irish Prison Service, 2006; 2015). The imprisonment of fine defaulters was greatly exacerbated by the financial crisis in 2008 which explains the dramatic increase but it is anticipated that the introduction of the Fines (Payment and Recovery) Act, 2014 will substantially reduce this number. The pattern of committals under sentence looks very different when fine defaulters

[10] The Council of Europe ranks countries high, medium or low in respect of penal statistics compared to other European Countries.
[11] There are no data on committals to prisons between the years 1995 and 2000 because detailed annual prison reports were not published (Kilcommins et al. 2004: 244).

are omitted as the rate decreased between 2006 and 2015, as can be seen in Figure 4.3. However, this raises more questions such as does this decrease indicate a change in sentencing practices in the courts? Is the judiciary becoming more lenient or dealing with fewer serious cases? (O'Donnell, 2017: 6) Although this is an encouraging development, frustratingly the data does not exist to be able to answer these questions (ibid).

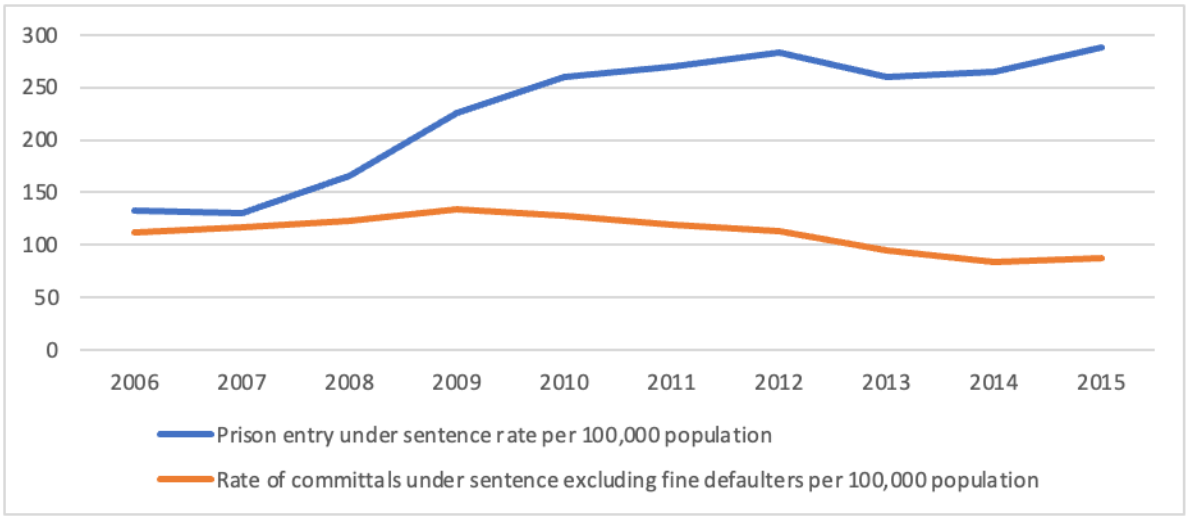

Figure 4.3 Total Committals under sentence rate per 100,000 population and total commits under sentence excluding those committed for non-payment of fines rate per 100,000 population in Ireland 2006-2015

Source: Irish Prison Service, annual reports various years

Young Adults in the criminal justice system

The data on young adults in the Irish criminal justice system are limited in that committal data for 18 to 25 year olds in prison are only available from the Irish Prison Service reports for the years 2006 to 2015. The rates of total prison entries and total committals under sentence were calculated per 1,000 population of 18 to 25 year olds which is the method in the literature for calculating juvenile prison rates (Muncie, 2008). As seen in Figure 4.4 the prison entry rate of young adults has increased from a rate of 7.16 per 1,000 population in 2006 to a rate of 10.02 per 1,000 population in 2011, mirroring the adult system rates. When analysing committals under sentence of young adults it is notable that there has been an almost doubling of the rate from 4.54 in 2006 to 8.15 per 1,000 population in 2015 with the

rate peaking in 2011 at 9.88 per 1,000 population. The rate has fallen from 9.88 in 2011 to 8.15 in 2015, similarly mirroring the adult system trends. This downward trend is potentially due to the reduction in the adult rates as seen above and also the closure of St Patrick's Institution that held young adult males (discussed in more detail below).

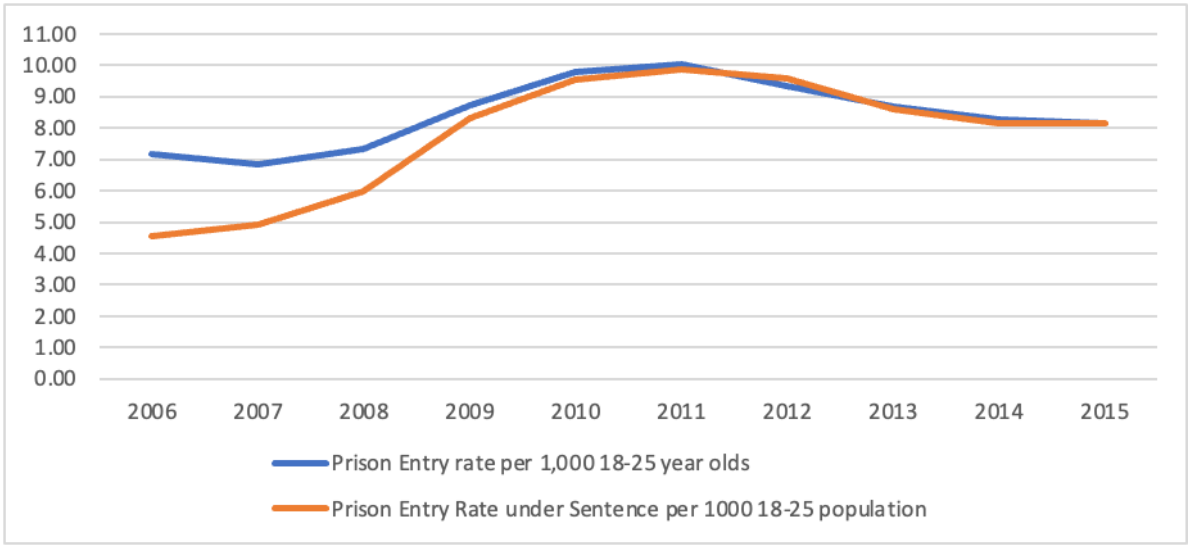

Figure 4.4 Prison Entry rate and Prison Entry rate under Sentence of 18 to 25 year olds per 1,000 population of 18 to 25 year olds in Ireland 2006-2015

Source: Irish Prison Service, Annual Reports, various years

There have been some studies, primarily conducted by NGOs, which have analysed the position of young adults in the criminal justice system in Ireland (IPRT, 2015; JCFJ, 2016). What is evident from the Irish literature on this matter is the overrepresentation of young adults in Irish prisons relative to the young adult general population. In 2006, young adults represented 11 per cent of the national population, yet they represented 34 per cent of the total committals to prison and 37 per cent of the total committals under sentence. By 2015, this decreased to 8 per cent of the national population and 22 per cent of the total committals to prison in 2015 and 23 per cent of the total committals under sentence. The young adult committals and committals under sentence relative to the total committals/committals under sentence to prison can be seen in Figure 4.5 and 4.6.

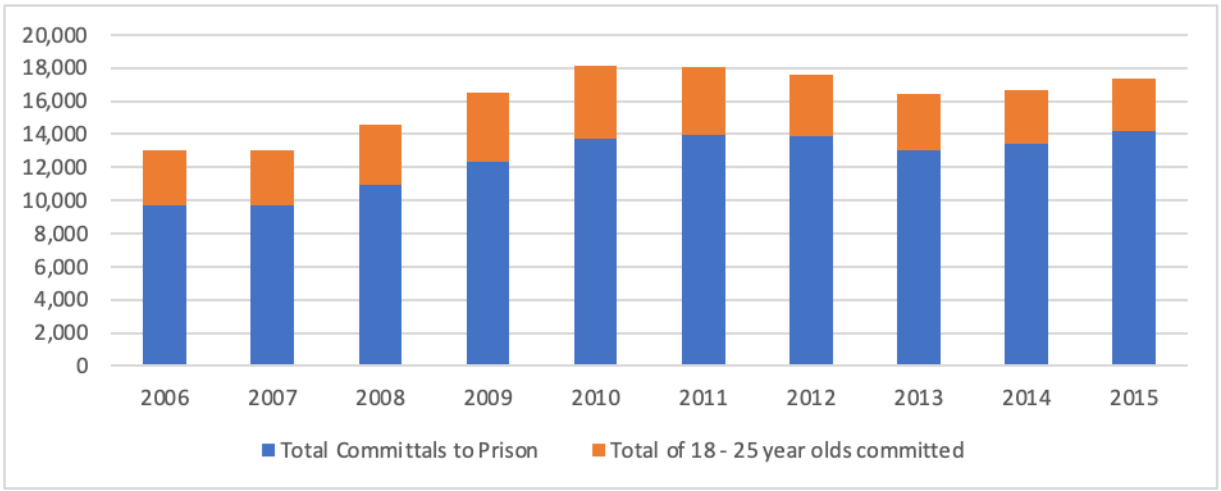

Figure 4.5 Total number of committals to prisons and total number of 18 to 25 year olds committed to prison in Ireland 2006-2015

Source: Irish Prison Service, Annual Reports, various years

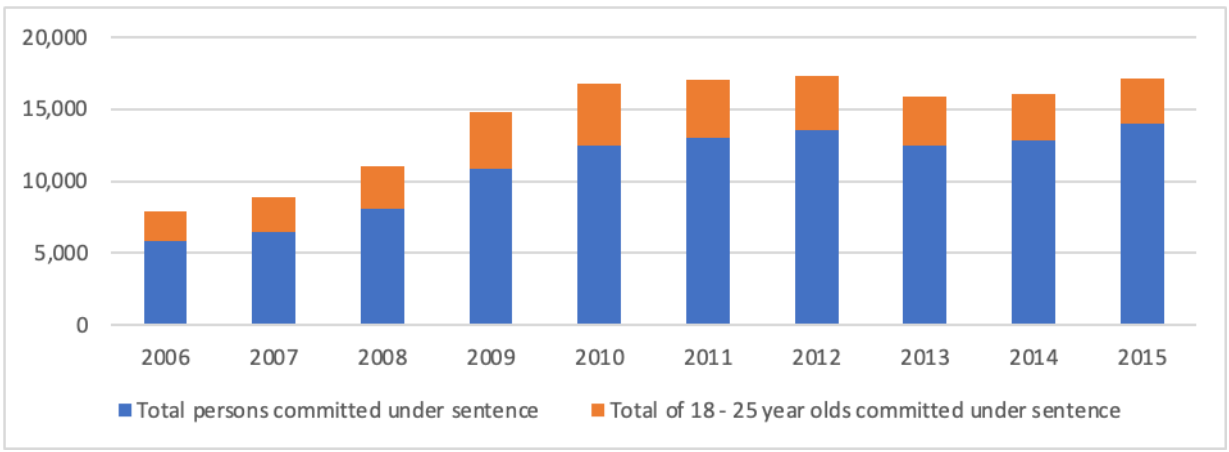

Figure 4.6 Total committals under sentence and total 18 to 25 year olds committed under sentence in Ireland 2006-2015

Source: Irish Prison Service, Annual Reports, various years

Youth Justice Sector

In Ireland, custody rates of juveniles are very difficult to ascertain which is primarily due to the way data are presented (Hamilton, 2014). Historically, children sentenced to a term of detention or imprisonment could be sent to either a detention school, St Patrick's Institution

or an adult prison. Traditionally Children Detention Schools housed children under the age of 16 years (Hamilton et al., 2016). Young people under the age of 18 could also be sent to prison in the past, mainly to St Patrick's Institution which closed in 2017. Therefore, both the data from detention schools and those under aged 18 detained in the prison system will be examined and analysed below.

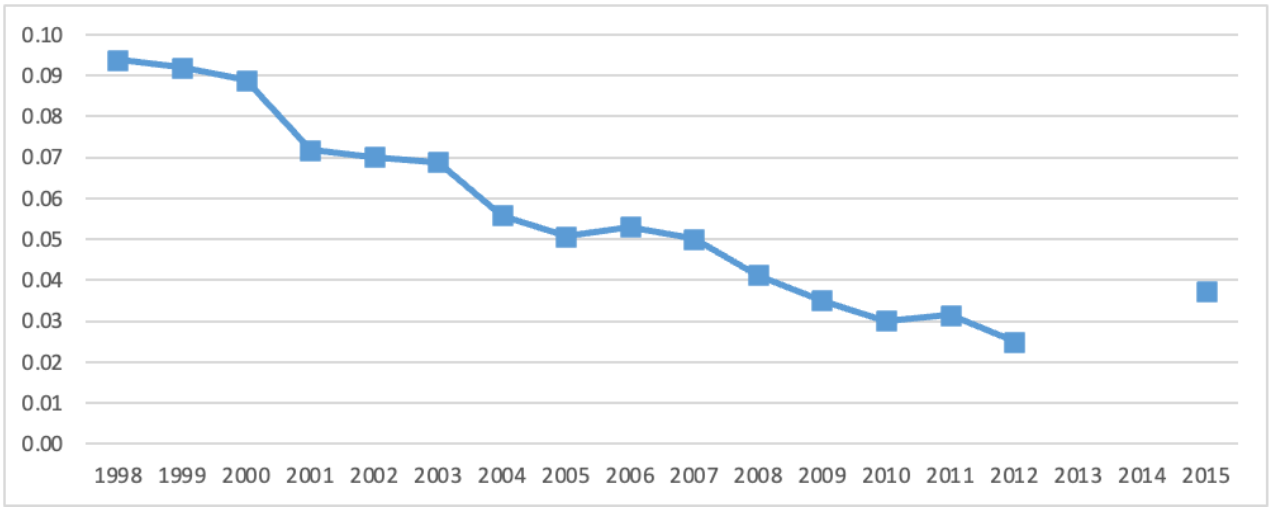

Figure 4.7 Average Children Detention School rates per 1,000 of the under 18 year old national population in Ireland 1998-2012, 2015

Source: Irish Youth Justice Service requested data on Children detention schools in Ireland including St. Laurence's, FC; NARU, FCC; FCAC; Trinity House School; Oberstown Girls Centre and Oberstown Boys Centre; Oberstown requested data on the average population 2013-2015[12].

The use of detention in children detention schools is analysed from 1998 to 2012 and 2015 using data provided by the Irish Youth Justice Service and Oberstown Children Detention Campus, as seen in Figure 4.7. The juvenile detention rates were also calculated per 1,000 under 18 population as explained above (Muncie, 2008). The most significant factor that contributed to downward trends in juvenile detention in Ireland was the implementation of the watershed Children Act 2001. The rate of the average number in detention schools reduced from to 0.09 in 1998 to 0.03 per 1,000 population in 2012.

[12] Data on the average detention population were not available for the years of 2013 or 2014 from Oberstown Children Detention Campus.

In respect of juveniles committed to prison, the only data available from the Irish Prison Service to analyse the number of young people under the age of 18 years old are data between the years 2006 to 2015 as seen in Figure 4.8. In addition, the daily average of those in St Patrick's Institution is seen in Figure 4.9. The importance of including both data sets arises from the use of other institutions such as Fort Michael and Shanganagh Castle to hold 16 to 21 year old males prior to their respective closures in 2005 and 2003. The 2001 Act abolished the imprisonment of all children under the age of 18, however, a decline in the number of under 18 year olds being committed to prison was not apparent until 2009 with a dramatic decrease from 2011 as can be seen in Figure 4.8. In 2006 the rate of under 18 year olds being committed to prison was 0.29 which decreased to 0.07 per 1,000 population in 2015. This decrease is also mirrored in under 18 year old committals under sentence as in 2006 the rate was 0.16 with a decrease to 0.05 per 1,000 population in 2015.

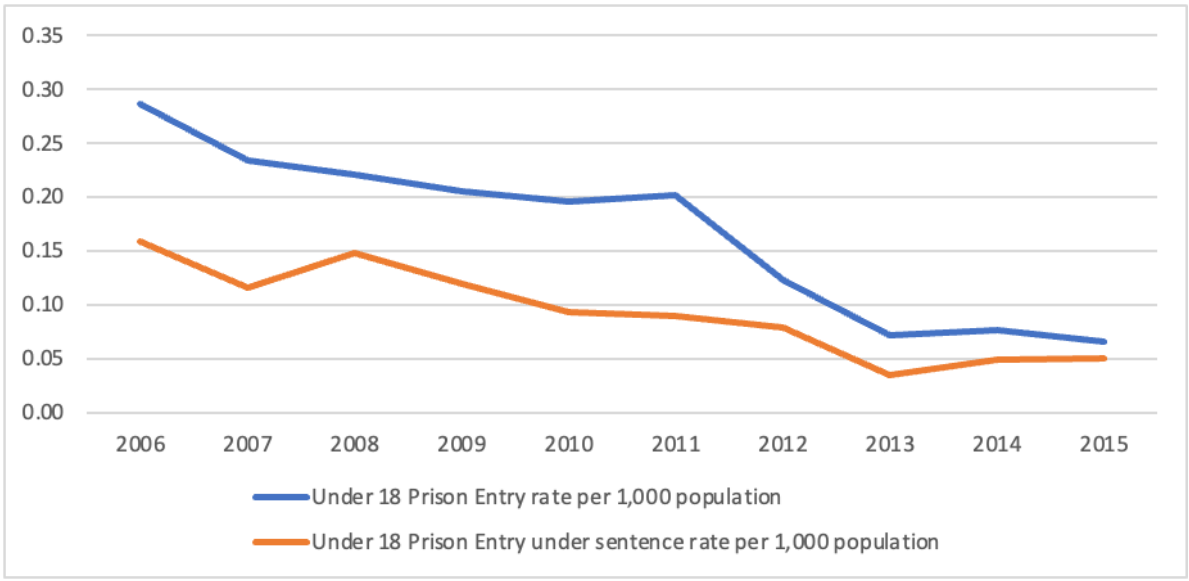

Figure 4.8 Rate of under 18 year olds committals to prison and committals under sentence to prison per 1,000 under 18 year old population in Ireland 2006-2015

Source: Irish Prison Service, Annual Reports, various years

St Patrick's Institution has received national and international criticism for decades (CIPS, 1985; CPT, 2011; IPRT, 2007; Inspector of Prisons, 2012) yet the average numbers detained

there rose from 125 in 1995 to 192 in 1996, and this remained relatively stable throughout the years, as seen in Figure 4.9. In 2013 following reports from the Inspector of Prisons (2012, 2013) highlighting serious concerns about the safety and protection of detainees, most young people were transferred out of the facility and this can be seen in the figures with the dramatic drop from the average number of 204 detained in 2012 to 11 in 2014 and 3 in 2015. During 2014 and 2015, those detained in St Patrick's were transferred to Wheatfield Place of Detention or Children Detention Schools[13]. In 2015, however, there were still young people under the age of 18 being committed to Irish prisons comprising of mostly 17 year olds (73) with a minority of 16 year olds (5). By 2018, however, no under 18 year olds were committed to prison (Irish Prison Service, 2019) with all of them being sent directly to the new Oberstown National Detention Campus.

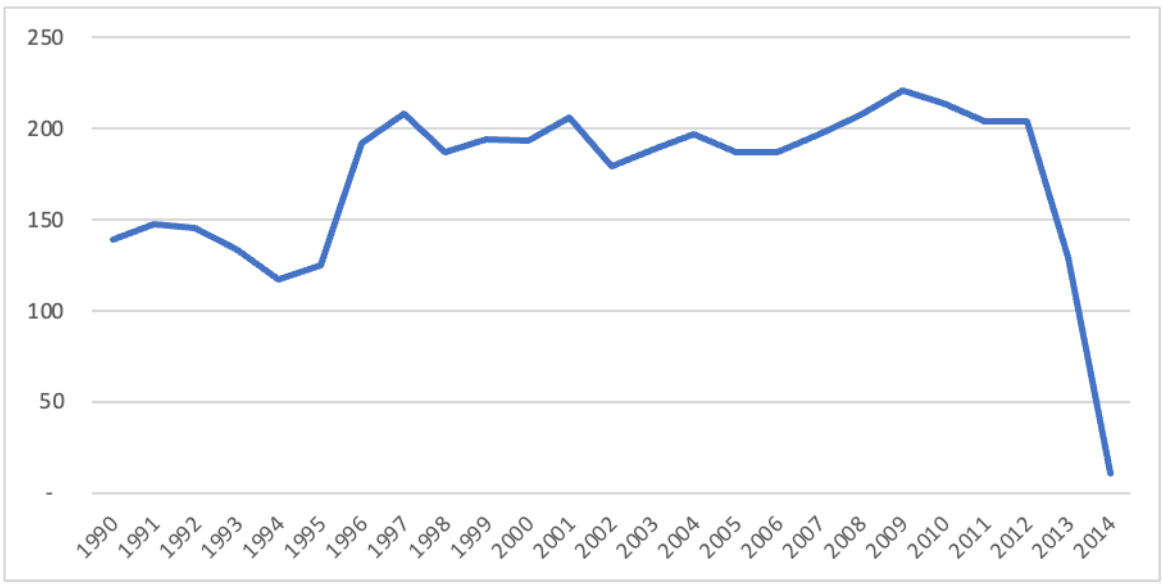

Figure 4.9 Daily average number in St Patrick's Institution 1990-2014

Sources: O'Donnell et al. (2005); Irish Prison Service, Annual Reports, various years

[13] Dáil Éireann Debates, Vol. 900, Col 4 (14 December 2015).

Index B: Sentencing

Adult Criminal Justice Sector

In terms of analysing sentencing in Ireland it is difficult to evaluate the trends given the limitations on the data[14]. As discussed earlier, there have been changes in sentencing practices which has impacted the growth of imprisonment in Ireland such as judges using imprisonment heavily, a general trend towards longer sentences, reduction in the use of temporary release and increase in the numbers sentenced for serious crime (O'Donnell, 2001, 2005; Irish Prison Service, 2006; O'Malley, 2006; Hamilton, 2014). In using statistics from the Probation and Prisons Annual Reports, O'Donnell (2004: 257) showed that the ratio of immediate custody to probation and community service was for many years tipped in favour of imprisonment. It is difficult to comment if this bias towards imprisonment remains the same as the trends analysed below indicate a reduction in the use of Probation, mirroring the reduction seen in the imprisonment rates.

The use of probation or community measures as a sentencing option peaked in 2011 as seen in Figure 4.10. Whilst there has been an increased emphasis on their use and reducing imprisonment in Ireland, it is hard to understand the decline in non-custodial orders being made alongside decreasing imprisonment rates. As argued by O'Donnell (2017: 3) surely if the probation and community service orders are declining in popularity imprisonment would take up the slack but this has not been seen.

[14] There are data on sentencing in the various courts in Ireland that is published in the Courts Service annual reports, however, due to the inconsistent manner in which the data has been collected and presented there are concerns in respect of its validity and it was therefore decided not to include the data in this study.

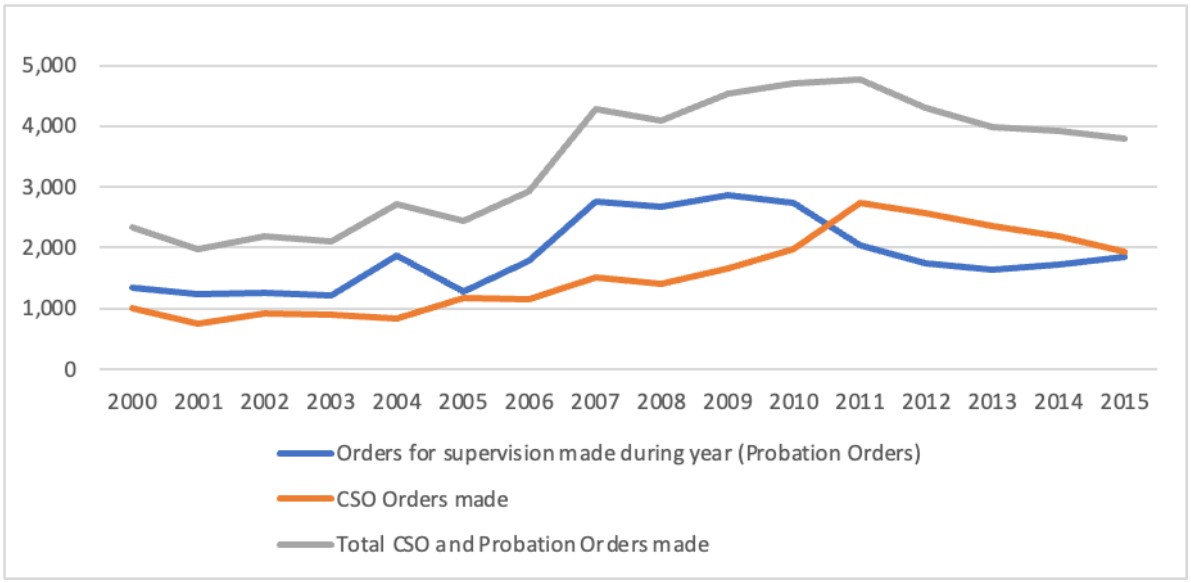

Figure 4.10 Orders for Supervision made during the year (Probation Orders), Community Service Orders made and the total Probation and Community Service Orders made in Ireland 2000-2015

Sources: Probation and Welfare Service Review of the years 2000 to 2003; Probation Service Annual Reports, various years

Young Adults in the criminal justice system

The data relating to the sentencing of young adults in Ireland is extremely limited except for some data from the Probation Service and data on the average sentence length received by young adults presented in the Jesuit Centre for Faith and Justice's ('JCFJ') report (2016: 27). From a snapshot of the prison population on 30 November 2015, it stated that 40 per cent of young adults were serving sentences of less than 24 months compared to 22.14 per cent of those over the age of 25. Over half of young adults (57.66 per cent) were serving sentences of under three years. The Probation Service data also shows a high proportion of 18 to 24 year olds being referred to the service, as seen in Figure 4.11. The general trend in the numbers of young adults referred to probation has been decreasing from 3,804 in 2011 to 2,784 in 2015, in line with the broader trend discussed above.

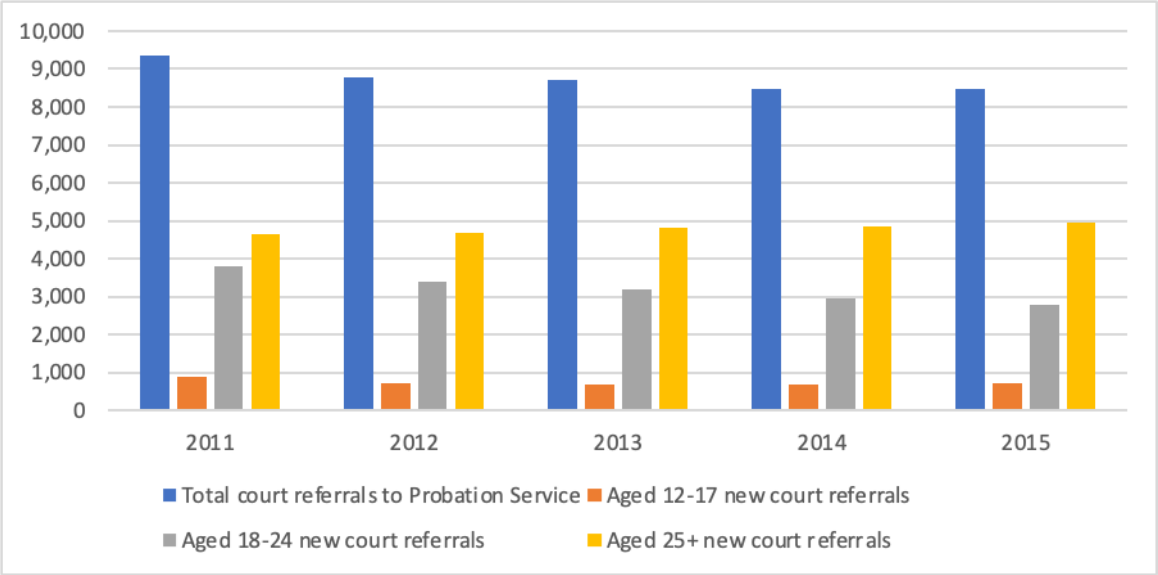

Figure 4.11 Age breakdown of new court referrals to the Probation Service in Ireland 2011-2015

Source: Probation Service, Annual Reports, various years

Youth Justice Sector

Under the 2001 Act the juvenile court was replaced by the new Children's Court which has the power to deal with both offending and non-offending children up to the age of 18 years old (17 prior to the enactment of the 2001 Act). The Children's Court has jurisdiction over all minor offences and (with some exceptions) has discretionary power to deal summarily with children charged with indictable offences. Approximately 2 to 4 per cent of Children's Court matters are sent forward for a trial in a higher court each year (Courts Service, 2007-2013). The Court Service provides data on the sentencing outcomes of incidents[15] before the Children's Court, however, due to the presentation of the data it is limited to the period 2006-2015 as seen in Figure 4.12. The key trends that be ascertained from the court data are: a decline from 2010 in the number of cases before the court and therefore a decline in the number of young people receiving a non-custodial sentence, a consistent decline beginning earlier from 2007 in the number of young people sentenced to detention; and briefly, between 2007 and 2010, a concomitant rise between in the proportion of young people receiving a non-custodial sentence compared to a custodial sentence.

[15] The Courts Service provided data on the sentencing outcomes per offender for the years 2004-2013 however the 2014 and 2015 Annual Reports did not include this data. From the years 2006- 2015 data on sentencing outcomes per incident was included and was therefore utilised in this research.

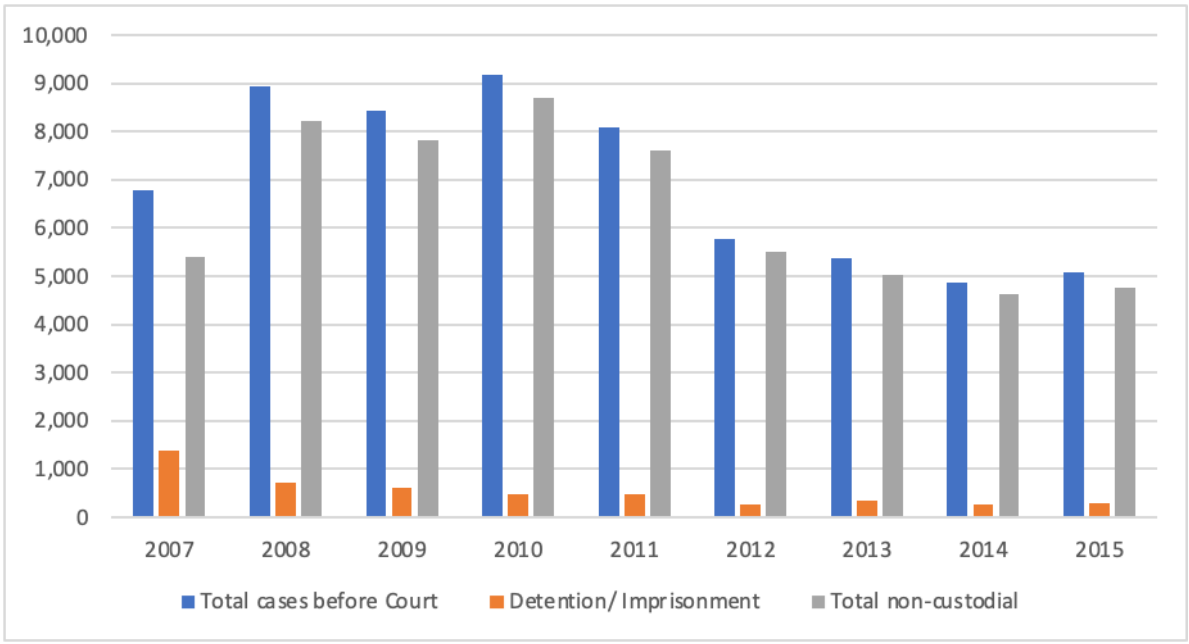

Figure 4.12 Total number of cases before the Children's Court, total number of custodial sentences imposed by the Children's Court, total number of non-custodial sentences imposed by the Children's Court in Ireland 2007-2015

Source: Courts Service, Annual Reports, various years

In respect of the Probation Service, the youth division known as the Young Persons' Probation has responsibility for assessing and supervising children on community-based orders. As seen in Figure 4.13, there was an increase in the number of young people being referred to the Probation Service and receiving Supervised Orders from 2008, the year in which custodial sentencing reduces in Figure 4.12. The decrease in the numbers from 2011 corresponds with the decrease in young people appearing before the Children's Court seen in Figure 4.12.

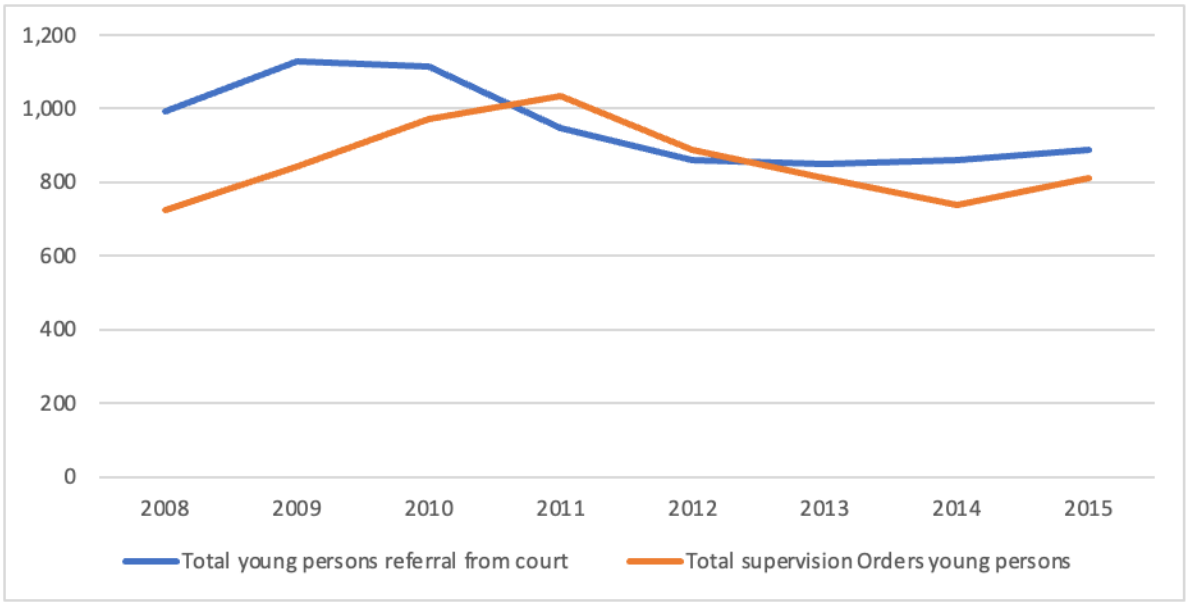

Figure 4.13 Number of young persons referred to the Probation Service from Court[16] and Number of young persons who received a Supervision Order[17] in Ireland 2008-2015

Source: Probation Service, Annual Reports, various years

Index C: Policing

Adult Criminal Justice Sector

Harkin (2015: 44-46) argues deprivations that often characterise prison life (liberty, autonomy, goods, services, security) also extend to policing, and therefore should be explored with imprisonment. Stop and search was identified as a key example of being liable to such deprivation and what Harkin (2015) describes as the 'pains of policing'. Ascertaining the number of people who are stopped, searched and arrested by Gardai as well as those who have been charged with a crime is useful to measure policing activities, in addition to changes in police powers. Unfortunately, despite this information being available in other jurisdictions such as the England and Wales (Conway and Walsh, 2011) it is not collected in Ireland. Such a lack of information has left a research gap and, as stated by Conway and

[16] Including referrals for Probation (pre-sanction) reports, referrals for Community Service reports, pre-sanction reports to consider Community Service, Orders without prior report, and Family Conference referrals from court.
[17] Including Probation Orders, Orders for supervision during deferment of penalty, Community Service Order, Fully Suspended sentence with supervision, Part Suspended sentence with supervision orders made, Other Orders, Deferment of detention orders and Detention and Supervision Orders.

Walsh (2011: 254), as long as this information is not available 'the Garda will continue to be one of the most secretive police forces in the Western world'. This is particularly worrying as over the selected period there have been causes of concern relating to police misbehaviour and unaccountability (Conway, 2010). In relation to police powers, in the early 1990s there was clear momentum for increased police powers based on the idea that the balance in the criminal justice system had swung too far in favour of the accused (Walsh, 2005). Since the Criminal Justice Act 1984 Walsh (ibid) points to the introduction of 27 major criminal justice amendments enhancing the powers of the police and the prosecution, with more statutes introduced after 2005 (e.g. Criminal Justice Acts 2006 and 2007).

Young Adults in the Criminal Justice Sector

As stated previously, there is a dearth of information on young adults in the criminal justice system in Ireland and in particular on young adults' experience at the front-end of the criminal justice system. Progress has been made in certain jurisdictions adopting and recognising the need for a tailored and distinct approach to young adults across all criminal justice agencies, however, policing is one key area where this idea has yet to gain much momentum, with the focus often being on sentencing and detention. A UK study on young adults and policing concluded that there should be a tailored approach towards the policing of young adults as police lacked the necessary training to deal with the distinct needs of young adults and the use of stop and search powers on young adults was particularly concerning (The Police Foundation, 2013, 2018). In respect of young adults' negative perceptions of the police, the most common issue cited in this study was the repeated and perceived misuse of stop and search, with it being described in England and Wales as 'the leading cause of tension between young adults and police' (ibid: 8).

Youth Justice Sector

The police in Ireland play a key role in youth justice as not only are they the first point of contact young people have with the criminal justice system, they have significant discretionary powers in respect of the Garda Juvenile Diversion Programme ('GJDP') (see Index D below). It has been highlighted in the literature (Hinds, 2007; Kilkelly, 2011; Flacks,

2018) that people's attitudes towards legal authorities are formed in childhood and interaction with police has a lasting long-term impact on this particular population. Similar to the adult system, there is a lack of data and information on policing activities in the youth justice context, namely, arrest rates and the operation of stop and search laws. The literature available on policing activities in Irish youth justice concerns the GJDP and its operation due to the central role of diversion in Irish youth justice. Garda interaction with young people is vital to achieving the GJDP's core aim of diverting children from the criminal justice system (Kilkelly, 2011) but the extent of the discretion exercised during the decision-making process in the programme and the transparency of such decisions has been questioned (Kilkelly, 2011). Convery and Seymour (2016) argue whilst discretion is key in decision-making about children in the criminal justice system, this must be balanced with a corresponding level of accountability to mitigate actual or perceived unfair practices. Further, wide police discretion can be 'prone to being used in ways that discriminate (in effect, if not in intent) against the poor, powerless, and unpopular in our society' (Smyth, 2011: 163)

Despite the Programme being entirely administered and managed by the Gardaí and the wide-ranging discretion afforded to the Director in deciding outcomes for children referred to the Programme, it is concerning that it has not been the subject of independent monitoring or an independent evaluation (ibid). The 2001 Act and Garda Management of the GJDP have a lack of provisions for ensuring transparency and effective accountability for the wide discretion which is exercised and on the Programme itself (Smyth, 2011). Little is known, as a result, about how Garda decide which children should be referred to the Programme.

In the Garda Public Attitudes Survey in 2018 16 and 17 year olds reported high levels of satisfaction with the service provided by Gardaí to the local community with 86 per cent either 'satisfied' or 'quite satisfied'. Further, 88 per cent said they had levels of mid to high trust in the Gardaí and felt Gardaí would treat people in a respectful and fair manner (An Garda Síochána, 2019). These results however should not be taken at face value as research in Ireland has shown satisfaction levels with the Gardaí are strikingly lower among ethnic minorities, particularly Travellers, (Mulcahy, 2016) and young people in disadvantaged communities in Dublin (Kilkelly, 2011).

Index D: Alternative disposals

Adult Criminal Justice Sector

The Garda Síochána Adult Caution Scheme was established in 2006 and provides a mechanism to divert adult offenders aged 18 years and over from the criminal justice system who are unlikely to re-offend by providing a formal police caution in lieu of prosecution before the courts. The circumstances of each case are analysed to see if diversion is appropriate indicating the wide discretion Garda have in deciding who is suitable for the scheme but it is aimed primarily at first time offenders. The reasoning behind ineligibility for a caution could lie, for example, in whether the individual has previous involvement in the criminal justice system (Tolan and Seymour, 2014) as having previous convictions would point to the person being unsuitable for adult caution (An Garda Síochána, 2017; 2020; Crowe, 2020). Another reason why an adult caution may not have been administered could be the suspected offender declining the offer (Crowe, 2020).

There are a limited amount of data and research on the scheme apart from Tolan and Seymour's (2014) study and a report to the Policing Authority (Crowe, 2020). As can be seen in Figure 4.14, following the caution's introduction in 2006, there was an increase in its use however since 2010 the caution's use has been decreasing consistently which may be due to the decline in crime more generally (O'Donnell, 2017). As can be seen in Figure 4.15 there has been a steady, but modest, increase in the proportionate use of cautioning as a response to criminal behaviour, with the percentage of incidents dealt with by way of adult caution rising from 3 per cent in 2006 to 7.3 per cent in 2010 (Tolan and Seymour, 2014). Unfortunately, there are a lack of data from 2010 in respect of the total number of eligible incidents for caution.

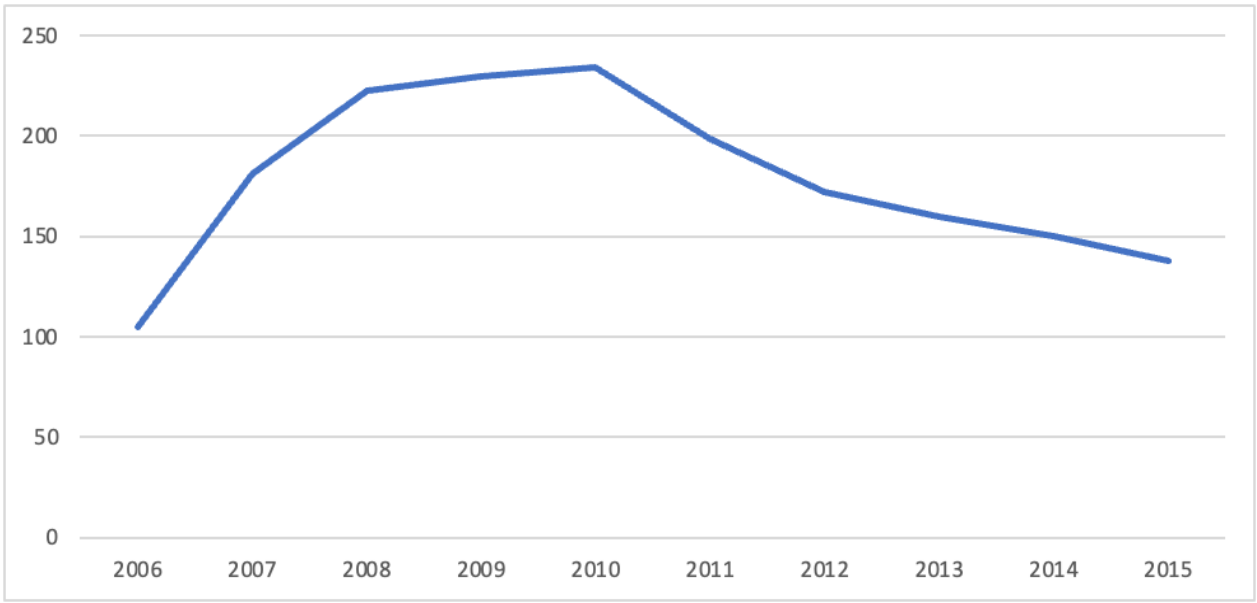

Figure 4.14 Rate of adult cautions per 100,000 of the national population in Ireland 2006 – 2015

Source: Crowe (2020)

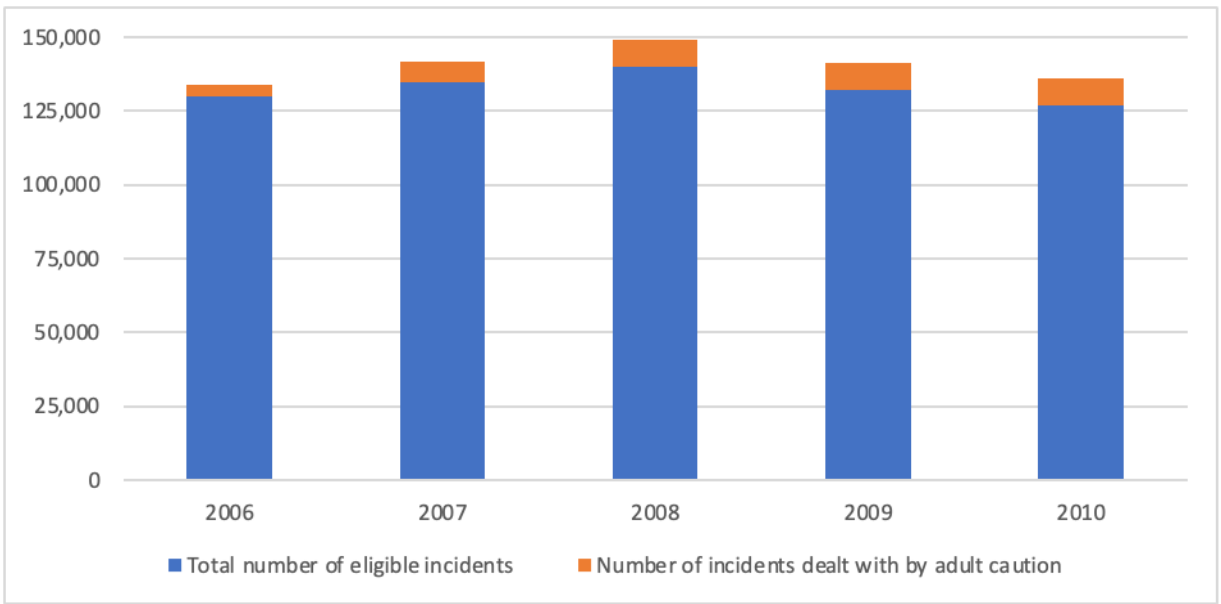

Figure 4.15 Incidents dealt with by way of an adult caution in Ireland 2006 – 2010

Source: Tolan and Seymour (2014)

Young Adults in the criminal justice system

As discussed above, with the Adult Caution Scheme in Ireland being relatively new there has been limited research and publicly available data on its use. What can be ascertained from the literature is that overall, almost three quarters (72 per cent) of the recipients of an adult caution were aged between 18 and 32 years old (Tolan and Seymour, 2014). In analysing the effectiveness of the caution programme, Tolan and Seymour (2014) found that one-third of those who had received a caution between 2006 and 2009 came to the attention of the Gardaí in the 12-month period following the commission of the offence for which they received the caution with the majority (82 per cent) of those being young males aged between 18 and 32 years old. Further reoffending data between June 2018 and February 2020 found that approximately 23 per cent of individuals reoffended after receiving an adult caution (Crowe, 2020: 19). Similar to the above finding, 41 per cent of those who reoffend after receiving an adult caution were aged between 18 and 22 years. This cohort was the largest percentage of reoffenders compared to the next largest cohort representing 15 per cent reoffenders who were aged between 23 and 27 years (Crowe, 2020: 19). These are quite striking statistics with Crowe (2020: 19) commenting on the reoffending figures for young adults stating that it was likely 'based on anecdotal evidence, that some of these are young adults who are receiving their first Adult Caution after multiple incidents as youth offenders'. The above further supports the argument to adopt a distinct approach to young adults in the criminal justice system and notably the Youth Justice Strategy 2021-2027 stated an assessment will take place on the potential expansion of the GJDP to 24 year olds (Department of Justice, 2021).

Youth Justice Sector

As discussed earlier, diversion is central to youth justice in Ireland (Convery and Seymour, 2016) and was placed on statutory footing by the 2001 Act. The GJDP is run throughout Ireland with a network of specially trained Gardaí known as Juvenile Liaison Officers ('JLO') under the National Juvenile Office. All offences are eligible for referral to the GYDP and the Director of the Programme is responsible for deciding the outcome of each case, which can be: recommending prosecution, a formal caution, an informal caution or no further action (Seymour, 2008). As can be seen in Figure 4.16, the number of children referred to the GJDP has dropped dramatically from its peak in 2007. Following the introduction of the 2001

Act the number of cautioned offenders increased from 8,832 to a peak of 16,753 in 2007, dramatically reducing again to 9,721 in 2011 and then to 7,282 in 2015 as seen in Figure 4.17. This decrease does align with the reduced number of juveniles being referred to the GJDP.

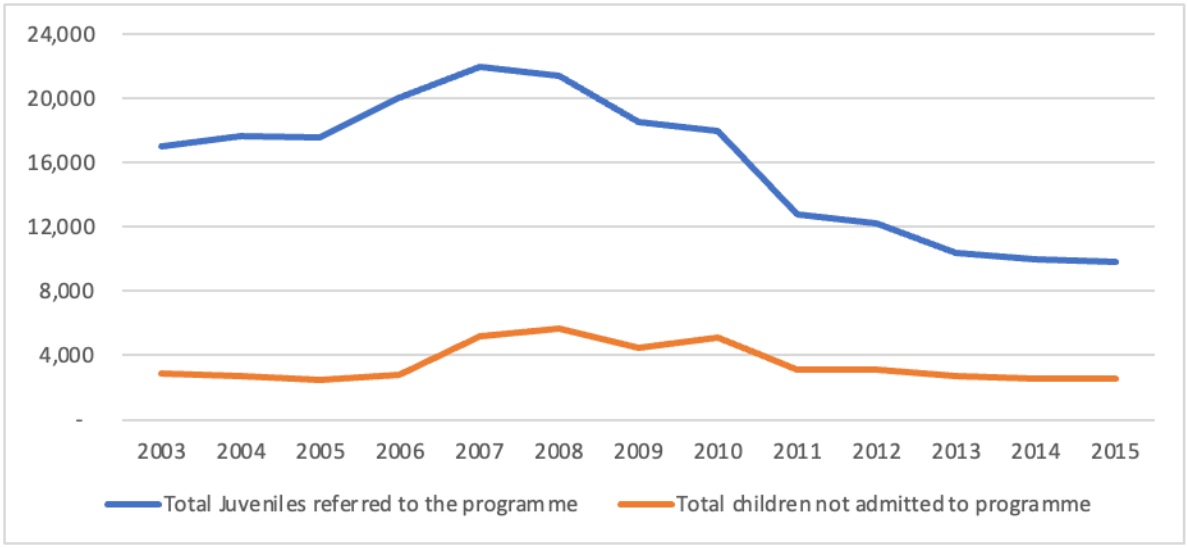

Figure 4.16 Total number of juveniles referred to the GJDP and total number of children not admitted to the GJDP in Ireland 2003-2015

Sources: Garda Recorded Crime Statistics 2003-2007; Annual Report of the Committee appointed to Monitor the Effectiveness of the Diversion Programme, various years

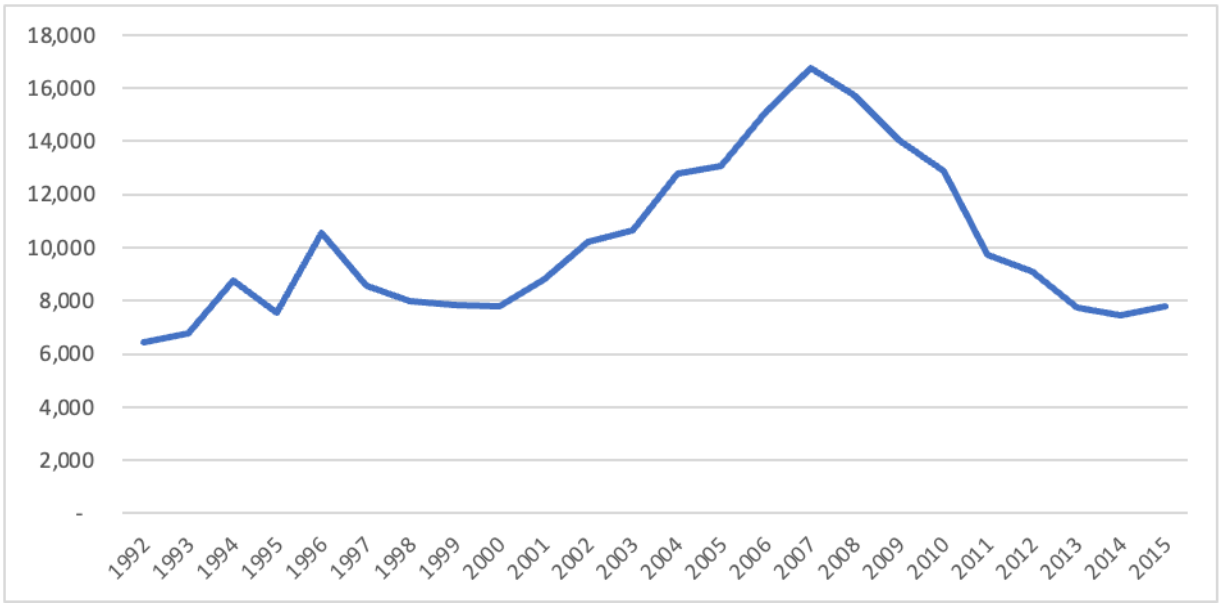

Figure 4.17 Total number of cautioned offenders (both formal and informal cautions) in the GJDP in Ireland 1992-2015

Sources: O'Donnell et al. (2005); Garda Recorded Crime Statistics 2003-2007 (Government of Ireland, 2009); Annual Report of the Committee appointed to Monitor the Effectiveness of the Diversion Programme, various years

In comparing the use of diversion in the youth justice system with its counterpart in the adult system several key distinctions come to light. Firstly, the percentage of those accepted into the GJDP who received a caution compared to Adult Caution Scheme is quite startling as seen in Figure 4.18. Secondly, in the GJDP the majority of offences are considered eligible for admission with decisions made on a case by case basis. Thirdly, in the GJDP cautioning and admission into the programme is not limited to first-time offenders and subsequent cautions can be issued (An Garda Síochána, 2011). Whilst first-time offenders are also not limited in the adult cautioning scheme, as discussed above, it was found the main reasons why an adult caution was not administered was due to the individuals previous history which could be 'significant' or the individual itself (Crowe, 2020: 18). Finally, as part of a juvenile caution, the 2001 Act provides for the recipients to undertake several diversionary activities e.g. attendance at diversionary activities, meeting with the victim.

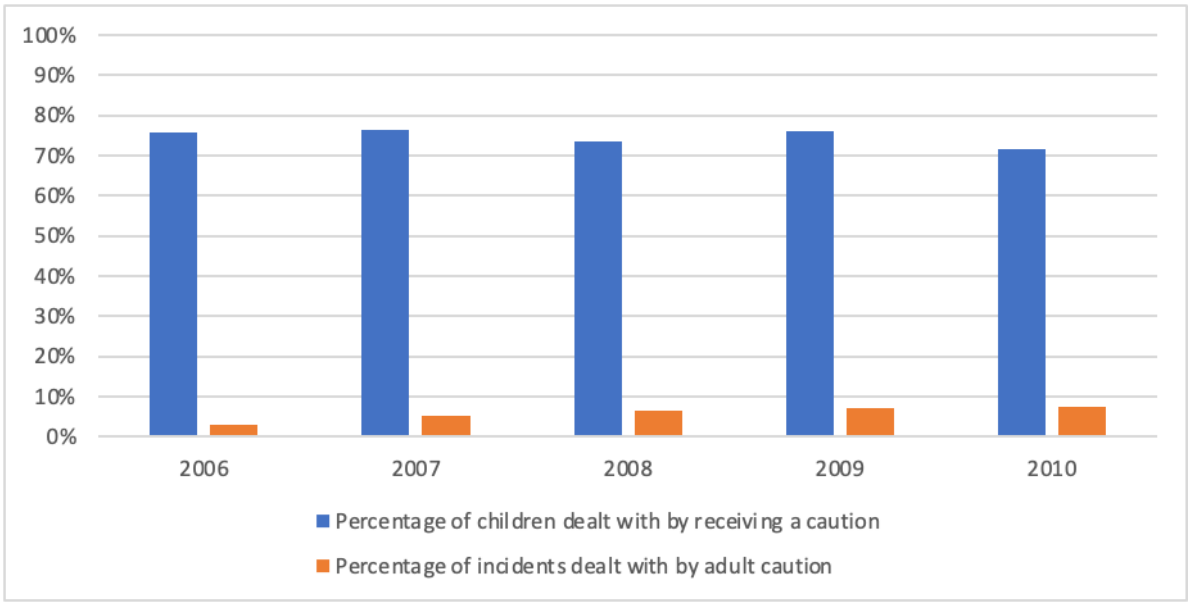

Figure 4.18 Total percentage of juveniles admitted into the GJDP who received a caution (both informal and formal) and percentage of incidents dealt with by way of an adult caution in Ireland 2006-2010

Sources: Garda Recorded Crime Statistics 2003-2007; Annual Report of the Committee appointed to Monitor the Effectiveness of the Diversion Programme, various years; Tolan and Seymour (2014) obtained from the Central Statistics Office by direct written request.

Index E: Prison/Detention conditions

Adult Criminal Justice Sector

In respect of prison conditions in Ireland the variables that will be examined are: respect for human rights, size of institutions, overcrowding, rehabilitative/other programmes in prisons. It was acknowledged by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT') in its sixth periodic visit to Ireland in 2014 that the Irish authorities had taken considerable steps to reform the prison system since its previous visit in 2010 noting the commencement of the Community Return Programme, improvement in the conditions of detention and introduction of the Fines (Payment and Recovery) Act 2014 aiming to reduce the use of imprisonment for fine defaulters. They noted that some difficulties and concerns, however, are still present such as slopping out and inter-prisoner violence (CPT, 2015). The CPT (2003, 2007, 2011) had previously raised concerns about overcrowding but it was positively noted in this visit (2015) that steps had been taken

to reduce overcrowding in prisons. Whilst this is the case, overcrowding has still occurred in the Dóchas Women's Centre (Dóchas Women's Centre Visiting Committee, 2016) which has previously been identified as problematic with the governor resigning in 2010 due to the 'serious undermining' of her efforts to deliver 'a progressive regime in overcrowded conditions' (Butler, 2016: 345).

Overcrowding that previously occurred in Irish prisons led to the inclusion of two-person occupancy in cells as part of the formal accommodation policy, in contravention to European Prison Rules and despite the sharing of cells contributing to prisoner violence, bullying and homicide (Rogan, 2011; Butler, 2016). In addition to these problems connected to overcrowding, the lack of in-cell sanitation in Irish prisons is particularly concerning (JCFJ, 2012). The CPT (2003, 2007, 2011) has been critical of the practice of 'slopping out', repeatedly stating it is a 'degrading' and 'humiliating' for prisoners but also debasing for prison officers. There were 330 prisoners (approximately one tenth of the prison population) continuing to 'slop out' daily in 2014 compared to almost a quarter of the prison population in 2010 (CPT, 2011). The government responded on the issue of 'slopping out' that it was aiming to provide in-cell sanitation for all remaining areas in the prison estate over the lifetime of the IPS Capital Expenditure Plan 2012-2016. However, as of April 2022 there are still 31 prisoners 'slopping out' in Irish Prisons (Irish Prison Service, 2022).

Another problem which has been raised over the years, particularly by the CPT (2007, 2011, 2015), has been inter-prisoner violence in Irish prisons. In both its 2006 and 2010 visit reports the CPT (2007, 2011) characterised three prisons namely, Mountjoy Prison, Limerick Prison and St Patrick's Institution as 'unsafe' for prisoners and prison staff. The CPT (2015) acknowledged the steps that had been taken to reduce the level of violence in prisons in the 2014 visit, however, it contended that the level of violence still remained far too high in Mountjoy Prison and other institutions. The delegation noted that inter-prisoner violence continued to be fuelled by the existence of feuding gangs and a high prevalence of illicit drug use. This is compounded by the increase in the number of deaths of Irish prisoners since the late 1990s (Irish Prison Service, various years) with 34 deaths occurring between 2012 and 2014 (Inspector of Prisons, 2014). The government has introduced new policies to reduce inter-prisoner violence and this can be seen in the reduction of prisoner on prisoner assaults from 715 in 2012 to 589 in 2015 (Irish Prison Service, 2018).

Rehabilitation and prisoner care is a core aim of the Irish Prison Service and, as stated in their mission statement, it 'seeks to manage sentences in a way which encourages and supports prisoners in their efforts to live law abiding and purposeful lives on release' (Irish Prison Service, 2020). Of note here is the responsibility being placed on the prisoner to engage. The lack of meaningful activity has been recognised as a problem in Irish Prisons (Inspector of Prisons and Places of Detention 2003, 2005; IPRT, 2017) with educational programmes and activities being impeded by the issues of overcrowding, availability of programmes in some institutions and cuts to the educational programmes (JCFJ, 2012; Behan and Bates-Gaston, 2016). Over the years there have been cutbacks on staffing costs resulting in staff shortages which has led to the closure of schools or a significant reduction of school hours in the prison estate (Inspector of Prisons and Places of Detention, 2003, 2005; IPRT, 2017) and a deteriorating budget for prisoners' access to the Open University Courses (IPRT, 2017).

Whilst it has been argued that many conditions prevailing in Irish Prisons have been in serious breach of key human rights requirements (JCFJ, 2012), some positive aspects of the system should also be acknowledged. Firstly, the small size of the institutions and relations between prisoners and staff are reasonably good and constructive (CPT, 2003, 2007). Secondly, the introduction of the incentivised regime programme in 2012 aims to provide incentives for prisoners to participate in structured activities, adopt a more pro-social lifestyle and reinforce good behaviour (Irish Prison Service, 2012; Behan and Bates-Gatson, 2017). Thirdly, community run programmes have been a positive development in recent years, particularly the Alternatives to Violence Programme and the Red Cross Programmes on improving healthcare and developing new skills in prisons (IPRT, 2017). Fourthly, in Ireland shaming schemes for prisoners are not present and they are not required to wear a uniform. Finally, a constant characteristic of the Irish prison system, until recently, has been the temporary release of prisoners every Christmas which testifies 'the humanity that continues to characterise the Irish system, for all its flaws' (Kilcommins et al., 2004: 265). Although it is worth noting that there has been some flux in the number of Christmas releases since 2000. O'Donnell and Jewkes (2011: 77) argued that 'there has been a steep – and sudden – decline in the granting of this privilege' in recent years with 270 Christmas releases in 2000 (nine per cent of the prison population) compared to 176 in 2009 (four per cent). The number of Christmas releases increased, however, between 2010 and 2015 therefore the continuation of the Christmas release tradition is still noteworthy (O'Donnell and Jewkes, 2011; IPRT, 2016).

Young Adults in the Criminal Justice Sector

In respect of young adults, it has been acknowledged that approaches more aligned to youth justice systems have a greater chance of being effective as opposed to the measures in the adult system (Council of Europe, 2009; Farrington et al, 2012; Transition to Adulthood Alliance, 2009; Irish Penal Reform Trust, 2015). Research has shown that the subjective development of criminal behaviour during young adulthood requires a flexible, individualised criminal justice response which is generally available in youth justice but not the adult justice system (Pruin and Dünkel, 2015). This flexible, individualised response could include adopting a more tolerant, cautious approach to young adult offenders, flexibility in sentencing, offering a breadth of educational and vocational training in prison, special visitation rights, and community work-release programmes (ibid). The evidence indicates without appropriate intervention many young adults will re-offend and return to prison in the future (JCFJ, 2016). Compared to other European countries Ireland is lacking in its response to young adults with it being one of a few European countries to have no special rules for young adults in either in youth justice law or general criminal law (Pruin and Dünkel, 2015). Whilst there has been some recent acknowledgement of the specific needs of young adults in Ireland (Strategic Review of Penal Policy, 2014; Government of Ireland, 2014), the Irish Youth Justice Service (2013) Action Plan 2014-2018 remains focussed on young people up to the age of 18.

The lack of information and focus on young adults in the Irish criminal justice system therefore makes it difficult to examine the specific conditions of young adults in the Irish Prison Service, particularly when 18 to 24 year olds can be sent to any prison in Ireland as no prison is designed exclusively for young adults. Of note, however, is that a number of young people sentenced to detention at Wheatfield Place of Detention are accommodated in separate wings of 18 to 20 years olds and over 21 year olds. There is no formal provision in place at Wheatfield for these young adults however and they have the same regime as the rest of the adult population (JCFJ, 2016). Whilst much of the discussion on the adult system above also applies to young adults in Irish prisons, their position is further exacerbated when a youth justice rights lens is applied. Young adults require a more individualised response which is acknowledged by many European countries recognising the fact that turning 18 alone should

not justify transferring young people to adult prisons (Pruin and Dünkel, 2015) which is the current approach in Ireland (IPRT, 2015).

Issues in Irish prisons that are seen to have a particularly negative consequence on young adults are overcrowding and sharing cells with older prisoners, extended lock up time and restricted regimes, and access to structured activities (JCFJ, 2016), clearly breaching the Beijing (1985) and Havana Rules (1990). In relation to the incentivised regime introduced in 2012 in Irish Prisons, there is a disproportionate number of young adults on the basic and standard regimes compared to the overall adult population (JCFJ, 2016). The incentivised regime has three levels: basic (lowest), standard (middle) and enhanced (highest) and if prisoners met certain standards they progress from one level to the other, but if there is non-compliance by prisoners it results in them being placed on the basic regime (Behan and Bates-Gaston, 2016). Evidence has shown that most young people tend to stop committing crimes as they grow older (IPRT, 2015) indicating young adulthood as an important stage for desistance as many young people 'grow out' of crime in their early twenties and measures to reduce offending should focus on supporting this process (JCFJ, 2016). Imprisonment as a response to young adult offending is unlikely to deter future offending and indeed between 2007 and 2010, 68-68.5 per cent of prisoners aged under 25 years old re-offended, compared to only 38.6 per cent of those aged 51 and over (Irish Prison Service, 2013).

Youth Justice Sector

Examining detention conditions for young people in Ireland between 1990 and 2015 is, as discussed earlier, complex due to the various institutions in which young people were detained. The practice of placing children in adult prison has been described as 'singularly inappropriate' (Goldson and Kilkelly, 2013: 354) and this practice in Ireland had attracted censure from the UNCRC, the CPT, the Council of Europe Commissioner for Human Rights and the European Committee of Social Rights. It was recommended as early as 1985 that St Patrick's Institution be closed (Whitaker Report, 1985) with the main criticisms of the Institution including: the failure to separate young people under eighteen years old from adults, the lack of programmes to deal with young people's offending behaviour, and inadequate education, training and recreation facilities (Whitaker Report 1985; Irish Penal Reform Trust 2007; Ombudsman for Children's Office 2011; Inspector of Prisons, 2012). The

Inspector of Prisons report (2012) concluded that the human rights of inmates detained in St Patrick's Institution were either being violated or ignored yet up to 2018, young people were still being committed to Irish prisons. The last published visit by the CPT was in 2014, during the time of transition with the three detention schools merging into one and new detention units under construction. During this visit, the CPT (2015) was pleased to note: the closure of St Patrick's Institution, the decline in the number of detained juveniles since 2010 and that the detention of all juveniles is now the responsibility of the Minister of Children and Youth Affairs.

From an international human rights perspective, Goldson and Kilkelly (2013: 352) identified a number of key issues relating to child imprisonment including: the separation of child and adult prisoners, provision of child appropriate regimes, protection of child prisoners' rights and operation of independent complaints and inspection mechanisms. Since the opening of the new national detention campus in Oberstown all under 18 year olds are no longer mixed with adult prisoners; child appropriate regimes are in place ensuring a children's rights approach to children in detention (Oberstown Children Detention Campus, 2019b); and it has in recent years had a low average population (approximately 40) for its capacity (90 places) (Oberstown annual reports, various years; Irish Youth Justice Service, 2011; CPT, 2015).

Since Oberstown only started operating fully as the National Detention Campus with the amalgamation of all detention schools in June 2016, it is difficult to gauge detention conditions for young people other than from internal reports from Oberstown itself (2017, 2018, 2019a), several external reviews carried out in 2017 (Oberstown Children Detention Campus, 2017; Review Implementation Group, 2017) and annual inspections by the Health Information and Quality Authority (HIQA). A challenging year for Oberstown was experienced shortly after it officially opened in 2016 which saw substantial industrial relations difficulties, a strike by Oberstown staff and an incident whereby young people caused substantial criminal damage to the Campus which gained considerable media attention (Oberstown Children Detention Campus, 2017). This was addressed through the commissioning of external reviews allowing an implementation plan to be put in place (ibid; Oberstown, 2021a; Oberstown, 2021b) and indeed progress can be seen since then (Kilkelly and Bergin, 2022) with annual reports and policy documents being published, increased availability of detailed statistics of young people in detention, introduction of a Children's Rights rules and policy framework, the inclusion of offending behaviour programmes and partnership with businesses to develop young people's vocational skills.

Index F: Human rights compliance

It has been suggested by Goldson and Hughes (2010: 212) that the UNCRC (1989) and a number of other human rights instruments including the Beijing Rules (1985) provide 'a unifying framework for youth justice policy on a global scale'. There is a near global consensus on the need to promote the core principles of best interests of the child, custody as a last resort, separation from adults and processes that respect the dignity of the child as seen from the UNCRC (1989). The following variables will be examined in respect of human rights for both the adult and young adult justice sectors: age of criminal responsibility, modes of the criminal trial in compliance with Human Rights Instruments in respect of youth justice specifically the Beijing Rules and UNCRC (including detention as a last resort and for the shortest period of time).

Young Adults in the Criminal Justice Sector

Whilst many of the human rights instruments reference young people under the age of 18, the Beijing Rules (1985: 3) also support a focussed approach to young adults in the criminal justice system, stating 'efforts shall also be made to extend the principles embodied in the Rules to young adult offenders' and extend the protection afforded by the Rules to cover proceedings dealing with young adult offenders. As noted above, in respect of young adults and their criminal trials in Ireland, there is no recognition of this distinct cohort and therefore there are no specific rules or guidelines for their modes of trial. Many European countries have moved towards a distinct approach to young adults in the criminal justice system, including England and Wales which has included maturity as a mitigating factor at sentencing (Transition to Adulthood Alliance, 2013). The principles outlined by the Beijing Rules and UNCRC have not been applied to young adults in Ireland particularly the principles of detention as a measure of last resort and for the shortest period of time. In Germany, for young adults, imprisonment is the option of last resort and only used when informal and formal community sanctions have failed (IPRT, 2016). Despite the Government's (2014) policy document recognising the particular needs of young adults, and that they are at developmental stage where real change can be affected, there is no specific intervention provided for this age cohort in Ireland.

There have been some recent acknowledgements of young adults, such as the Spent Convictions Bill, 2018 which envisages a distinct approach to young adults aged 18 to 24 years old. The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 did not acknowledge young offenders, however, the 2018 Bill would provide that those aged between 18 and 24 years old would be able to have three convictions (other than minor motoring/public order offences) eligible to considered spent[18]. This aligns with Youth Justice Strategy 2021-2027, as discussed earlier, which has included proposals for a more flexible approach to dealing with young adults of this age group including expansion of the GJDP to 24 year olds (Department of Justice, 2021).

Youth Justice Sector

The 1908 Act set the age of criminal responsibility in Ireland at seven years old (Kilkelly, 2006) but the 2001 Act (in force from 2006) raised the age to 12. The Criminal Justice Act 2006, however, made amendments to the 2001 Act, abolishing the presumption of *doli incapax* and lowering the age of responsibility to ten for children charged with murder, manslaughter, and serious sexual offences. This has been seen as a retrograde step (Kilkelly, 2006; Convery and Seymour, 2016) and places Ireland out of line with other European jurisdictions where the minimum age of criminal responsibility is more commonly 14 years and above (Goldson, 2013). Even in the recent Youth Justice Strategy 2021-2027 no suggestion is made in relation to raising this minimum age of criminal responsibility, even though it does emphasis children under 14 should only be prosecuted as a last resort (Department of Justice, 2021). The 'continued resistance' to raise this minimum age therefore 'may point to an underlying ambiguity towards children in conflict with the law' (Forde and Swirak, 2023: 124).

There was increased recognition in Ireland of the rights of the child through the introduction of the 2001 Act which enshrined many of the principles in the UNCRC and other international instruments. Specifically, the 2001 Act legislates: the principle of detention as a measure of last resort and for the shortest period of time, heavy emphasis on diversion, and protection of privacy during legal proceedings. Notably missing from inclusion in the 2001 Act is the duty to act in the best interests of the child and it is rather set out as a factor which

[18] Criminal Justice (Rehabilitative Periods) Bill 2018 (in the Second Stage, before Dáil Éireann as of May 2023).

must be taken into account (Kilkelly, 2008). Huge progress has been made in human rights compliance in Irish youth justice, however, with practitioner data reflecting a strong embedded shift towards the use of custody as a last resort, welfarism being the most commonly cited aim (Hamilton et al., 2016) and young people under the age of 18 have now been separated from adults.

Unfortunately, several problems do remain in relation to human rights compliance including geographical variation, wide discretion of the GJDP, disproportionate number of young people on remand and the operation of the Children's Court. Sentencing practices in Irish youth justice have been described by legal practitioners as 'lenient' (Hamilton et al., 2016: 237), however, this 'perceived leniency' is highly contingent on many factors impacting what sentence a young person will receive. Geographical variation is a particularly important factor in Ireland as young people who appear before regional courts are perceived as disadvantaged (Hamilton et al., 2016). Other factors include: the resources available, the child's ability to engage with services and delays. Further these factors are influenced by differing levels of professional discretion which introduces problems of inconsistency and disproportionality (ibid).

Whilst the Beijing Rules (1985) state that availability of discretion at all stages in youth justice is justified due to the special needs of juveniles and the variety of measures available, it also recommends that such discretion be exercised in accordance with the criteria set down by law and there is sufficient accountability at all stages and levels in the exercise of such discretion (Kilkelly, 2011). As discussed above, due to lack of independent monitoring of the GJDP, little is known about the decision-making process for children being referred to the programme. There is no opportunity for young people or their parent(s)/guardian(s) to appeal decisions about treatment, other than to make a complaint to the Garda Síochána Ombudsman Commission. This complaints procedure is neither 'age-appropriate [n]or fully accessible to those under 18 years' (Kilkelly, 2011: 148). In addition, net widening foundations in theory can be seen in the discretionary operation of diversion and the 2006 Act extending the remit of the GJDP to include ten and 11 year olds and children engaged in anti-social behaviour (Convery and Seymour, 2016). In the absence of empirical data, it is difficult to comment on the extent to which net widening is actually occurring in practice but it raises concerns in respect of due process rights.

The treatment of children in the Children's Court has been highlighted as an issue (Kilkelly, 2008; 2014) as it has been found children did not participate in proceedings in a meaningful way (Kilkelly, 2008; Seymour and Butler, 2008). In particular, it was pointed out that the lack of involvement children had in their case in court served to compound their 'lack of understanding about bail compliance and, most importantly, the consequences of not complying' (Seymour and Butler, 2008: 53). The length of time to finalise cases has been an enduring problem as highlighted by Convery and Seymour (2015) with the vast majority (over 80 per cent) of admissions to detention schools in 2010 involving children on remand (IYJS, 2011). Further issues such as spending long periods waiting for their cases to be heard and coming into contact with adult accused and others not involved in the proceedings were pointed out by Kilkelly (2008). Kilkelly (2014: 216) is critical of the operation of the Court stating that 'no systematic approach has been developed or adopted to support the Act's implementation in the Children Court nationwide'.

4.4 Conclusion

As can be seen over the twenty-five year period examined above, there are some commonalities and differences present within the Irish criminal justice system between its respective sectors. Both the adult and youth justice systems have experienced low rates of imprisonment and detention with a decrease occurring in the rates in recent years. In addition, both sectors have experienced issues with human rights compliance. What is clear from the above analysis is the pace at which progress occurred in Irish youth justice far outstretches the adult system. There has been a radical shift in Irish youth justice over the twenty-five year period particularly seen in the introduction and implementation of the 2001 Act, the opening of Oberstown National Detention Campus in 2016 and the consistent decrease over recent years in the detention rates, court referrals and GJDP referrals. The adult system has progressed in some areas such as reduction of imprisonment and positive policy developments, however, this was done at much slower and inconsistent pace over the years, with considerable flux being seen. It is argued the failure to recognise and accommodate young adults in Irish criminal justice has resulted in this sector experiencing an inadvertent punitiveness, particularly with the overwhelming international evidence supporting the adoption of a distinct approach.

4.5 Postscript

As discussed briefly in this Chapter, the Irish Youth Justice Strategy 2021-2027 (Department of Justice, 2021) expands its focus to offending in early adulthood (up to age 24) as well as in early childhood. The Strategy intends to assess the potential of adopting a distinct approach to young adults up to 24 years old in the context of diversion (strategic objective 2.6.3). The Strategy also intends to develop specific protocols, policies and actions for the management and care of young adult offenders (aged 18 to 24) in the prison system (strategic objective 2.13). This will be done both in relation to transitions from Oberstown to the prison system and also for young adults within the prison system. In addition, the Strategy plans to pursue enhanced effective services for young adults on release from prison (strategic objective 2.15). and continue to develop appropriate measures for young adults under Community Supervision (strategic objective 2.7.2(d)). Kilkelly and Bergin (2022: 48) comment on the Strategy: 'while its goals are ambitious, its development through a strongly consultative process provides further evidence of the continuing progression of Irish youth justice in line with international children's rights standards.' The transition into adulthood was stressed as a priority area by the IPRT for this Strategy and they advocated for the extension of the protection of the young justice system to those aged 18 to 24 (IPRT, 2020).

Further, work by Kilkelly and Bergin (2022) accounts for the progression in Ireland's detention practices in recent years, by identifying the key elements of the children's rights approach to the deprivation of liberty and the process of advancing children's rights. The authors note the significant process made in Oberstown over five years from 2017 to 2022 to ensure a child-centred and rights-based model was the standard for all those under 18 in detention. This was done through the adoption of a Children's Rights Policy Framework, the development of the modern facility and the introduction of new ways of working within the facility including professionalizing staff (Kilkelly and Bergin, 2022). Ultimately, they conclude that 'detention cannot be viewed in isolation from other parts of the young justice system or indeed from the child welfare and protection systems of the state' (ibid: 176). They further acknowledge the complex needs of the young people who end up in detention including the over-representation of Traveller children as well as other minority ethnic groups but stress the importance of ensuring every individual child's needs are met. Such work contributes to our knowledge and understanding of Oberstown and its transformation in recent years and importantly demonstrates how child-centred and rights-based practice in custodial institutions can be achieved.

Chapter 5 – Cross-sectoral punitiveness in Scotland 1990-2015

5.1 Introduction

It has been widely claimed that Scottish criminal justice has a 'distinctive' nature compared to England and Wales and wider international contexts (Munro et al., 2010; Croall, 2006; McAra, 2007, 2008) and is a 'country of many contradictions' therefore meriting close attention (McAra, 2008: 500). The following chapter aims to provide an extensive review of criminal law and policy within the adult and youth criminal justice systems of Scotland for the period from 1990 to 2015. This chapter is divided into two parts: firstly, it will provide the reader with a chronological review of law and policy in both sectors over the twenty-five year period 1990-2015 and secondly, it will assess cross-sectoral punitiveness according to the five/six indices as outlined in Chapter Three.

5.2 Punitiveness in Scotland 1990-2015

5.2.1 Adult Criminal Justice in Scotland 1990-2015

When Scotland and England became one country under the Act of Union in 1707 (Young, 1997; McAra, 2005) the Scottish parliament was dissolved however, it was guaranteed that Scotland would retain its own law and criminal justice systems (in addition to education and the established church) (Young, 1997; McAra, 2005; Mooney et al, 2015). The remaining institutions of civil society therefore 'provided a mechanism through which the vestiges of Scottish nationhood could flourish' (McAra, 2005: 294). During the last three decades of the 20th century penal welfarism dominated Scottish policy at a time when imprisonment rates were high and rising (McAra, 2008). However, following devolution in 1999, at exactly the point in time when it might have been expected for Scottish criminal justice to flourish (McAra, 2008), there was a major retreat from welfarist principles to more punitive and actuarial principles (a period of so-called 'detartanisation'). This changed when the Scottish Nationalist Party ('SNP') gained power in 2007, with a perception of change in criminal justice, reversing previous trends in a process of 'retartanisation' (Mooney et al., 2015;

McAra, 2017b). Reflecting the significance of these periods in Scotland, the following section is sub-divided into three time periods namely: 1990-1999; 1999-2007 and 2007-2015.

A. 1990 to 1999: Divergence and Welfarism

For almost 300 years before devolution, Scotland retained its own distinctive legal and criminal justice systems administered by distinctive Scottish institutions (Mooney et al, 2015), although during this time all laws relating to Scotland were enacted by the UK national parliament in Westminster (Morrison, 2012). Pre-devolution the Home Department of the then Scottish Office in Edinburgh administered Scottish policy on crime control and penal practice (McAra, 2008). As noted, between the late 1960s and early 1990s Scottish criminal justice fully embraced penal welfare values and resisted the 'punitive turn' evident in several other jurisdictions (McAra, 2008). This was attributed to several factors including: the survival of social work, continuing therapeutic and rehabilitative practices in prison and the Children's Hearing System ('CHS') (McAra, 2008); geographical distance from the rest of the UK; the distinctive 'civic and political culture' (McAra, 2008: 493) and the policy network that could tailor policies to Scottish conditions (Mooney et al., 2015). This distinctive policy network, Scottish 'quasi-state' or 'penal elites' consisted of senior 'essentially progressive' civil servants in the Scottish Office, Directors of Social Work, Crown Office, senior academics and the judiciary (Mooney et al., 2015; McAra, 2017a: 770).

Despite this, some sceptical voices have been raised with Munro et al. (2010) and Mooney et al. (2015:10) arguing there is a 'mythological aspect' to the claims of Scotland's resistance to punitive excesses. There are clear indicators of this as seen in the operation of the CHS with (until recently) one of the lowest ages of criminal responsibility in Europe (Muncie, 2011) and the presence of managerial strategies (Hamilton, 2014). Most significantly perhaps, Scotland has continued to have relatively high rates of imprisonment from the early 1990s similar to imprisonment levels in England and Wales (Mooney et al., 2015; Tombs and Piacentini, 2010).

Moreover, since the mid-1990s there was a major retreat from welfarist principles in some areas of both adult and youth justice (McAra, 2008). These shifts in penality, which became more marked after devolution, resulted in what has been described as 'welfarism in crisis' (McAra, 2007). This was seen in two controversial criminal justice acts introduced by

Scottish Secretary Ian Lang in 1995, namely the Criminal Justice (Scotland) Act 1995 and Children (Scotland) Act 1995, which signalled a shift from welfarism (McAra, 2006, 2008; Mooney and Poole, 2004). The appointment of Michael Forsyth as Scottish Secretary in July 1995 certainly marked the end of the divergence that had characterised the Scottish system for some time. Forsyth was described as 'the first, and only, genuinely Thatcherite Scottish secretary' (Torrance, 2006: 326) as his policies closely resembled those of the English Home Secretary, Michael Howard. Such an approach led to a dramatic increase in the number of criminal justice acts (16) passed in a three year period (1995-1997). The flagship act was the Crime and Punishment (Scotland) Act 1997 (the '1997 Act') which effected reform in several major areas including minimum sentences for serious offences and abolition of parole and automatic early release. Despite these developments, many proposals by Forsyth were amended or withdrawn and blocked by the influential Scottish elites (McIvor and Williams, 1999).

B. 1999 to 2007: Punitive Turn? the 'detartanisation' of Scottish Criminal Justice

During the latter half of the 20th century pressures for constitutional change grew with the resurgence of national politics in Scotland and demands for greater home rule (McAra, 2005; McAra, 2008). During the Thatcher and Major UK Conservative Governments, the pressures became particularly acute as there was a major disjuncture between voting patterns in Scotland (majority Labour) and those in England (majority Conservative Party) (McAra, 2005; McAra, 2008). In 1997 these pressures were alleviated with the election of a New Labour government and the passage of the Scotland Act, 1998 ('the 1998 Act') which set out a framework for a devolved government (McAra, 2005). The first two governments in the re-convened Scottish Parliament (1999-2003 and 2003-2007) were dominated by the Labour-Liberal Democrat coalition (Mooney et al., 2015). There was a contrast seen in the approaches taken by the two governments, with the period to the early 2000s continuing penal welfarism and the later 2000s being regarded as a period of 'detartanisation' (McAra, 2008; Mooney et al., 2015).

The first administration of the Liberal Democrats post-devolution saw relatively limited activity in this area (Mooney et al., 2015). It has generally been agreed that even if the Scottish Government of 1999 to 2003 continued and developed welfarist policies the second

Government from 2003 to 2007 marked a break with the past and welfarist traditions (McAra, 2008; Mooney et al., 2015). As a means of ensuring greater accountability amongst criminal justice institutions, the New Labour/Liberal Democrat administration drew on the language of new public management (McAra, 2017a: 772) and had an increased emphasis on managerialism, efficiency, monitoring, evaluation and target setting (Croall et al., 2010). In particular, youth crime, antisocial behaviour and tackling young persistent offenders formed a centrepiece of governance (McAra and McVie, 2010a, 2010b; McAra, 2017a) (discussed further below).

Reflecting these ideological shifts, the new government heralded a new architecture in creating over 100 institutions, many with overlapping competencies, all trying to build political capacity in the new system (McAra, 2008, 2017). A degree of public disillusionment with the devolved settlement surrounded the early years of the new Parliament and, as well documented in the criminological literature (discussed in Chapter Two), in order to overcome crises of legitimacy weak governments often turn to mechanisms such as crime control and 'governing through crime' (Simon, 2007). This type of governing was seen in the new administrative arrangements or 'hyper-institutionalisation' that characterised the first decade of devolution (McAra, 2008; Munro et al., 2010). In addition, there was a weakening of the consensual, elitist welfarist influences as their functional capacity to effect policy change was undermined by the new logic of managerialism that reinforced political control over the system and the new institutional framework (McAra, 2008). Other views offered on why change occurred after devolution concern the creation of new democratic structures and closer political scrutiny (Munro et al., 2010: 269) or that Scotland's politicians were following the New Labour ideologies (seen in increased politicisation of criminal justice, introduction of targets for persistent offenders, electronic tagging etc.) (Croall, 2006) The detartanisation of Scottish criminal justice has therefore been as a result of the complex and shifting modalities of power and identity (McAra, 2008: 494).

C. 2007 to 2015: Compassionate Justice: the 'Retartanisation' of Scottish Criminal Justice

In May 2007, the third Scottish Parliament elections led to the formation of a minority government by the Scottish National Party ('the SNP'). Since 2007, there were hints of new trajectories of distinctiveness (Munro et al., 2010) and a perception of change, even though

there were clear elements of policy continuity (Mooney et al., 2015). A new, more positive relationship between government and uniformed justice agencies was signalled in the clear, early rejection of the principle of prison privatisation alongside a repeated target to recruit an extra 1,000 police officers. In addition, there were efforts made to reduce the number of short-term sentences, an increased focus in tackling problems presented by women's prisons[19], and a renewed emphasis on restorative and reparative principles in penal policy seen in community-payback (McAra, 2017a).

Inquiries were set up to advise on the ways forward (Scottish Government, 2009; Scottish Prisons Commission, 2008) and the SNP governments have explicitly utilised research evidence to build 'an intellectual case for "compassionate justice" as a distinctively Scottish approach to matters of crime and punishment' (McAra, 2017a: 772-773). The Prisons (McLeish) Commission Report, 'Scotland's Choice' (Scottish Prisons Commission, 2008), set out the choice the country faced between continuing to be a high imprisonment society or developing more constructive community justice polices. Since 2008, there has been a reduction in crime rates in Scotland (Scottish Government, 2013) in line with the universal crime drop (McAra and McVie, 2019) and the prison population rate has reduced (Council of Europe, 2019). This prison population rate, however, continues to be high compared to other European Union countries (ibid). This begs the question of whether 'compassionate justice' has been achieved in practice, particularly when it has been argued that the change in the prison population rate is due to the reduction in the number of people being prosecuted before the courts rather than a change in penal policy (Howard League, 2018). Indeed, Brangan (2019: 795) argued that while Scotland's penal transformation in the 1980s and 1990s was not as punitive as other countries, it cannot be characterised 'as exceptionally moderate or progressive'. Rather, what occurred was not a reduction in its use of prison but was a 'concealment of its penal pains' in an attempt to define themselves in contrast to England and portray their 'Scottish penal superiority' (Brangan, 2019: 793, 794).

Notably, Scotland has one of the highest proportions of young adult offenders under 21 in Europe (Cavadino and Dignam, 2006: 223) and imprisonment is closely correlated to indices of deprivation, particularly among young males. In examining postcode data in 2003, Houchin (2005) found that one in nine men from the most deprived communities would spend time in prison before they were 23. In addition, younger prisoners aged 18 to 20 in

[19] Following the recommendations in the 'Angiolini Report' (2012) which was a report of the commission set up to review the treatment of women offenders.

Scotland have been found to have intense problems a third worse than those problems of older prisoners in respect of basic skills, rates of unemployment and previous levels of school exclusion (Scottish Prisons Commission, 2008).

The defining event to the outside world of this administration was the Justice Minister's decision in June 2009 to release Abdelbaset Ali Mohmed al-Megrahi, the man responsible for the Lockerbie bombing in 1988, on compassionate grounds. This was a controversial decision and received international scrutiny (Munro et al., 2010; Mooney et al., 2015), however, the Justice Minister Kenny MacAskill commented that 'in Scotland, we are a people who pride ourselves on our humanity' as a 'defining characteristic of Scotland and the Scottish people' (Munro et al., 2010: 262). The SNP won a decisive outright majority in the fourth Scottish elections in May 2011 and it has been argued that the SNP were reluctant to do anything that would damage its electoral chances at the Scottish Independence vote in 2014 (Mooney et al., 2015). There have, however, been a number of major changes in criminal justice including: the creation of 'Police Scotland' (McAra, 2017a); changes to the CHS (Mellon, 2013) and to community justice social work; and serious organised crime initiatives (Mooney et al., 2015). The 2014 Scottish Independence Referendum was not passed with 55.3 per cent voting to remain a part of the UK, but the SNP was returned as a majority government to the fifth Scottish Parliament in 2016.

5.2.2 Youth Justice in Scotland 1990-2015

The current youth justice system in Scotland, the Children's Hearing System ('CHS') is based on a core set of welfarist principles stemming from the Kilbrandon Committee report in 1964. The period that followed can be described as the high point of welfarism in youth justice in Scotland (McAra and McVie, 2010b: 69) and lasted until the 1990s. From the mid-1990s, and in particular following the introduction of the Children (Scotland) Act 1995, there was a shift towards more punitive rhetoric in youth justice and increased politicisation of youth crime (McAra and McVie, 2010b). This changed again in 2007 when youth justice was seen to be characterised by a new emphasis on restorative and reparative principles and a decision was taken to raise the age of criminal responsibility from 8 to 12 (McAra, 2017a). In line with these periods in Scottish youth justice, the following section is sub-divided into three time periods namely: 1990-1995; 1995-2007 and 2007-2015.

A. 1990 to 1995: The Kilbrandon Philosophy and the CHS: the 'triumph of welfarism'

The Social Work (Scotland) Act, 1968 abolished the existing juvenile courts in Scotland and established a new institutional framework for youth justice, the CHS. The ideas lying behind the CHS were recommended by the Kilbrandon Committee report in 1964 (Young, 1997) which drew no distinction between child offenders and children in need of care and protection[20]. The overall aim of the new youth justice system (implemented in 1971) was to deal with the child's needs (whether referred on care and protection or offence grounds), rather than deeds with the best interests of the child being paramount in the decision making process (Kilbrandon Committee, 1964; Young, 1997; McAra and McVie, 2010b). The Scottish youth justice system's embodiment of welfarism set it on a divergent trajectory to the one in England and Wales and can be largely understood in the context of social, political and penal change at the time. Furthermore, the distinctive nature of the Scottish civic culture which emerged in the 1960s (McAra, 2008) enabled the youth justice system to resist the decline in the rehabilitative ideal seen in other western jurisdictions (McAra, 2005; McAra and McVie, 2010b).

The historical account of the embodiment of welfarist principles and children's rights in youth justice (Asquith and Docherty, 1999) does raise some contradictory considerations in several respects. Firstly, children can still be prosecuted in Scotland depending on the type of offence the child is accused of committing and where facts are disputed during hearings (Asquith and Docherty, 1999). Secondly, the Scottish civic culture was prepared to accept, up until 2019, an extremely low age of criminal responsibility at eight years old (Muncie, 2008). Thirdly, the CHS in practice only deals with children up to the age of 16 (or 18 if they are already in the system) (McAra and McVie, 2010b) therefore there is an 'abrupt propulsion of 16-year olds… into the adult criminal system' (Munro et al., 2010: 264). Furthermore, there was a lack of research into the functioning of the CHS system for decades following its creation which indicated 'the distinctiveness of the hearings system had itself become a signifier of Scottish identity and therefore not to be tampered with' (ibid).

[20] This is in relation to compulsory measures of care.

B. 1995 to 2007 'Fast-tracking' youth justice? The challenging of the Kilbrandon ethos

Similar to the adult justice system, a shift towards public protection and risk management was evident in youth justice from the mid-1990s. Whilst it has been argued by McAra and McVie (2010b) that this change was evident pre-devolution, the pace of change gained momentum in the post-devolutionary era. Early signs of change can be seen in the number of changes brought in by the Children (Scotland) Act, 1995 ('the 1995 Act'). Most notably, the 1995 Act introduced the paramountcy principle relating to circumstances where children are at significant risk of causing harm to themselves or others. In this situation the CHS can place the principle of public protection above that of a child's best interests (Burman et al., 2008; McAra and McVie, 2010b). This risk principle was seen to challenge the interests of the child principle in the Kilbrandon ethos (Burman et al., 2008).

In 1999, the Scottish Cabinet set up an Advisory Group on Youth Crime to assess the CHS and the criminal courts and their approach to persistent young offenders (Scottish Executive, 2000). The most notable finding was the 'inherently contradictory' practice of over 16 year olds being referred to the adult system (Burman et al., 2008: 444; Scottish Executive, 2000). The Report noted the 'sharp transition between the "needs"-based approach of the Hearings system and the "deeds" based approach of the courts which occurs after the offender's 16th birthday' (Burman et al., 2008: 444). The report's widely accepted recommendations for 16 to 17 year old offenders were never fully realised (Burman et al., 2008). Disconcertingly, following the publication of this report there was a toughening up of policy towards youth offenders as persistent young offenders were identified as a problematic group (Scottish Executive, 2000; Burman et al., 2008). Since 2001, the New Labour First Minister prioritised and promoted a headline grabbing youth justice/anti-social behaviour agenda (Mooney et al., 2015) and spearheaded a number of 'get tough' initiatives (Burman et al., 2008). In response to media and public disquiet concerning youth justice, a '10 Point Action Plan on Youth Crime' was published which set out new measures to tackle persistent offending including: 'fast track' hearings for offenders under 16 years, community service orders and restriction of liberty orders (Scottish Executive 2002, Burman et al., 2008). The development and expansion of programmes based on 'what works' principles with its emphasis on persistent offenders posed a challenge to the Kilbrandon philosophy and its emphasis on needs over deeds (Burman et al., 2008; McAra, 2004).

One particularly controversial initiative was the establishment of the Youth Court for 16 and 17 year old persistent offenders. It was observed by Piacentini and Walters (2006) that the youth court in fact results in more guilty pleas and higher rates of detention than if young people appeared in the adult courts. As such, while 'tempered a little by welfare considerations,' (McDiarmid, 2011: 236) 'Scotland remains one of the few countries in Europe that prosecutes its children in adult "contexts"' (Piacentini and Walters, 2006: 55). The more punitive tone in relation to young offenders can be seen in the campaigns against antisocial behaviour with Croall (2006: 599) arguing that 'some of the clearest examples of penal populism can be found in the consultations leading up to the 2004 Antisocial Behaviour ("ASBO") (Scotland) Act (the "2004 Act") and its subsequent implementation'. This deeply contentious Act introduced ABSOs and electronic monitoring for under 16s, police powers to designate 'dispersal zones' and disperse groups and parenting orders. The Act indicated convergence with England and Wales where focus on antisocial behaviour had resulted in increased punitiveness and demonising of young people (Croall, 2006). The fate of the 2004 Act, however, was similar to the 1997 Act, discussed earlier in the chapter, with core provisions barely or never implemented by practitioners who continued to use informal mechanisms (such as warnings for tackling unruly behaviour) and the more formal mechanism of the CHS for serious unmanageable cases (Mellon, 2013; McAra, 2017a). This echoes similarities with the Irish youth justice system and the divergence between the law on the books and the law in practice.

C. 2007 to 2015 Resurgence of welfarism: the 'progressive era'

In the final years of the Labour/Liberal Democrat coalition (2006-2007) the penal expansionism experiment seen in previous years ended abruptly as the fast-track system and other associated programmes were proven to be ineffective at tackling persistent offending (McAra and McVie, 2019). A new narrative predicated on early intervention began but only came into fruition during the SNP government years with the immediate and quiet withdrawal of key targets set by the previous administration and abandonment of core elements of the antisocial agenda to place a greater emphasis on research-led policy models. The policy frame which the SNP proposed, 'Preventing Offending by Young People: A Framework for Action' (Scottish Government, 2008b), has been described as having 'an uneasy mixture of welfarist, actuarialist and retributive impulsions' (McAra and McVie,

2010a: 182). The direction taken by the SNP shifted to focusing on the 'at-risk child' and 'at risk family' replacing the 'offender' and 'failing parents' from the Labour/Liberal Democrat years (ibid). It has been argued by McAra and McVie (2010a) that the research evidence-base ('what works' and 'risk-factor paradigm') was drawn on selectively by Scottish policy makers without openly acknowledging the debate surrounding both bodies of work.

The longitudinal Edinburgh Study of Youth Transitions and Crime ('the Edinburgh Study') findings were strongly supportive of the original Kilbrandon ethos favouring the minimal intervention aim and a holistic approach to young people in conflict with the law (McAra and McVie, 2010a, 2010b). The findings from this study and the Government policy 'Getting it Right for Every Child' (Scottish Government, 2008a) underpinned the Whole System Approach for Children and Young People who Offend ('WSA') rolled out nationally in youth justice in 2011. The WSA encompasses early and effective intervention, diversion from prosecution and reintegration and transition (MacQueen and McVie, 2013; Murray et al., 2015). Since the mid-2000s, there is evidence that there has been substantial progress made in reducing youth offending with a reduction in referrals to the CHS on offence grounds, a decline in conviction rates in court and decline in the use of custody for young adults (under 21) (Nolan et al., 2018; Scottish Government, 2015a; McAra and McVie, 2019). This reduction has been attributed to both behavioural change and policy drivers which have diverted young people away from formal measures (Murray et al., 2015; McAra and McVie, 2019).

Despite clear progress being made various areas of concern remained in Scottish youth justice with the UN Committee being particularly critical of the low age of criminal responsibility (Muncie, 2011). It was not until the Criminal Responsibility (Scotland) Act 2019 that the age of criminal responsibility was raised in Scotland to 12. Another area of concern is the treatment of young adults and in particular 16 and 17 year olds with Scotland being the only country in Western Europe that routinely deals with 16 and 17 year olds before the adult courts (Muncie, 2011). It has been highlighted that too many young people under 18 continue to be tried as an adult in court (Mellon, 2013; Dyer and Carter, 2017) with 37 per cent of children who come into contact with the formal system for their offending behaviour going to court (Lightowler, 2020). In 2008, the Scottish system held over 200 under 18 year olds in prison, which was 40 per cent more than the number held in Italy, a country ten times larger than Scotland (Scottish Prisons Commission, 2008). A paradox therefore exists that a 'country that has pioneered such a distinctive welfare-based youth

justice system also proves to be conspicuously punitive' (Goldson 2004: 37 in Muncie, 2011: 48).

In relation to young adults, whilst there are no waivers or transfer laws in place, Scotland does have three young offender institutions for those aged 16 to 21. This may explain why Scotland has one of the highest proportions of young adult offenders under 21 in Europe due to the inclusion of 16 and 17 year olds in the young offender institutions (Cavadino and Dignam, 2006). Some local authorities in Scotland (e.g. West Lothian) have implemented parts of the Whole System Approach in 2011 to include young people up to the age of 21, however, it is not compulsory for authorities to do so (Dyer and Carter, 2017).

5.2.3 Conclusion

Over the twenty-five year period, criminal justice in Scotland has experienced continuity and change in both the adult and youth justice sectors. The adult system on the surface has always attempted to maintain its distinctive welfarist nature and has done so with a softer rhetoric. The system experienced upheaval during the 1990s with devolution, the detartanisation period and increase in imprisonment rates, however, the softer rhetoric largely remained. Despite this the adult system experienced punitive practices seen in the stubbornly high rates of imprisonment. Overall the adult system experienced both continuity and change during this period. In youth justice whilst the CHS has the reputation of representing 'a triumph in welfarism' (McAra 2002: 446) with both its soft rhetoric and practice, it is limited, particularly as it relates to the treatment of 16 and 17 year olds and the only recently changed low age of criminal responsibility. The youth system experienced continuity over this period. The youth and adult justice systems in Scotland therefore display contrasting trends in respect of its policy and practice.

5.3 Cross-sectoral Punitiveness in Scotland 1990-2015 by Index and Sector

The below discussion will examine cross-sectoral punitiveness in the three justice sectors in Scotland, namely, the adult, young adult and youth criminal justice systems. The indices for this study, as outlined in Chapter Three, are as follows: imprisonment/detention; sentencing; policing; alternative disposals; prison/detention conditions and human rights compliance (for

the youth and youth adult justice sectors only) reflecting both the front and back-end of the criminal justice system. For the purposes of the criminal justice sectors for Scotland, the adult criminal justice sector is aged 21 and above, the young adult criminal justice sector is 18 to 21 years old and the youth criminal justice sector is under the age of 18 years old. As will be discussed in further detail below, the age limits were adjusted due to the availability and age breakdown of data in Scotland.

Index A: Imprisonment/Detention

Adult Criminal Justice Sector

Scotland ranks as having one of the highest prison population rates in Europe in 2015 (Walmsley, 2018) with a rate of 145 per 100,000 population in 2015. Scotland's rate is much more comparable to jurisdictions with much higher national populations such as England and Wales (148) and Romania (145) than with jurisdictions of similar national populations such as Norway (70), Finland (54) and Ireland (80) (Walmsley, 2018). Prior to the 1990s Scotland's prison population rate was relatively moderate in comparison to other Western European jurisdictions, however, as seen in Figure 5.1, this changed from the early 1990s onwards. In terms of the reasons for this change, it has been argued there is an interplay of factors including: the emergence of a more punitive climate of political and media opinion, increases in average sentence length, stricter enforcement and use of prison in response to breaches of community penalties, and stiffer legislation for prisoners released on licence/under supervision (Tombs and Piacentini, 2010: 239). Further, it has been argued that two key drivers of the high prison population are system-led: rates of parole have increased 900 per cent over less than a decade and more people entered prison in 2006/2007 on remand than to serve a sentence, as seen in Figure 5.2 (Scottish Executive, 2008). The rising prison population and concerns about overcrowding and prison conditions led to a series of official consultations as referenced above (Scottish Executive, 2002a; Scottish Prisons Commission, 2008) which recommended a more moderate use of imprisonment (Scottish Prisons Commission, 2008; McNeill, 2011) Subsequently, from 2011, there has been a downturn in the prison population from a rate of 152 to 143 in 2015, although this may be due to a reduction in the number of people being proceeded against in the courts rather than any deliberate strategy (Howard League, 2018).

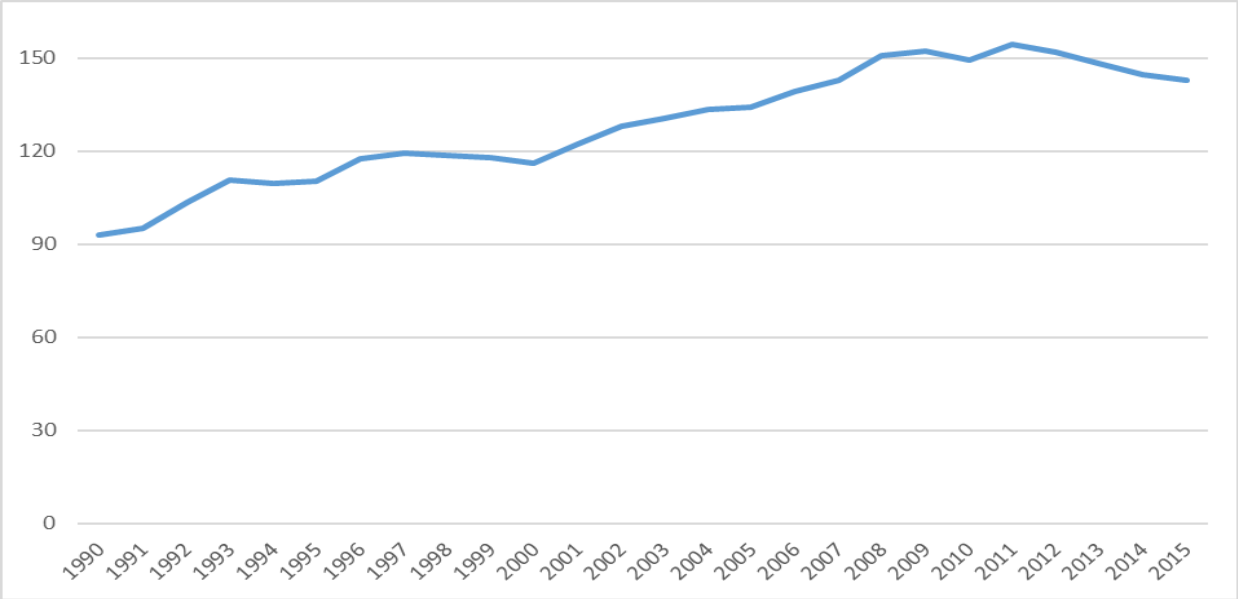

Figure 5.1 Prison population rate per 100,000 population in Scotland 1990-2015

Sources: Scottish Prison Service Annual Reports 1990-1996, 2012-2013, 2015-2016, Scottish Executive: Statistical Bulletin: Prison Statistics Scotland 1997-2012, Scottish Government Prison statistics and population projections 2013-2014.

As noted, a significant factor in the growth of the prison population has been the increased use in immediate custody and remands by the courts (Tombs and Piacentini, 2010). When examining the reception entry rates or 'flow' of prisoners through the system, Scotland remains the country with the *highest* rate of entries to penal institutions in the European Union (Council of Europe, 2009; 2019). Scotland's prison entry rate of 627 per 100,000 population in 2013 significantly surpasses its neighbours of England and Wales (188), Ireland (347) and Northern Ireland (239) (Council of Europe, 2019). Due to availability of data, the total entry rates were only available for the years 1990 to 2013[21]. As seen in Figure 5.2 the total reception rates fluctuated over the years and reached a peak of a rate of 849 per 100,000 national population in 2008. Since 2008, there has been a consistent decline of the number of prison entries with a rate of 631 per 100,000 national population in 2013, in line with the drop in the prison population. Of particular interest is the interaction of the receptions under

[21] The Scottish Government server was upgraded in 2014 which resulted in a new dataset and methods being used and receptions are no longer recorded in either source (Scottish Government, 2020). The sources being recorded are arrivals and departures to prison however the Scottish Government has not been able to correlate these statistics with the historical statistics of receptions as of yet (Scottish Government, 2020).

sentence and remand rates with both rates going in opposite directions from 2002. With remand rates stable between 1990 and 2001 they then began to rise from 2002 and in 2004 overtook the receptions under sentence rate, which meant there were more offenders entering prison on remand (awaiting their trial or sentence) then those entering prison to serve a sentence.

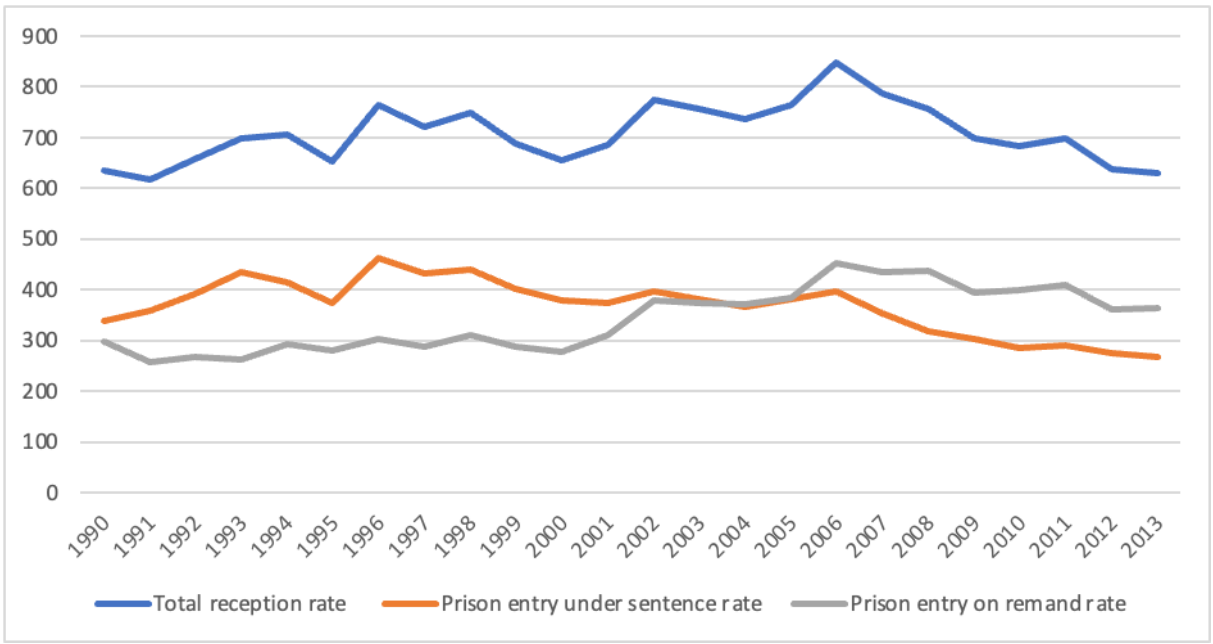

Figure 5.2 Total prison entry rates, prison entry under sentence rates and prison entry on remand rates per 100,000 population in Scotland 1990-2013

Sources: Scottish Prison Service Annual Reports 1990-1996, 2012-2013, 2015-2016, Scottish Executive: Statistical Bulletin: Prison Statistics Scotland 1997-2012, Scottish Government Prison statistics and population projections 2013-2014.

Young Adults in the criminal justice system

As the Children's Hearing System ('CHS') in Scotland generally only encompasses those under the age of 16 years old, those over the age of 16 are dealt with in the adult criminal justice system. If a young person between the ages of 16 and 21 receives a custodial sentence they will be sent to one of the five Young Offenders Institutions ('YOI') therefore they are described as 'young offenders'. Once a young offender turns 21 years old they are sent to an

adult prison. There were limited data[22] available in respect of this cohort with the breakdown of the age of prisoners in custody on one day per year (from 1997 to 2015) available for 18 to 25 year olds. Reception under sentence figures for young offenders (aged 16 to 21) were also obtained. These rates were calculated per 1,000 population for both 18 to 25 year olds and under 21 year olds which is the method in the literature for calculating juvenile prison rates (Muncie, 2008). As can be seen from Figure 5.3 the rate of 18 to 25 year olds in custody fluctuated between 1997 and 2009 when there was a decrease which halved the rate of 4.1 in 2011 to 2.2 in 2015. The overall trend (as seen in Figure 5.4) for under 21 year olds was an earlier steady decline in 1996 from a rate of 3.5 to 0.9 in 2013. Both of these rates show a more pronounced decline for the young adult cohorts compared to the adult prison population.

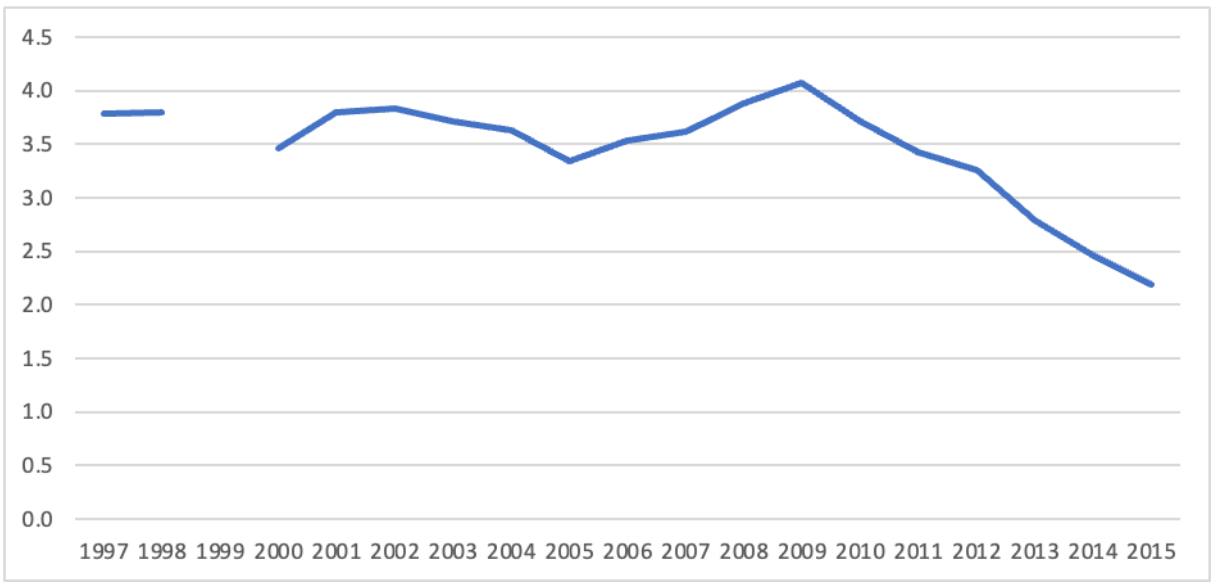

Figure 5.3 Rate of 18 to 25 year olds in custody per 1,000 of the 18 to 25 year old population in Scotland 1997-1998, 2000- 2015

Sources: Scottish Prison Service Annual Reports 2012-2013, 2015-2016, Scottish Executive: Statistical Bulletin: Prison Statistics Scotland 1997-1998, 2000-2012, Scottish Government Prison statistics and population projections 2013-2014.

[22] There is no publicly available report for prison statistics in 1999 therefore the figure for the breakdown of age in custody for this year was unavailable. There was no data recorded on age in custody for the years 1990-1996.

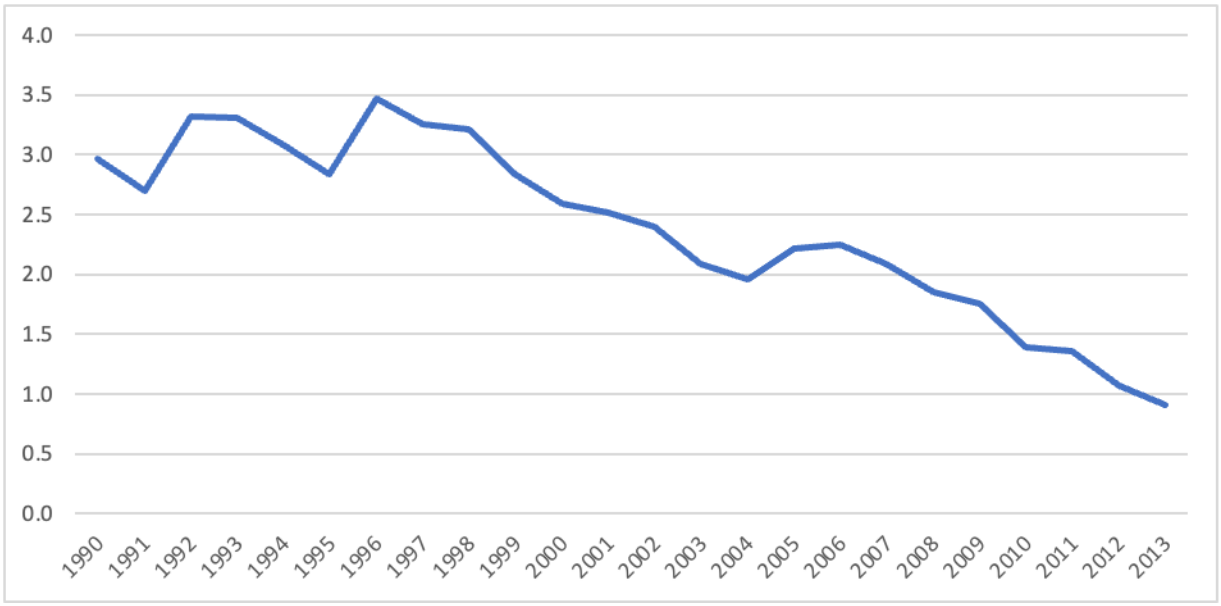

Figure 5.4 Under 21 prison entry under sentence population rate per 1,000 under 21 population in Scotland 1990-2015

Sources: Scottish Prison Service Annual Reports 1990-1996, 2012-2013, 2015-2016, Scottish Executive: Statistical Bulletin: Prison Statistics Scotland 1997-2012, Scottish Government Prison statistics and population projections 2013-2014.

Youth Justice Sector

In Scotland there are two places a young person under the age of 18 can be detained: in 'secure care' accommodation for those aged up to 15, legislated for within the CHS, and, for those aged 16 to 20, in a YOI, legislated though the adult criminal justice system. Therefore, it is proposed to examine: (i) the rate of under 18s in custody on a given date every year[23] (ii) entries to prison under sentence and (iii) the average daily population of secure care accommodation. Similar to the above, the rates will be calculated per 1,000 of the under 18 national population.

[23] See note 22.

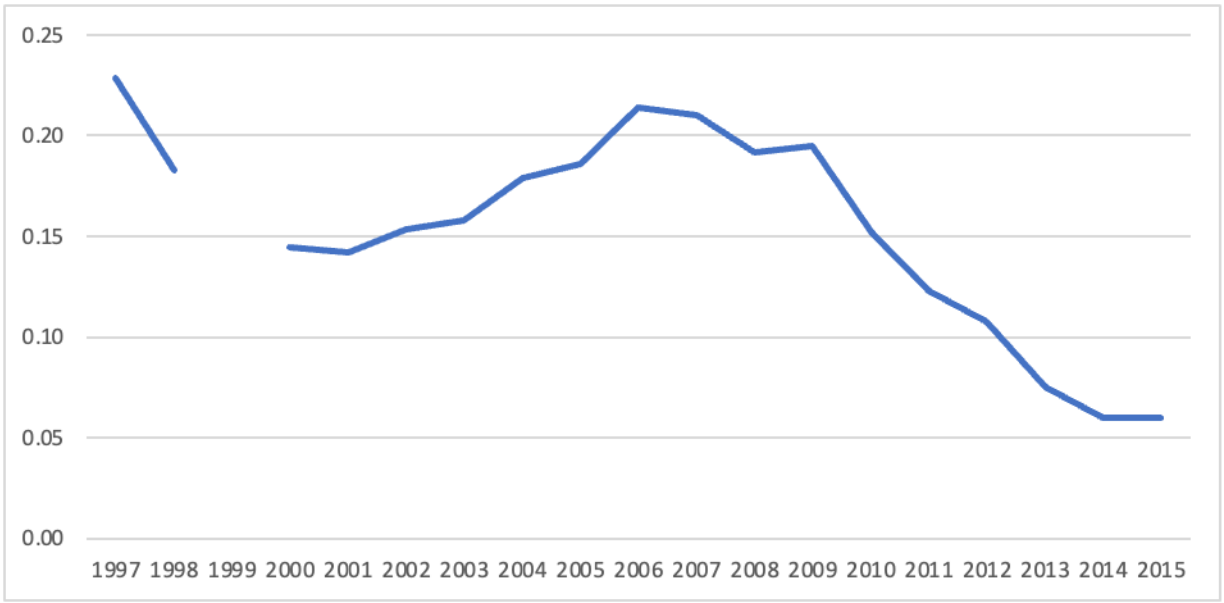

Figure 5.5 Rate of under 18 year olds in custody per 1,000 under 18 population in Scotland 1997-1998, 2000-2015

Sources: Scottish Prison Service Annual Reports 2012-2013, 2015-2016, Scottish Executive: Statistical Bulletin: Prison Statistics Scotland 1997-1998, 2000-2012, Scottish Government Prison statistics and population projections 2013-2014.

Scotland has one of the highest proportions of under 18 year olds in prison compared to other European jurisdictions (Cavadino and Dignam, 2006; Scottish Prisons Commission, 2008; Barry, 2011). As can be seen in Figure 5.5 the rate of under 18 year olds in custody had started to decline from 1997 from 0.23 but then increased from 0.14 in 2000 to 0.21 in 2006 per 1,000 of the under 18 year old population. During these years there was a toughening up of policy towards young offenders (Scottish Executive, 2000; Burman et al., 2008), as discussed earlier in the chapter. The rate then begins to steadily decrease in 2008 following the SNP taking power and a possible behavioural change in young people that has contributed to increased diversion and a reduction in the prison population (McAra and McVie, 2017).

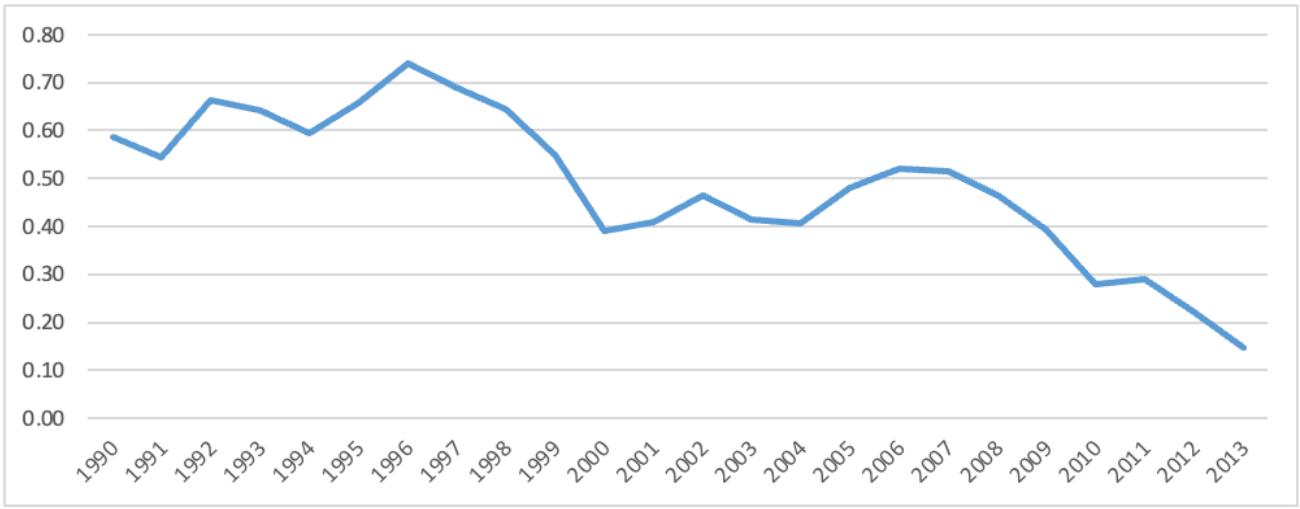

Figure 5.6 Rate of under 18 year olds committals under sentence per 1,000 under 18 population in Scotland 1990 to 2013

Sources: Scottish Prison Service Annual Reports 1990-1996, 2012-2013, 2015-2016, Scottish Executive: Statistical Bulletin: Prison Statistics Scotland 1997-2012, Scottish Government Prison statistics and population projections 2013-2014.

In relation to the receptions under sentence rate for under 18 year olds, as seen in Figure 5.6, there is variation in this rate over the years but, as with the under 21 rate, there is a strong downward trend since 1996. In respect of secure accommodation rates, as can be seen in Figure 5.7 the rate of the average secure accommodation population peaked in 2007 (0.10) but the overall trend between 2000 and 2015 has been one of stability with a rate of 0.08 in both 2000 and 2015. It is worth noting that young people can be placed in secure accommodation by the CHS or the Courts for both offence and care reasons i.e. for their own safety (Gough, 2016) which may explain the stability in the trends discussed.

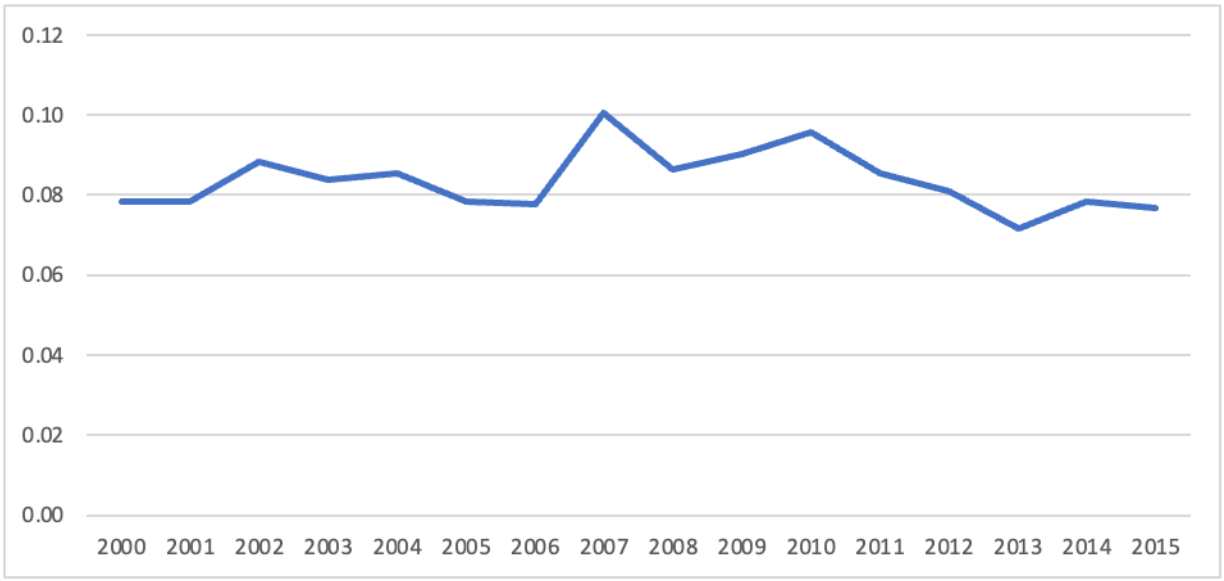

Figure 5.7 Average daily population in Secure Accommodation per 1,000 under 18 national population in Scotland 2000-2015

Sources: Scottish Executive Secure Accommodation Statistics annual notices, 2000-2002, 2005; Scottish Executive Children's Social Work Statistics 2003-2004; Scottish Government annual Children's Social Work Statistics 2006-2015.

Index B: Sentencing

Adult Criminal Justice Sector

As seen above, imprisonment is relied on heavily in Scotland, particularly through the overuse of short sentences. The Scottish Office in 1991 introduced funding and standards that aimed to increase the use of community sanctions (McNeill, 2010). As can be seen in Figure 5.8 the use of community sentences as an outcome of criminal proceedings started to increase from 1990 and in 2004 overtook the number of people receiving a custodial sentence. Unfortunately, this 'success' of community sentences was occurring as the prison population continued to rise, with the number of custodial sentences increasing in tandem with community sentences rising. Indeed, as can be seen in Figure 5.9 custody as a proportion of total sentences handed down in criminal proceedings has increased over the period. The reasons behind this apparent paradox are complex (McAra, 2008; McNeill, 2010) but what can be seen from Figure 5.9 is that the increase in community sentences has actually

displaced financial penalties and not custodial sentences. The other issue, as pointed out by McNeill (2010), is that community sentences themselves bring increased risks of defaults and potential net-widening effects which may have in turn contributed to the growth of imprisonment. A further point to note is the actual decrease in the total number of people receiving a sentence in criminal proceedings which dropped from a rate of 3,475 per 100,000 population in 1990 to a rate of 1,860 per 100,000 population in 2015 (Scottish Office, 1992; Scottish Government, 2016).

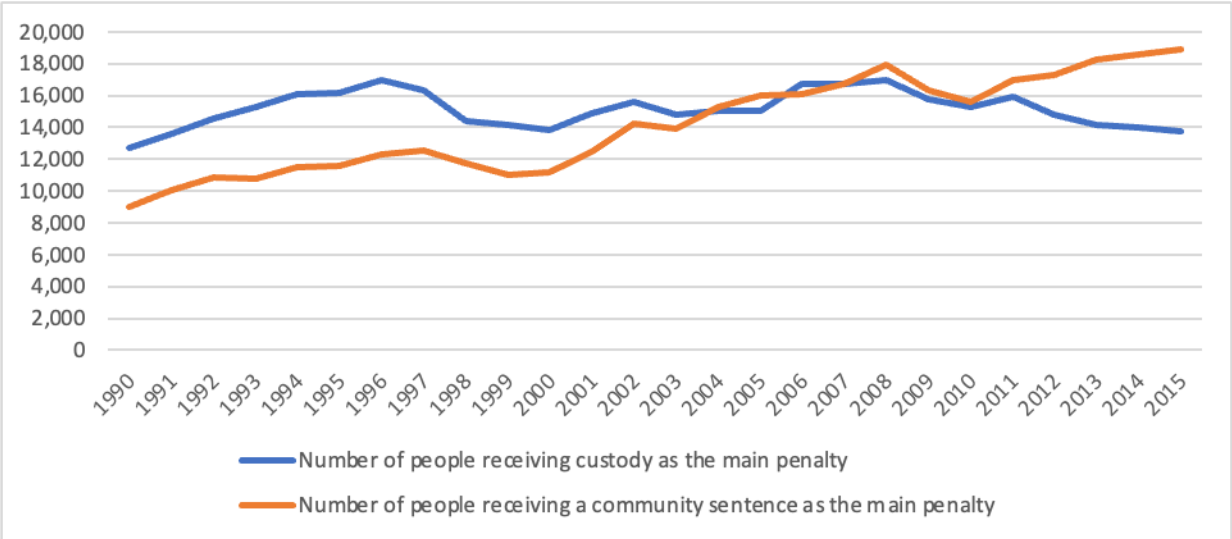

Figure 5.8 Total number of people receiving custody and community sentence as the main penalty from criminal proceedings in Scotland 1990-2015

Sources: Scottish Office Statistical Bulletin, Criminal Proceedings in Scottish Courts 1990-2015

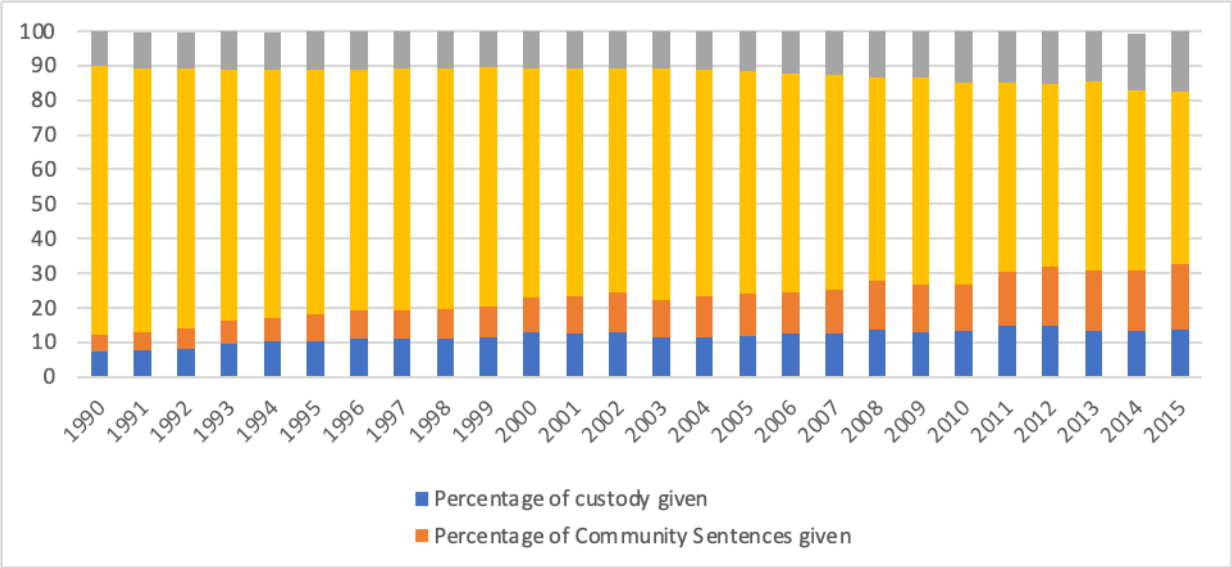

Figure 5.9 Percentage of custody[24], community sentence[25], financial penalty[26] and other sentences[27] given as the main penalty from criminal proceedings in Scotland 1990-2015

Source: Scottish Office Statistical Bulletin, Criminal Proceedings in Scottish Courts 1990-2015

Successive governments have encouraged judges to use custody sparingly and by statute[28] judges are required to resort to a custodial sentence for an offender only 'when no other method of dealing with him is appropriate' (Hutton and Tata, 2010), however, there has been no direct way to control the upward penal drift seen in recent decades with the wide discretion enjoyed by judges (ibid). The Criminal Justice and Licensing Act, 2010 made provisions for a Sentencing Council (established in late 2015), a new Community Payback Order ('CPO') and a presumption against short-term prison sentences of less than three months (McNeill, 2010; Munro et al., 2016). CPOs were seen as an improvement on previous community penalties by Sheriffs but Anderson et al. (2015) found there was little change in Sheriffs use of community or custodial disposals. The presumption against short sentences

[24] Custody includes prison, YOIs, supervised release order, extended sentence, and order for life-long restriction.
[25] Community Sentence includes community payback order, restriction of liberty order, drug treatment and testing, Community Service Order, Probation and other community sentences including supervised attendance orders, community reparation orders and anti-social behaviour orders.
[26] Financial Penalties include fines and compensation orders.
[27] Other sentences include caution or admonition (includes a small number of court cautions and dog-related disposals), absolute discharge no order made, remit to Children's Hearing and insanity, hospital, guardianship order
[28] Section 204(2) of the Criminal Procedure (Scotland) Act 1995.

also appears to have had little or no impact on sentencing and may in fact have resulted in up-tariffing with more people receiving prison sentences from three to six months (Anderson et al., 2015). This has been addressed in the recent introduction of the Presumption Against Short Periods of Imprisonment Order in 2019 which extends the presumption against short sentences from three months to 12 months or less (Howard League, 2019).

An important point to make in relation to Scotland's sentencing practices is that it has remained relatively immune to the mandatory sentences trend seen in some other western jurisdictions. Other than for murder, there are no mandatory sentences in place (Tata, 2010). In the Crime and Punishment (Scotland) Act, 1997 two presumptive sentencing provisions were introduced, however, only one of them was implemented (minimum of 7 years for repeat drug traffickers) (ibid). In 2003 as part of the UK-wide Act a presumptive sentence was introduced for firearms. The lack of these sentences illustrates the wide discretion judges in Scotland have and they have been able to resist any restriction of their discretion in sentencing and maintain their independence in sentencing from the government (Duff, 1994; Hutton and Tata, 2010). The new Sentencing Council established in 2015, however, will affect this wide discretion in preparing sentencing guidelines for the Scottish courts.

Young Adults in the criminal justice system

For young offenders under the age of 21[29], the overall conviction rates between 1990 and 2015 have decreased in line with the adult trend from a rate of 30 in 1990 to 8 in 2015 per 1,000 of the under 21 national population. Similar to the adult justice system, young adults have been particularly affected by the dramatic decline in the use of financial penalties. This is seen in the proportion of financial penalties received as a sentence for under 21 year olds reducing from 68 per cent in 1990 to 36 per cent in 2015 as seen in Figure 5.10. Both the increase in community sentences and other sentences has displaced the use of financial penalties, similar to the adult justice system. When examining the actual proportion of custodial sentences given to under 21 year olds before the Scottish Courts the rate in recent years has been relatively stable between 15 per cent in 2011 and 13 per cent in 2015, as seen in Figure 5.10.

[29] The Scottish Office Statistical Bulletins on Criminal Proceedings in Scottish Courts 1990 to 2015 provided data for the following age cohorts: under 21, 21-30, and over 30. No data were available therefore on the specific 18 to 25 year old cohort.

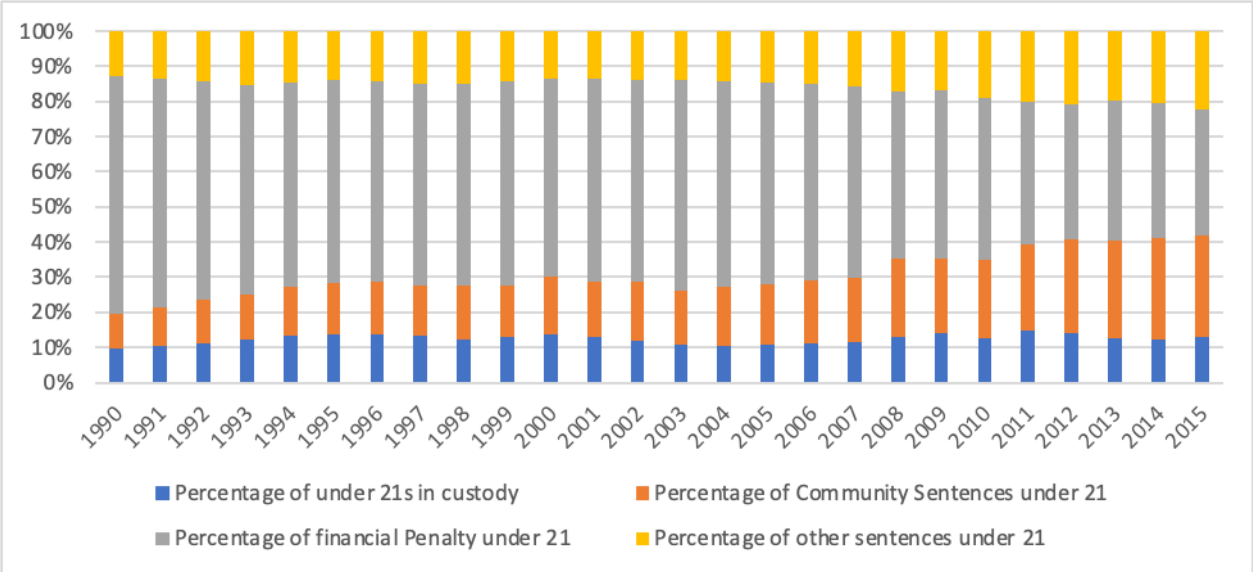

Figure 5.10 Percentages of under 21 year olds receiving a custodial sentence, community sentence, financial penalty and other sentence from criminal proceedings in Scotland 1990-2015

Sources; Scottish Office Statistical Bulletin, Criminal Proceedings in Scottish Courts 1990-2015

Youth Justice Sector

As discussed above, in the Scottish youth justice system following sentencing a young person can be sent to either secure accommodation if in the CHS or to a YOI. In analysing the length of the sentence being served in secure accommodation the majority of young people serve short sentences of under six months. As can be seen in Figure 5.11 the number serving sentences under six months has varied over the years but, following a spike in 2007 the trend has been overall downward. The trends of young people receiving longer sentences in secure accommodation has remained relatively stable over this period.

Of note in this regard was the establishment of youth courts in 2003 that focus on persistent 16 and 17 year olds offenders as well as some 15 year old serious offenders. These courts, as discussed earlier in the chapter, were criticised (Piacentini and Walters, 2006) for pre-empting the transition and accelerating their escalation from the CHS to the adult criminal justice system even though the intention for the courts was to 'ease the transition' (Barry, 2011). Unfortunately, data does not exist in terms of the 16 and 17 year olds specifically

before the courts as they would be encompassed in the under 21 young offender data which was discussed above.

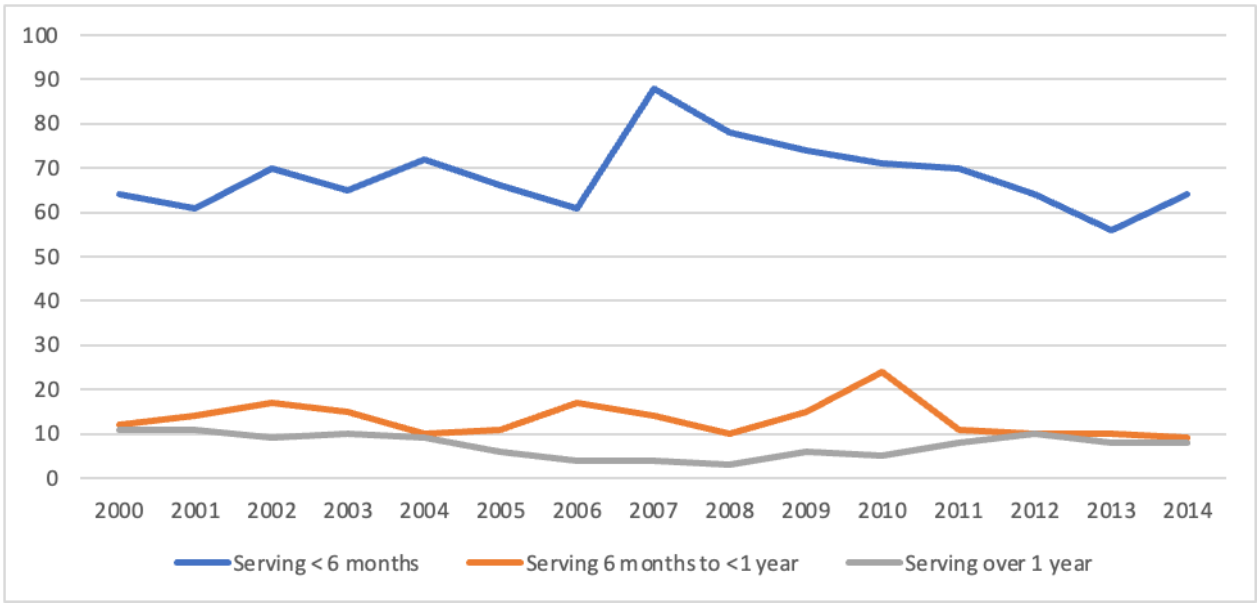

Figure 5.11 Length of sentence served by young people in Secure Accommodation in Scotland, 2000-2014

Sources: Scottish Executive Secure Accommodation Statistics annual notices, 2000-2002, 2005; Scottish Executive Children's Social Work Statistics 2003-2004; Scottish Government annual Children's Social Work Statistics 2006-2015.

Index C: Policing

Adult Criminal Justice Sector

As discussed in the previous chapter, policing and its 'pains' (Harkin, 2015: 44-46) should be explored in addition to imprisonment when measuring state punitiveness. Similar to Ireland, there has been a lack of research in this area with no arrest rates available in Scotland and, up until 2014, a lack of research into the use of stop and search (Murray, 2014). This is more striking in the Scottish context when compared to the substantial research undertaken in England and Wales over the last three decades (ibid).

While Scottish Policing can traditionally be described as ‘mundane and non-adversarial, scrutiny and interrogation faltered’. (Murray and Harkin, 2017: 899), with intensive enforcement seen in the ‘sovereign state strategy’ of crime control confined to limited geographical areas or periods of time (Fyfe, 2010, 2016) e.g. zero-tolerance policing (ZTP), more recently a more authoritarian approach to policing has been adopted. Since the centralisation of the police forces to Police Scotland in 2013, Fyfe (2016: 173) argues that the mass increase in stop and search suggests ‘a significant spatial and temporal shift in the culture of control’.

There was a rise in stop and search in Scotland between 1992 and 2013 which occurred without political challenge and little media critique, with search practices varying sharply across Scotland (Murray, 2014; Murray and Harkin, 2017). A series of initiatives undertaken by Strathclyde Police in the 1990s are seen to have started this rise of mass stop and search with Operation Dove and Operation Blade focussing on the knife-carrying culture. ‘Spotlight’ operations were introduced in 1996 and saw a focus on an array of targets including underage drinking, sporting events, street robberies and was described as ‘community policing with the gloves off’ (Murray and Harkin, 2017: 893). Despite such a widespread approach this practice appeared to be tolerated and maintained a low profile signalling a shift from stop and search being used as a tool for targeted intervention and detection to a broadly applied policy (ibid). In Scotland, the number of recorded searches rose by approximately 550 per cent between 2005 and 2012/2013 (ibid). Scottish police forces were three of the four highest users of stop and search in Britain and the national search rate outstripped New York City frisk rates (Murray, 2014; Murray and Harkin, 2017). The indifference towards stop and search in Scotland was attributed to a ‘cool’ political climate, lack of scrutiny and the ability of the policing and political elites to downplay the contentiousness of police power (Murray and Harkin, 2017).

Within several months of the creation of Police Scotland in 2013 there was new media attention on the ‘massive scale’ of stop and search and the police leaders and political elites were unable to control public discourse. In 2014, the year following, it is estimated there were over half a million stop and searches across Scotland (Deuchar, 2016). The publication of the Murray (2014) and Scottish Police Authority (‘SPA’) (2014) reports were turning points in that they revealed the extensive and uneven use of stop and search, the lack of legal authority and lack of clarity on the purpose of the tactic. The SPA (2014: 17) review found that they could find ‘no robust evidence to prove a causal relationship between the level of

stop and search activity and violent crime or anti-social behaviour' or 'establish the extent to which use of the tactic contributes to a reduction in violence'. In 2015, with both the Scottish Human Rights Commission and the UNHRC commenting that non-statutory stop and search was unlawful and should be repealed, the Scottish Government accepted the appointed Independent Advisory Group recommendations to abolish non statutory stop and search and establish a statutory Code of Practice (Scott, 2015; Murray and Harkin, 2017).

Young Adults in the criminal justice system

Police have a demanding series of roles to play in policing young people but they cannot tackle youth offending and disorder alone (Nicholson, 2011) A central focus in Scottish youth justice is the adoption of a minimal intervention approach following findings from the longitudinal Edinburgh Study (McAra and McVie, 2010a). The Study found that young people who were caught and processed by police manifested as a repeated and intensive form of intervention. A high proportion (56 per cent) of those referred on offence grounds to the Children's Reporter had a conviction at some point in the adult criminal justice system by the age of 22. Further those young people who made the transition to the adult system were assessed as having a high volume of needs at the point of transition. These young people were up-tariffed quickly with a disproportionate number being placed in custody before their 19th birthday compared to those who had no children hearings' history (McAra and McVie, 2010a). In addition, of those who did experience custody with the police by the age of 19, 70 per cent were sentenced to a further period of custody by the age of 22 with a very high percentage of those being excluded from school by age 12 and experiencing labelling and stigmatising from an early age (McAra and McVie, 2014).The report on the scale of stop and searches (Murray, 2014) also emphasised how such searches fell disproportionately on children and young people with them being more likely to be searched than adults on a non-statutory basis thus illustrating the importance of examining the 'front-end' of the criminal justice system in its interaction with young people.

Youth Justice Sector

The police play a key role in youth justice as they are the first point of contact with the criminal justice system and have discretionary powers in dealing with young people. Research has shown that the key driver in the police deciding whether to charge a young person and refer a case to the Reporter was 'previous form' i.e. a young person's previous interaction and history with the police (McAra and McVie, 2010a). Young people have reported being aware of these labelling and stigmatising effects (McAra and McVie, 2014) and previous Edinburgh studies provide evidence of an adversarial relationship between police and young people (Anderson et al., 1994; Loader, 1996; McAra, 2005). In addition to the concerns around stop and search practice generally, discussed above, for young people there are specific concerns about the practice not being compliant with the law and children being unaware of their rights (Murray, 2014). During the significant rise and widespread use in stop and search between 1992 and 2013, it was found that most searches were carried out without reasonable suspicion or legal authority and had a significant impact on young people, with this practice becoming a part of everyday life for some young people living in urban areas (Lightowler, 2020). It was found that children as young as 11 and in the most deprived areas were being stop and searched by police on a regular basis (Murray, 2014). In addition, it was found police in some parts of Scotland were stopping and searching young people at rates many times higher than New York or London (Murray, 2014). Since 2015 there has been a transformation in the use of stop and search in Scotland with questions being raised about its disproportionate use against young people and children (Murray, 2014; HMICS, 2015). Historical stop and search data are not readily available in Scotland and, as stated previously, there was a dearth of research in this area prior to 2014 (Murray, 2014). It is only since 2017 that Police Scotland publicly publish this data (Police Scotland, 2020; McAra and McVie, 2019). In 2016, of note is the reduced use of stop and search of young people under the age of 12 compared to Murray's (2014) finding in 2010 there were 500 children aged 10 years who were stopped and searched by police. Despite this, 19 per cent of searches conducted in 2016 were on young people between the ages of 12 and 17, even though they represent 6 per cent of the population (McAra and McVie, 2019). It was also seen in this data that the rate of search increased according to the level of deprivation in the area with rates of stop and search for 12 to 17 year olds being twice as high in 20 per cent of the most deprived areas (McAra and McVie, 2019).

Index D: Alternative disposals

Adult Criminal Justice Sector

The Procurator Fiscal (public prosecutor) has wide discretion in Scotland in deciding how to deal with a person who has been charged with an offence (Duff, 1993). There are multiple alternative actions to prosecution that the Procurator Fiscal can take including fiscal warnings, diversion to social work, use of conditional offers of a fixed penalty for a range of motor vehicles offences, the 'fiscal fine' for non-motor less serious offences, sending the case to the Children's Panel, or making the decision to take no proceedings (Scottish Government, 2010). As can be seen in Figure 5.12 the overall trend seen in the issuing of fiscal fines has been a doubling in its use from a rate of 276 in 1990 to 614 in 2015 per 100,000 of the national population. In 2007 there was an increased rollout of the use of the fiscal fines by the Procurator Fiscal which can explain the increase between 2007 and 2008 from a rate of 368 to 711. The use of the fiscal fine has attracted criticism in respect of the potential for net-widening (Duff, 1993, 1994), however, in the Scottish system this has not occurred over the years (Seymour, 2006b) and it has been successful in diverting thousands of offenders from prosecution (Duff, 1993; Mair, 2004). However, the use of diversion has been found to have 'significant variation across Scotland and over time that cannot be accounted for by population or crime rates' (Bradford and MacQueen, 2011: 3; Murray et al., 2015) which is likely a result from the 'relatively high levels of autonomy within the prosecution service' (Pakes, 2010: 69 in Murray et al., 2015: 43).

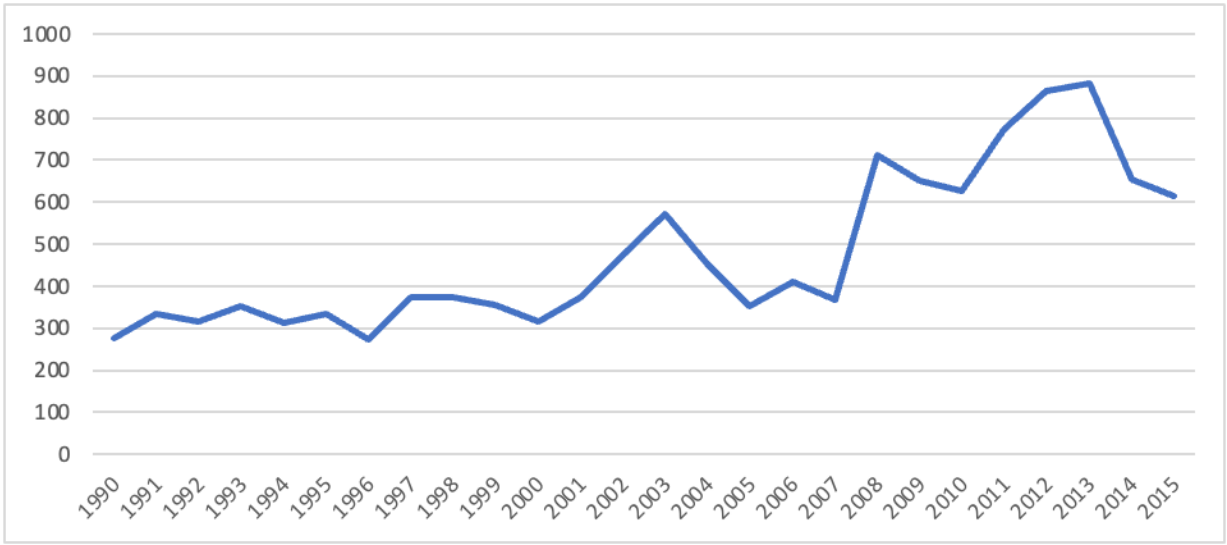

Figure 5.12 Rate of fiscal fines issued per 100,000 of the national population in Scotland, 1900 to 2015

Sources: Scottish Office Statistical Bulletin, Criminal Proceedings in Scottish Courts 1990 -2015

In addition to the diversionary options available to the Procurator Fiscal, in 2007 a range of new measures were introduced, including increasing the use of alternatives to custody that the police can offer to deal with minor offences, such as fixed penalty notices for antisocial behaviour and formal adult warnings (Scottish Government, 2010). As can be seen in Figure 5.13, other than the peak the year after these disposals were introduced the rate of police disposals has been relatively stable with a rate of 1,186 in 2008 which has since reduced to 814 in 2015 per 100,000 national population. The decrease in these rates could be explained by the establishment of the national police force in 2013 in addition to the intense scrutiny of the use of stop and search in Scotland in recent years. In 2016, Police Scotland replaced the formal adult warning system with the Record Police Warning Scheme which allows police officers to use their discretion when dealing with minor crimes and offences (Scottish Government, 2019).

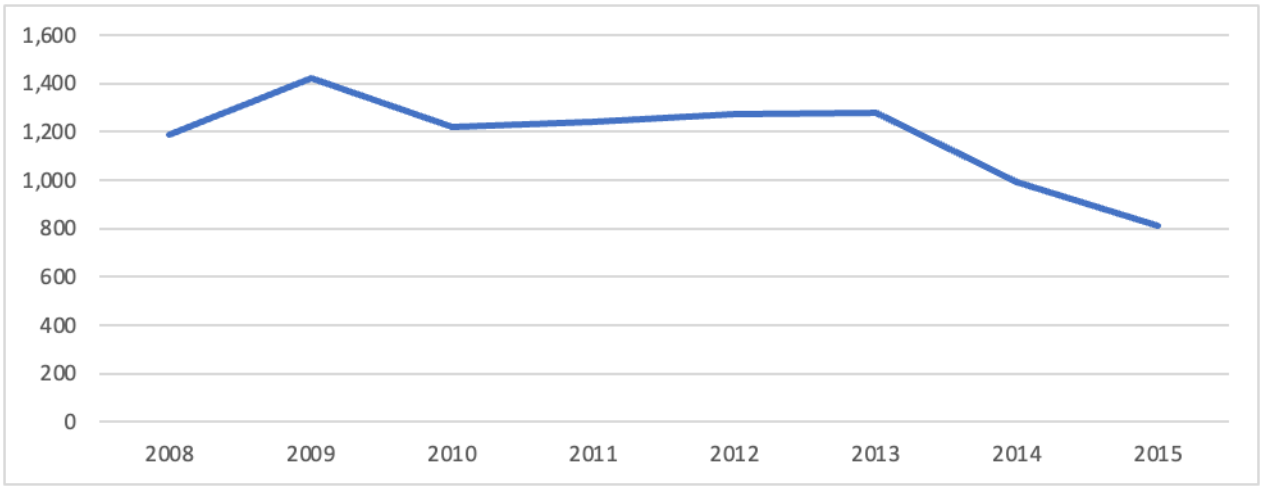

Figure 5.13 Rate of police disposals[30] per 100,000 of the national population in Scotland, 2008 to 2015

Sources: Scottish Office Statistical Bulletin, Criminal Proceedings in Scottish Courts 2008-2015

Young Adults in the criminal justice system

Diversion of young adults[31] is available to the Procurator Fiscal similar to the adult sector above. The data for this cohort are limited with only certain categories of diversion data being available from 2009 to 2015 as seen in Figure 5.14 below. These categories included of anti-social behaviour fixed penalty notices ('ASBFPNS') which is a fine (£50) issued by the police and fiscal fines (between £50 and £300) issued by the procurator fiscal as an alternative to prosecution (Scottish Government, 2016). These were included for analysis as they are front-end measures used on young adults in Scotland and therefore important to examine, even if the data are limited. The rate of ASBFPNS in Figure 5.14 has substantially reduced since 2009 from a rate of 17 to a rate of 5 in 2015 per 1,000 of the under 21 population. This could be explained by the decline in political attention to anti-social behaviour following the SNP coming into power in 2007. Whilst the fiscal fine rate was more consistent over the years the overall trend has been a decline from 2009 from 5.2 to a rate of 2.7 in 2015 per 1,000 under 21 population. The adult trends also reduced between 2009 (rate

[30] Including: antisocial behaviour fixed penalty notice, formal police warning, restorative justice warning, early and effective intervention and other warnings (including recorded police warnings, warning letters (police/children's reporter, prostitute warnings, verbal warning and community warning notices).
[31] See note 29. Data were only available on under 21 year olds.

of 650) and 2015 (rate of 614) there was also a substantial increase between 2010 and 2013 which did not occur in the young adult sector.

As discussed earlier in the chapter, the Whole System Approach ('WSA') was rolled out nationally in 2011 and is generally applied up to the age of 18. In West Lothian, however, where agencies are co-located and where possible, young people up to the age of 21 are prioritised for this approach (Dyer and Carter, 2017). The Procurator Fiscal notifies the Youth Justice Manager of any diversions being considered and appropriate assessments are carried out by support workers. Dyer and Carter (2017:13) found that substantially more young people aged between 18 and 20 were being diverted through this approach compared to neighbouring authorities who would utilise police disposals or fiscal fines discussed above. Evidence has shown that for the majority of young people community-based services are more effective in reducing offending behaviour (Scottish Government, 2011).

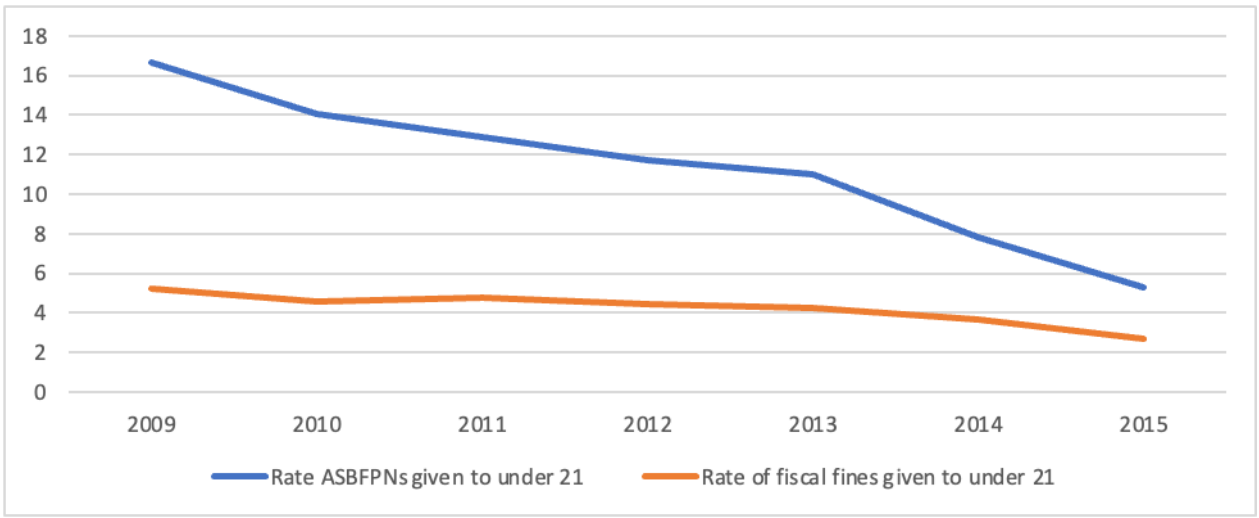

Figure 5.14 Rate of Anti-social behaviour fixed penalty notices (ASBFPNS) given to under 21 year olds and rate of fiscal fines for under 21 year olds per 1,000 of the under 21 national population, 2009 - 2015

Sources: Scottish Office Statistical Bulletin, Criminal Proceedings in Scottish Courts 2008-2015

Youth Justice Sector

The WSA has two main work stream activities relating to diversion: Early and Effective Intervention ('EEI') and Diversion from Prosecution (Murray et al., 2015). EEI was made available for 16 and 17 year olds in September 2013 and aims to reduce referrals to Children Reporters via the PRS to ensure that only children who are likely to have compulsory measures imposed are referred to the CHS (Murray et al., 2015). It works using a pre-referral screening process ('PRS') which diverts young people from the formal criminal justice system. The PRS is triggered by a police charge for those under 17 years old who are referred to the Police Juvenile Liaison staff risk assessment team who considers if the case is suitable for early diversion. If a case is suitable for early diversion it is discussed at multi-agency meetings with multiple partners (Education, Young People's Services etc.) and a range of outcomes are available to the partner agencies e.g. police warning letters, diversion to education etc. It was found by Murray et al. (2015) that under 16 year olds are more likely to be diverted using PRS than 16 or 17 year olds. If the case is not suitable a joint referral is made to the CHS. In line with the adult and youth adult sectors, Diversion from Prosecution is a formal decision made by the Prosecutor Fiscal and for young people in minor cases the Fiscal may decide to refer the case to criminal justice social work rather than through the courts or offering direct fiscal measures (Murray et al., 2015).

As can be seen from Figure 5.15 the rate of offence referrals received by the CHS has substantially reduced from a rate of 32 in 2003 to a steady rate of 7 for 2013, 2014 and 2015 per 1,000 of the under 16 population. It is not clear if this is due to a reduction in offending or shift in use of other different disposals (Murray et al., 2015), particularly since it began prior to 2011 and the WSA being introduced. Coinciding with the fall in offence referrals to the CHS from 2003 to 2015, the number of Children Hearings of young people being held has been more consistent rising to a rate of 44 in 2009 and falling slightly to 36 in 2015. The consistent rate in respect of the number of Children Hearings being held supports the hypothesis that those children referred to the CHS are at the more serious end of the spectrum who more than likely need compulsory measures of care (Murray et al., 2015).

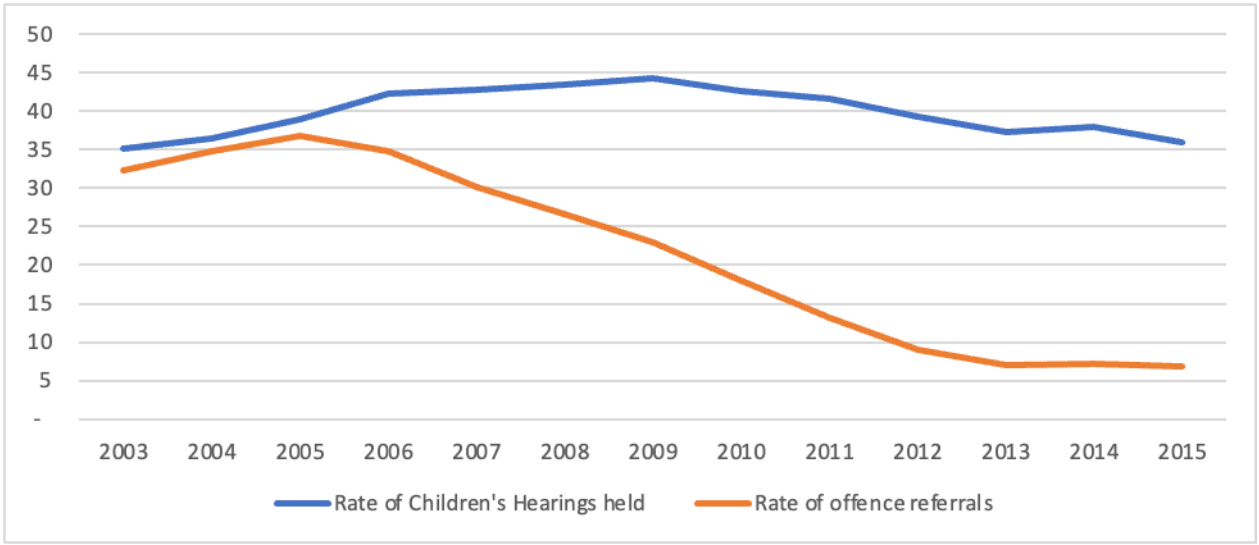

Figure 5.15 Rate of offence referrals to the Children's Hearing System and rate of Children Hearings held per 1,000 under 16 population, 2003-2015

Sources: Scottish Children's Reporter Administration Online Statistical Dashboard, various years (https://www.scra.gov.uk/stats/?=undefined&areas%5B%5D=Scotland&measures%5B%5D=Children%20referred); Scottish Children's Reporter Administration Online Statistics Reports, various years.

As stated above if the young person is not eligible for the PRS they would be referred to a Children's Reporter who investigate and decide whether to refer the young person to a Hearing if there is a need for a compulsory measures of intervention to address the child's behaviour and/or to protect the child or grounds exist as stated in the Children's Hearings (Scotland) Act 2011 (SCRA, 2015). The Reporter can also make other decisions if they decide the young person should not be referred to a Hearing. There are some limited data available detailing the specific decisions that Reporters make between 2011 and 2015 and as seen from Figure 5.16 the overall number of decisions has slightly decreased since 2011 but remained consistent and the majority of the Reporter's decisions is for no hearing to take place but other interventions instead. As can be seen, in Figure 5.17 the overwhelming reason why a Reporter decides for no hearing to take place is because there are already measures in place, indicating the child has been before the Reporter/CHS before.

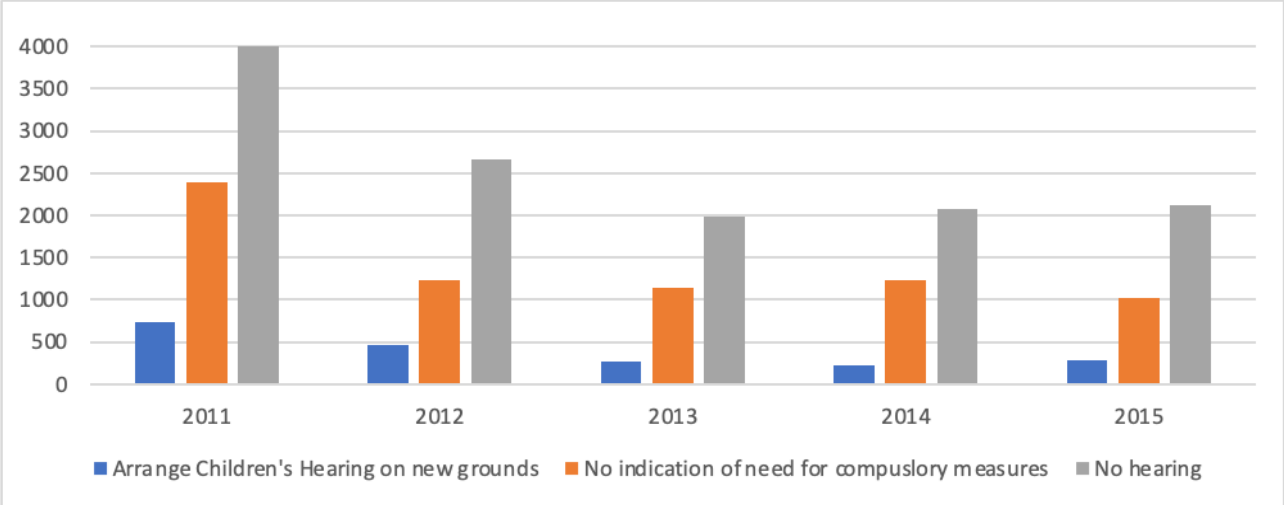

Figure 5.16 Reporter Decisions at Children's Hearings in Scotland 2011-2015

Sources: Scottish Children's Reporter Administration Online Statistical Dashboard, various years (https://www.scra.gov.uk/stats/?=undefined&areas%5B%5D=Scotland&measures%5B%5D=Children%20referred); Scottish Children's Reporter Administration Online Statistics Reports, various years.

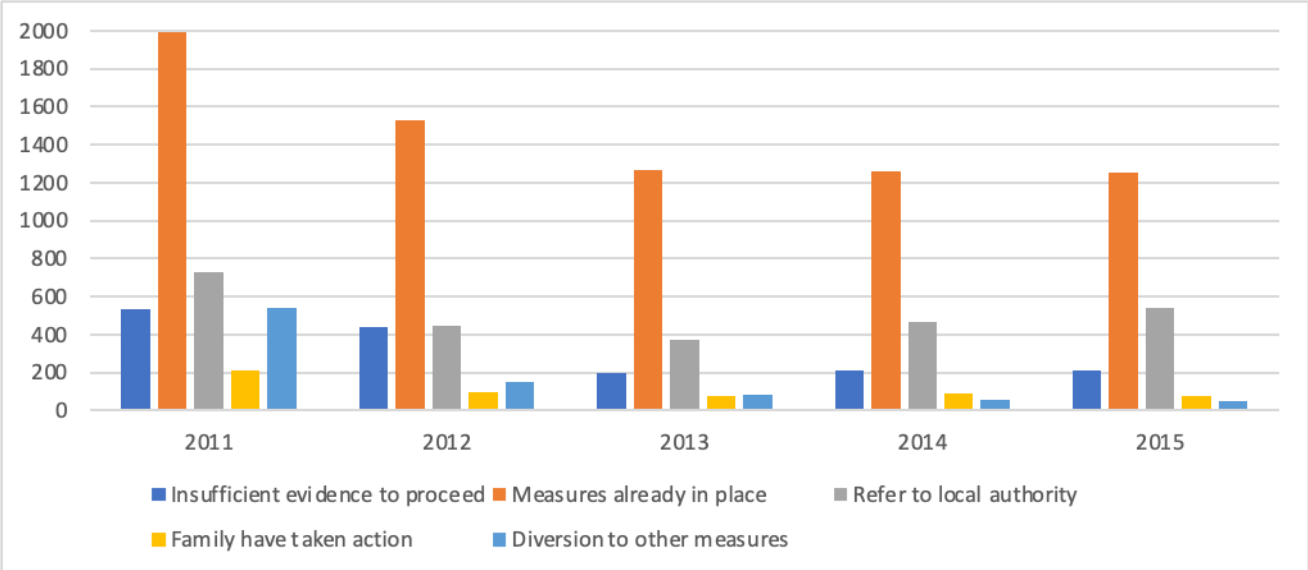

Figure 5.17 Breakdown of 'No Hearing' Reporter Decision at Children's Hearings in Scotland 2011-2015

Sources: Scottish Children's Reporter Administration Online Statistical Dashboard, various years (https://www.scra.gov.uk/stats/?=undefined&areas%5B%5D=Scotland&meas

ures%5B%5D=Children%20referred) Scottish Children's Reporter Administration Online Statistics Reports, various years.

Index E: Prison/detention Conditions

Adult Criminal Justice Sector

In relation to prison conditions in Scotland the variables that will be examined are respect for human rights, size of institutions, overcrowding, and rehabilitative/other programmes in prisons. In relation to overcrowding, at the time of the CPT's visit in 2012, the Scottish Prison Service (the 'SPS') was catering for 30 per cent more prisoners than when the CPT visited last in 2003 and the prison estate was still running at an occupancy level of 104 per cent (CPT, 2014). To cope with this expansion, the CPT acknowledged that the Scottish authorities had invested in building new prison establishments, expanded several existing prisons and adopted a number of initiatives such as increased investment in the community (CPT, 2014). Despite this, it was acknowledged by the CPT that relations between prisoners and staff were positive, that levels of prisoner-on-prisoner assaults and assaults on staff had fallen to their lowest levels in recent years, and that the Scottish Government had adopted a number of initiatives to curb the rising prison population (CPT, 2014).

One major change in prison conditions in recent years has been the ending of the practice of 'slopping out' since 2009. This can be seen as a progressive advancement, with jurisdictions like Ireland, discussed above, not successful in ending this practice to date. In its two previous visits to Scotland, the CPT severely criticised the lack of in-cell sanitation and consequent practice of 'slopping out' (CPT, 1996; 2005). The practices persisted until the *Napier* judgments[32] that found the conditions experienced by Robert Napier whilst on remand in Barlinnie Prison in 2001 breached the European Convention on Human Rights and damages were awarded. By 31 March 2009, approximately 8,250 similar claims were submitted by prisoners (Tombs and Piacentini, 2010). As stated, the practice of 'slopping out' does not exist in Scotland since 2009 with all prisoners having access to toilet facilities (SPS, 2009) and indeed the CPT (2014) commented there was an acceptable state of hygiene in the prisons it visited in 2012.

[32] *Napier v Scottish Minister* [2005] SC 229 OH.

Traditionally, Scottish prisons have shown a commitment to rehabilitation and are known for their efforts having developed 'some of the most progressive prison regimes to be found elsewhere' (Young, 1997: 116). In order to reduce re-offending the SPS sought to lead offender management services for prisoners and aim to make rehabilitation as one of its main aims (Tombs and Piacentini, 2010). There are examples in Scottish prisons of purposeful activities including excellent facilities, work programmes, training and education, however, the HMIPS (2014) has reported they are often not sufficient to meet the needs of the prison population and has repeatedly recommended these activities are increased. Unfortunately, due to the overcrowding in prisons, it seriously hampers any rehabilitative efforts and in some prisons there are not enough places available for activities and in others they are not used to their maximum effect (HMIPS, 2014). This is particularly the case for female offenders, whose number has doubled over a ten year period from 2000 to 2010 (Commission on Women Offenders, 2012). At the time of the CPT's visit in 2012, some women prisoners were transferred to female-only wings in other prisons to reduce capacity. These other prisons, however, did not have the infrastructure to run relevant female offender programmes and 40 per cent of women offenders were not engaged in any purposeful activity (CPT, 2014). In addition, there is very limited availability to training/rehabilitative programmes to prisoners serving less than six months in prison (Reform Scotland, 2017). Those who are given short sentences in Scotland have a high likelihood of reoffending (Reform Scotland, 2017) and the lack of access to rehabilitative programmes could explain this. For prisoners held in segregation units for preventative purposes, the CPT commented that there was no individual regime in place for prisoners who were confined to their cells for 22 or 23 hours a day with minimal contact with staff and no opportunities to interact with other prisoners (CPT, 2014).

Recent positive aspects include the increased emphasis on family contact and development of family centres or help hubs and increased links with third sector and partner organisations attending prisons. A positive note is also the small size of the Scotland prison institutions. Recently in the CPT's fourth periodic visit to Scotland in 2018 it acknowledged that the Scottish Government had embarked on an agenda of reform since its previous 2012 visit, particularly in respect of women prisoners and young offenders (CPT, 2019). In addition, at the establishments visited in 2018 the CPT acknowledged the vast majority of prisoners stated they were treated correctly by prison officers and the delegation received no allegations of deliberate ill-treatment was received of prisoners by staff. Difficulties and concerns remain present however such as the overcrowding of prisoners, growth in the inter-

prisoner violence and inmate-on-staff violence since the 2012 visit and issues with segregation units and impacted regimes (CPT, 2019).

Young Adults in the criminal justice system

As discussed in the previous chapter, it has been acknowledged that the approaches taken in the youth justice system have a greater chance of being effective for young adults than adult measures (Council of Europe, 2009; Farrington et al., 2012; Transition to Adulthood Alliance, 2009). In Scotland there are currently five Young Offenders Institutions ('YOI'), geographically dispersed and often located within an adult prison. There is not significant information on young adults in Scotland due to the lack of focus on this particular cohort, however, the existence of the YOIs allow limited examination into the conditions for young offenders up to the age of 21. While Scotland on the one hand should be commended for the existence of YOIs providing separation from older adult offenders, there are no sentencing rules for young adults implying mitigation, the institutions also hold 16 and 17 year olds, and the measures only extend to 21 (Pruin and Dünkel, 2015). In recent years, as discussed earlier in Index A, the young offender population has reduced although it was acknowledged that this population has a greater concentration of complex needs, including challenging behaviours and extensive histories of mental health issues and trauma and abuse (HMIPS, 2016). The CPT (2014) commented on its visit in 2012 that in respect of activities, young offenders were all involved in educational classes and/or work, were offered recreation each evening and had purposeful activity each day outside of their cell. It was noted, however, that the young people did complain about the lack of available activities especially during the weekend when no purposeful activities were provided. As commented by the CPT, young people have a particular need for physical activity and intellectual stimulation, therefore, being confined to their cells is not conducive to their wellbeing (CPT, 2014). On a positive note, the HMIPS (2014) commended work that has recently gone into the development of a young people in custody strategy with considerable progress made on creating a learning environment seen in the HMP and YOI Polmont in 2014 and the HMIPS (2014) recommended the implementation of this strategy to the other YOIs.

Youth Justice Sector

Examining detention conditions for young people in Scotland is complex due to the differing treatment of 16 and 17 year olds and the care element of the CHS. In accordance with the United Nations Convention on the Rights of the Child ('UNCRC') children are defined as persons under the age of 18 years and when in conflict with the law should be dealt with in the youth justice system. In Scotland, whilst child offenders up to the age of 18 can be dealt with in the CHS, 16 and 17 year olds are still more generally processed through the courts as adults as the police tend to refer these offenders to the Procurator Fiscal (Burman et al, 2008), resulting in the mixing of child and adult prisoners. Critically, Dyer (2016) argues the majority of these children could have been dealt with appropriately within the CHS and they should be in secure care accommodation rather than a YOI (Gough, 2016; Scottish Government, 2011). Secure care establishments are based on different values to a YOI and provide more relationship-based and therapeutic support together with child-care centred staff and having a more appropriate setting (Gough, 2016; Nolan et al., 2018). These establishments are primarily used to detain children if they pose a risk to themselves or a risk is posed on them (Lightowler, 2020). Some issues have been raised in respect of compliance with rights in secure care with measures designed to 'protect' the children not actually prioritising the child's participation or best interests (Haydon, 2018; Lightowler, 2020). It has also been argued the criteria for secure care are not well defined or stringent and the use of secure care is not consistent across Scotland with some geographical areas showing dramatic increases and other areas showing dramatic declines (Barry, 2011). What is striking, however, is that more young people continue to serve periods of remand and sentence in a YOI than in secure care (Gough, 2016; Nolan et al., 2018).

Whilst the YOI population, as discussed earlier in the chapter, is falling, the number of under 18 year olds imprisoned is unusually high compared with European neighbours (Scottish Prisons Commission, 2008; Nolen et al., 2018). Moreover, not only are these young offenders out of the remit of the youth justice system, they are in institutions with older offenders. Those under the age of 21 in Scotland, whatever the sentence, are the most likely to be reconvicted; 54 per cent within two years in contrast to those aged over 30 having a reconviction rate of 34 per cent (Scottish Prisons Commission, 2008). Several recommendations have been made concerning this cohort, including detaining 16 and 17 year olds in secure youth facilities, separate from older offenders and those under 16 (Scottish Prisons Commission, 2008) and remitting all under 18 year olds to the CHS and secure care

(Dyer, 2016; Nolan et al., 2018), and only in 2022 was some progress made on this issue. The Scottish Government announced its intention to end the placement of all under 18 year olds in YOIs which will be contained in a Children's Care and Justice Bill (Scottish Government, 2022). However until that time it remains that secure care accommodation, despite some issues, does accommodate young people's needs and has the necessary regimes in place for young people, but 16 and 17 year olds placed in YOIs are particularly disadvantaged from an international human rights perspective.

Index F: Human rights compliance

The following variables will be examined in respect of human rights for both the adult and young adult justice sectors: age of criminal responsibility, modes of the criminal trial in compliance with Human Rights Instruments in respect of youth justice specifically the Beijing Rules (1985), the Havana Rules (1990) and UNCRC (including detention as a last resort and for the shortest period of time).

Young Adults in the criminal justice system

As discussed above, the principles outlined by the UNCRC and the Beijing Rules have not been applied to young adults in Scotland particularly the principles of detention as a last resort and for the shortest period of time. In respect of modes of trial there are no specific rules or guidance for young adults. There have been some recent advancements in relation to sentencing with the Scottish Sentencing Council developing sentencing young people guidelines for the courts (Scottish Sentencing Council, 2020; 2021). The Scottish Sentencing Council acknowledged published research stating that brains do not fully mature until at least the age of 25 and recommended that judicial decision-making should take this into account. The sentencing guidelines apply to those under the age of 25 at the date of their guilty plea or where a finding of guilt is made against them. The guideline sets out various factors for the courts to take into account when sentencing a young person such as maturity and rehabilitation. They also state a custodial sentence should only be imposed on a young person when no other sentence is appropriate (Scottish Sentencing Council, 2021). The guidelines were approved by the High Court of Justiciary and came into force in all Scottish Courts on

the 26th of January 2022 (ibid). This is a positive move in the right direction for young adults in the criminal justice system in Scotland.

Youth Justice Sector

Young justice in Scotland has and continues to be a 'locus of intense reform' (Armstrong and Munro, 2019: 141) and to display tensions between welfare, punishment and public protection (Asquith and Doherty, 1999). There is much confusion in Scottish policy and practice about the legal definitions of 'children', particularly concerning 16 and 17 year olds, and there needs to be greater compliance with the UNCRC definition of children as all under the age to 18 years old (Lightowler, 2020). Up until recently Scotland's age of criminal responsibility was eight, which placed it significantly out of line with European neighbours and was criticised by the UN Committee which consistently argued that any minimum set below the age of 12 would 'not be acceptable' (UNCRC, 2007: 8). The age of prosecution for children in Scotland changed from 8 to 12 in the Criminal Justice and Licencing (Scotland) Act 2010, however, children between 8 and 12 could still be held to have the mental capacity to commit a crime. Finally, with the enactment of the Age of Criminal Responsibility (Scotland) Act 2019 the age of criminal responsibility in Scotland was raised to 12. It should be pointed out, however, that Scotland is still out of line with emergent children's rights thinking and other European jurisdictions where the minimum age of criminal responsibility is more commonly 14 years and above (Goldson, 2013).

There have been significant concerns raised in respect of the transition from the CHS to the adult criminal justice system in Scotland, which has been discussed earlier in this chapter. Young people who commit an offence at the age of 16 are generally abruptly transitioned from the CHS to the adult courts. It was noted in 'Scotland's Choice' (Scottish Prisons Commission, 2008: 14) that in 2008 the Scottish prison system held over 200 under 18 year olds in prison, which is 40 per cent of the number held in Italy, which has ten times the population of Scotland. Whilst there has been a fall in the number of imprisoned young people in recent years this also occurred in England and Wales (Armstrong and Munro, 2019) and Scotland still has a sizable number of young people in YOIs (Nolan et al, 2018). Whilst the WSA (which can deal with those under 18) has been commended on its policy intentions it has been found to only being partly achieved in practice (Nolan et al., 2018). Academics

have raised a number of issues including lack of understanding, information and support reported by young people, failing to maximise the use of the CHS rather than the adult court system, and the use of custody rather than secure care (Nolen et al., 2018). This is illustrated by the fact that 37 per cent of children up to the age of 18 who came into contact with the 'formal system' for their offending behaviour went to Court in 2017/2018 (Lightowler, 2020).

For young people under the age of 16 in Scotland the use of custody is used as a last resort with very low numbers in secure care and young people under this age are separated from adults. A number of concerns, however, have been raised about the CHS including delays and gaps in provisions; absence of a systematic review; the recruiting and retaining of panel members; and their lack of social diversity (Barry, 2011; Croall, 2006). In addition, in some areas there has been a shortage of qualified social workers leading to no care or action plans being put in place for young people (Croall, 2006).Young people themselves have commented that they feel they are not always heard, panels can be traumatic, judgmental and disrespectful and some young people indicated that they would prefer to be dealt with by the courts because at least their 'sentence' has an end date (Vaswani and Gillon, 2018). There has been concern raised that the CHS is reserved for non-offenders and more offending children are referred to the courts (Croall, 2005). Early criminalisation measures in place in Scotland, for example intensive supervision or antisocial behaviour orders, also raise concerns about the up-tariffing of young people in the CHS and criminal justice system which can occur as a result of a young person's failure to comply with conditions imposed on community based orders rather than as a result of serious offending (Morgan, 2009; McAra and McVie, 2007; Barry, 2011). Akin to community-based disposals in the adult criminal justice system is compulsory supervision within the CHS which can escalate a young person's journey though the CHS if requirements are breached (Barry, 2011).

5.4 Conclusion

Scotland has been known for using imprisonment heavily since the 1970s, compared to other European jurisdictions, with a seemingly contradictory welfarist approach to youth offending: a country of both 'penal harshness and innovation' (Young, 1997: 116). The above analysis of the Scottish criminal justice sectors over this period largely confirms this impression: on the surface there appears to have been bifurcating trends between the adult and youth systems

over the 25 year period with the adult trajectory broadly going upwards in a more punitive manner and the young adult and under 18 trajectory broadly going down, in the opposite direction, towards tolerance. It is important to note, however, that these ostensible divergent trends cloak serious issues in the youth justice system. Young people's experience of Scottish youth justice is quite punitive when considering policing practices, human rights issues (detention with adults) and the treatment of 16 and 17 year olds. In the absence of adequate provision for young adults there is also a neglect of international evidence arguing for a distinct approach to this cohort.

5.5 Postscript

As discussed above, Scotland's sentencing of young people guidelines came into force in early 2022 (Scottish Sentencing Council, 2021). These guidelines apply to the sentencing of any young person who is under the age of 25 at the date of their guilty plea or when a finding of guilt has been made against them. The guidelines, in recognition of adolescent brain development, require the courts to consider rehabilitation over imprisonment and take an 'individualistic approach' to sentencing. Assessing the maturity of the young person is also emphasised to identify the most appropriate sentencing, and several relevant factors can be considered by the courts including adverse childhood experiences, trauma, living environment, physical and mental health, addiction and if a proposed sentence is likely to be effectively implemented. This is a positive development in Scottish criminal justice and for young adult offenders as outlined above and is indeed reflective of General Comment No. 24 (UNCRC, 2019).

As these guidelines came into force recently in 2022, there has not been a chance yet to examine how they are operating in practice. A notable exception in this regard is a recent case in Scotland which provoked public outcry in relation to these sentencing guidelines. Sean Hogg was a 21 year old who was found guilty in 2023 of raping a 13 year girl. Mr Hogg was given a 270 hour community payback order, was placed under supervision and was put on the sex offender register for three years. In deciding to not give Mr Hogg a custodial sentence, Judge Lord Lake referred to the sentencing guidelines and told him 'You are a first offender with no previous history of prison - you are 21 and were 17 at the time. Prison does not lead me to believe this will contribute to your rehabilitation' (Carrick, 2023; Morrison, 2023). This decision caused public outcry, both in Scotland and in England and Wales with

the Scottish Sentencing Council receiving criticism over the sentencing guidelines (ibid). The Council defended the guidelines in a statement, referring to the fact they are based on independent evidence and the guidelines leave the full range of sentencing options open to a court (Morrison, 2023). The Council stated that they are developing guidelines of sentencing rape offences, in order to alleviate public concern raised as a result of this case (ibid). This does show the challenges that come with the implementation of progressive practices such as sentencing guidelines based on neurological research. Time will tell as to the practical impact and implementation of these guidelines, but such a strong public reaction at this stage may call for widened dissemination of the rationale and research that these guidelines are based on.

Chapter 6 – Cross-sectoral punitiveness in The Netherlands 1990-2015

6.1 Introduction

From the exemplary penal-welfare approach of the 1950s, to the period described as 'the end of tolerance' of the 1980s, and the subsequent dramatic drop in the prison population between 2005 and 2016, the Netherlands has been characterized as an 'exceptionalist' country (Downes and van Swaaningen, 2007; Tak, 2008; Dünkel, 2017: 634). The following chapter aims to provide an extensive review of criminal law and policy within the adult and youth criminal justice systems of the Netherlands for the period from 1990 to 2015. Similar to the previous two chapters, this chapter is divided into two parts: firstly, it will provide a chronological review of law and policy in both sectors over the twenty-five year period 1990-2015, and secondly, it will assess cross-sectoral punitiveness according to the five/six indices as outlined in Chapter Three.

6.2 Punitiveness in The Netherlands 1990-2015

6.2.1 Adult Criminal Justice in The Netherlands 1990-2015

The Netherlands has traditionally 'held a symbolic position as an example of penal enlightenment' (Cavadino and Dignan, 2006: 113) and its criminal justice system has been associated by David Downes (1988) with Dutch tolerance. No sooner had Downes's famous research, *Contrasts in Tolerance*, been published, however, than times changed in the late 1980s and the Dutch prison population went on an upward trajectory reaching its peak in 2005. Subsequently, the Dutch prison population has decreased by 44 per cent between 2005 and 2015 appearing to have 'reversed the punitive turn' (van Swaaningen, 2013: 339). Reflecting the significance of these periods in the Netherlands, the following section is sub-divided into two time periods namely: 1990-2005 and 2005-2015.

A. 1990 to 2005: 'A Beacon of Tolerance Dimmed'

From 1947 to the mid-1980s, Dutch penal policy was the best example of what Garland (1985) referred to as 'penal -welfarism' and went through a period of 'decarceration' (Downes and van Swaaningen, 2007) seen in the prison population gradually reducing to the extremely low rate of 18 per 100,000 of the national population in 1973. The period of decarceration started with the broad reformist programme set out in the Fick Committee guidelines in 1947 followed by the establishment of the Utrecht School of the 1950s (Downes, 2007). The Utrecht School consisted of a diverse group of criminal lawyers, criminologists and psychiatrists who 'set the standards for the penal climate in the decades to follow' (de Haan, 1990 in Downes and van Swaaningen, 2007: 39). They were joined in the 1970s and 1980s by a strong prisoners' rights movement and the character of imprisonment in the Netherlands went from largely cell-bound austere system to one that was rated as the finest in Europe (Downes, 2007; Downes and van Swaaningen, 2007; van Swaaningen, 2013).

The period between 1975 and 1985 proved to be a decisive phase of transition from 'a liberal penal climate favouring decarceration to a more managerial penal climate oriented towards the expansion of imprisonment' i.e. from 'penal-welfarism' to a 'culture of control' (Downes and van Swaaningen, 2007: 43; Downes, 2007). The Netherlands was seen as a 'beacon of tolerance dimmed' with the overthrowing of the older liberal elites and their philosophy of punishment which was due to a number of factors including an openness to the influences of the US and England and Wales and the rising crime rates from 4,500 in 1980 to just under 7,000 in 1985, (Downes, 2007: 109; Downes and van Swaaningen, 2007). Despite crime rates stabilising in the 1990s, the prison population rate increased from a rate of 18 in 1973 to 134 in 2005 per 100,000 national population, one of the steepest increases in the world (Downes, 2007; van Swaaningen, 2013). At the same time there was an expansion of non-custodial sentences, very intrusive 'preventative' measures and 14 new prisons were built between 1992 and 1994 including an 'Extra Safe Institution' or supermax (Tak, 2003; uit Beijerse and van Swaaningen, 2006; van Swaaningen, 2013). Nelken (2004) argues the Netherlands felt entitled to build more prisons after the first publication of comparative European prison rates in the 1980s, despite the opposite happening in Finland, where prison building was cut back. A number of complex factors operated to sustain this 'recarceration' into the late 1980s and beyond including: an increasingly punitive attitude within the police, prosecution, judiciary and prisons services; extensive use of longer sentences; fears and anxieties about ethnic-

minority, organised and drug-related crime; emergence of multicultural problems; more serious and violent crime; the growing importance of victims; and the reinvention of harsh punishment as the only feasible means of social defence narrated by the mass media and certain politicians (Grapendaal et al., 1997; Pakes, 2004; Downes, 2007; van Swaaningen, 2013).

Policymaking in the Netherlands was traditionally not crisis-driven and party politics played little part in the shifting of Dutch penal attitudes (Adler, 1983; Pakes, 2004; Cavadino and Dignan, 2006). This changed in the late 1990s, with the populist (or extreme) right focussing strongly on the threat that 'foreigners' and Islamic terrorists posed to Dutch Society (van Swaaningen, 2013). This was particularly evident following the Twin Towers attack in 2001, when the level of unease increased in the Netherlands, which in turn legitimised focussing on ethnic minorities and crime, particularly the Muslim population (Pakes, 2004). In the May 2002 elections, crime and security were the principal issues and its key figure was right-wing populist political leader Pim Fortuyn who was characterised as 'maverick', 'flamboyant', 'confrontational' and 'right-wing' (Pakes, 2004). Fortuyn led his own party, List Pim Fortuyn, with an anti-immigration campaign and advocated for hard-line policies on law and order and immigration (Cavadino and Dignan, 2006). Fortuyn was assassinated two weeks before the elections, sending shockwaves throughout the nation (Pakes, 2004). At the general election, List Pim Fortuyn entered a short-lived coalition with the Christian Democrats which, following its collapse, led to new general elections in 2003 which the Christian Democrats and Labour won (Pakes, 2004). The 'Pim Fortuyn phenomenon', however, influenced the hardening of policies of mainstream parties relating to immigration issues (Pakes, 2004; Cavadino and Dignan, 2006). Only the next year, the Netherlands 'experienced its most serious intercommunal unrest of modern times' with the murder of film director Theo van Gogh who had made a film about the allegedly misogynous nature of Islam (ibid: 121; Downes and van Swaaningen, 2007).

These events contributed to a social climate of fear and moral panic and led to the popular impression of a 'country in despair' and a rise of a 'politics of discontent' (Pakes, 2004: 284, 285). The number of parliamentary debates on crime and insecurity rose from 15 in 1995 to almost 60 in 2003 (Downes and van Swaaningen, 2007). In 2002, the Government released a report 'To a Safer Society' which had the 'classic makings of Garland's crime complex' (Pakes, 2004: 291) with 105 proposals on reducing crime by 20 per cent by 2006 including: an extra 5,000 prison places, increased capacity to detect illegal immigrants, introduction of

basic cells and two in one cell, increased use of electronic detention and increasing numbers of police, police powers, prosecutors, judges, and sentencing powers and penalties (Ministry of Justice, 2002; Pakes, 2004). What is quite striking is that there appeared to be very little opposition to this punitive approach with nearly all political parties agreeing that the country was too lenient and needed more obvious sanctions (van Swaaningen, 2013). There was a lack of reasons, however, given in policy documents for the continuous penal expansion with only two referencing the alleged public outcry over penal leniency and rising crime rates (ibid). This is despite the stabilisation of crime rates in the 1990s and their decline from 2002.

B. 2005 to 2015: 'Reversing the punitive turn'

The prison population in the Netherlands experienced a real and sustained dramatic drop of 44 per cent over the ten year period between 2005 and 2016 (Boone et al., 2020). During this period, this rapid yet sustained reduction in the prison population had no parallel in the Western World with the closing of eight prisons and the renting of a prison to Belgium (van Swaaningen, 2013; Boone et al., 2020). As stated by van Swaaningen (2013: 349) 'no penal expert had predicted this' as there was no change in the 'socio-cultural fabric' of the country, no re-emergence of reductionist politics and no clear decriminalisation or other policy initiative that would have had a depenalising effect (Boone et al., 2020). The most often heard explanation for the dramatic reduction in imprisonment rates is the decline in crime rates as less serious offences were coming before the courts from 2005 onwards (Van Dijk, 2011). Given, however, that crime rates did not correlate with the expansion of the prison system van Swaaningen (2013) questions how they could determine a decrease. Further, in other European countries crime rates were falling, yet they did not experience a decrease in imprisonment rates (Boone et al., 2020: 14). Other cited reasons for the decline are the increase in the use of non-custodial measures and electronic monitoring and several changes in the processing of cases prior the court stage (van Swaaningen, 2013). In 2005, the 'prosecutorial settlement' (*Wet OM-afdoening*) was introduced which allows the prosecutor to settle the case and impose non-custodial punishments such as a fine or community sentence (van Swaaningen, 2013; Boone et al., 2020). In addition, prosecutors can waive a minor case and the number of conditional waivers increased by 77 per cent and unconditional waivers by 55 per cent between 2005 and 2016 (ibid). A new form of case progressing was introduced in 2011 ('*zsm'* which is an abbreviation of Dutch meaning 'as soon as possible')

to allow for a rapid handling of cases aiming for them to be decided at the level of the prosecution service (Boone et al., 2020). Thus, the number of cases being sent to court by the prosecutor reduced by 31 per cent between 2005 and 2016. Judges in addition played a central role as seen in the decrease in prison sentences given, the shortening of the average prison sentence length for most crimes, and the increase in acquittals by 37 per cent between 2005 and 2016. However, the average prison terms for serious offences such as rape and homicide did increase (Boone et al., 2020).

On a sociological level, van Swaaningen (2013) offers three further hypotheses. Firstly, there is a need to acknowledge too many prisons were built during the recarceration era. Whilst this may not offer an explanation as to why the imprisonment rates reduced it 'reveals the (costly) belief in punitive solutions' and perhaps explains why so many prisons are now closing or half-empty (ibid: 352). This acknowledgement also indicates an appreciation of the penal excesses in the 1990s prison building programme. Secondly, the judiciary are more open than prosecutors and politicians to expert critiques of punitiveness. Members of the judiciary, including Supreme Court Judges and the President of the Council for the Administration of Justice, have been openly critical of the practice of bringing very minor offences to court which may have had an impact on sentencing. This openness would be very much in the spirit of the Utrecht tradition, which perhaps does not exist in Anglophone societies such as the US, United Kingdom and Australia. Thirdly, the reduced impact and attention given by media and politicians to law and order issues. The mediatisation of crime and insecurity emerged in the 1990s and continued particularly into the early 2000s as the murders of Pim Fortuyn and Theo van Gogh were sensationalised by the media. Since the banking and economic crisis of 2008 and 2011, however, critical journalism returned. In politics, and in the most recent electoral campaign, law and order are well below healthcare and the economy as key issues for the electorate and play a far less prominent role. The reduction of crime media and sensationalism in turn may decrease the pressure for a more punitive stance in the political sphere.

As stated by Goshe (2015: 42) however a 'punitive legacy' and persistent problems can remain following such a dramatic change in the criminal justice system and this is evident through the high percentage of offenders who receive a custodial sentence in the Netherlands and heavily ethnically biased imprisonment rates (Kalidien et al., 2011). Furthermore, successive governments have proposed punitive measures including: ASBOs, increasing the maximum length of imprisonment, and custodial consequences for breaching parole. In 2004,

under the ISD Act, a measure was introduced aimed at incarcerating habitual offenders similar to the three strikes rule in the US (Downes and van Swaaningen, 2007). Indeed, van Swaaningen (2013: 354) argues the decrease in the prison population may be due to the transformation of police and community safety into the main strategies of crime control. With the lasting policy shift from 'crime' to 'pre-crime' or 'anti-social behaviour' van Swaaningen (2013: 354) argues the Netherlands cannot be a true example of reversing the 'punitive turn'.

6.2.2 Youth Justice in The Netherlands 1990-2015

Youth justice in the Netherlands is a hybrid model as several punitive features are present, yet many other elements maintain the welfare tradition, particularly in practice (Junger-Tas, 2004). Since 1905 the key principles of youth justice in the Netherlands have been the protection and education of the juvenile offender, even throughout important changes in 1921 and 1965. However, these principles were abandoned in 1995 when the leading rationale of youth justice was changed to 'protect[ing] society' (Uit Beijerse and Van Swaaningen, 2006). From 2007, similar to other Western European Countries, the youth justice system experienced a crime drop and a reduction in juvenile detention (van der Laan et al., 2019; Schmidt et al., 2020). Recognising the significance of these events, the following section is sub-divided into three time periods namely: 1990-1995; 1995-2007; 2007-2015.

A. 1990 to 1995: Diversion and Discretion: The Welfare Tradition

A separate youth justice system (known as *Kinderwetten* or 'child laws') has operated in the Netherlands since the Children Acts in 1905 (Uit Beijerse and Van Swaaningen, 2006). Criminal and civil decisions are made by specialised youth judges (*kinderrechte*) in the Netherlands (normally these fields are separated) 'in the (best) interests of the child' with a view to rehabilitation and re-education (Junger-Tas, 2004; Weerman, 2007). A predominant characteristic of the Dutch youth justice system is the influence of the welfare tradition which is seen in police dealing informally with a large number of cases resulting in most juveniles being kept outside the system (Junger-Tas, 2004). The minimum age of criminal responsibility of 12 was introduced in 1965 however, on the other end, provisions allowing adult sanctions to be applied to 16 and 17 year olds were introduced in 1905 and further

clarified in 1965 (Uit Beijerse and Van Swaaningen, 2006; Weijers, et al., 2009). In practice, however, specialised youth judges rarely use this provision as they are very cautious (Uit Beijerse, 2016).

During the 1980s and 1990s a range of diversion programmes and alternative sanctions were introduced for juveniles including unpaid community service, compulsory courses, rehabilitation programmes and intensive probation supervision. These alternative sanctions are proposed by the prosecutor or ordered by the judge and became formal modes of punishment in the 1995 Youth Justice Law, discussed further below (Weerman, 2007). Most notably, the diversion programme HALT (an abbreviation of 'the alternative' and is a pun that indicates stopping offending) emerged in 1981 (Uit Beijerse and Van Swaaningen, 2006). Initially started to reduce vandalism in Rotterdam, HALT gradually developed into a crime prevention project adopted in other cities (Junger-Tas, 2004; Uit Beijerse and Van Swaaningen, 2006). HALT bureaus grew from 11 in 1987 to 64 in the early 1990s and its use as a sanction increased from 1,200 in 1987 to 21,000 in 1996. This expansion was due to HALT being available for diversion for a wider range of offences such as theft, fireworks, truancy and assault (ibid.) HALT sanctions are given by the police and involve a waiver of further prosecution if the juvenile pleads guilty and signs an agreement with their parents (Weerman, 2007). Since the 1990s, however, the mood in the youth justice system changed away from a welfare and protective system to a system that simultaneously allocated more individual rights to juveniles but became more repressive (Junger-Tas, 2004). In 1994 a government-appointed special Juvenile Crime Committee (Van Montfrans Committee) recommended 'early, swift and consistent intervention' leading to a series of organisational reforms (Uit Beijerse and Van Swaaningen, 2006: 67; Weerman, 2007), many of which were seen in the Juvenile Justice Act, 1995.

B. 1995 to 2007: From protection to incapacitation: The 'Punitive Turn'?

The introduction of the Juvenile Justice Act 1995 ('the 1995 Act') led to several changes that 'broke the strong bond between Juvenile Justice and Child Welfare that existed for 90 years' (Uit Beijerse, 2016: 3). The 1995 Act changed criminal procedure with the emphasis placed on the increased maturity of young people and reworked the youth justice system into the direction of the adult criminal justice system (Uit Beijerse and Van Swaaningen, 2006). It

further abolished several distinctive youth justice procedures, modified the sanctioning system and curtailed the power of youth judges (Junger-Tas, 2004; Uit Beijerse and Van Swaaningen, 2006). The 1995 Act merged two existing measures, coercive education and the treatment of mentally disturbed juvenile offenders, into one measure of 'placement in an institution for juveniles' or custodial treatment order (*PIJ-maatregel*) ('PIJ') (Uit Beijerse and Van Swaaningen, 2006; Liefaard, 2012). This Order could prolong the detention of a juvenile for up to seven years (Liefaard, 2012). HALT was originally informal and based on voluntary collaboration but was given statutory footing in the 1995 Act as an official formal interaction from the police (Junger-Tas, 2004). The maximum length of sentence was doubled for offenders between 12 and 15 years old to 12 months and quadrupled for 16 and 17 year olds to 2 years (Uit Beijerse and Van Swaaningen, 2006; van der Laan, 2010). For 16 and 17 year olds provisions which allowed for the application of adult law changed so that each criterion could be independently sufficient instead of cumulative (Uit Beijerse, 2016). The number of juveniles in detention centres more than tripled from 700 in 1990 to 2,400 in 2003, although half were there for a custodial treatment order ('PIJ') (Uit Beijerse and Van Swaaningen, 2006) and of the remaining offenders, 82 per cent are on remand.

The UN Convention on the Rights of the Child ('UNCRC') was ratified by the Netherlands in 1995, and due to the special rules regarding 16 and 17 year olds the Netherlands made an official reservation in relation to the provision that requires separate detention of children and adults. The UN Committee has since pressed the Dutch government to withdraw this restriction and it has been heavily criticised by Dutch youth criminal law experts (Uit Beijerse and Van Swaaningen, 2006; Uit Beijerse, 2016). At the other end of the spectrum, a worrying trend was the focus of politicians on children below the age of 12 shortly after the 1995 Act (Junger-Tas, 2004; Uit Beijerse and Van Swaaningen, 2006). Between May 1999 and December 2009 a project, modelled by HALT, called STOP was introduced for children aged 12 and under on an experimental basis that deals mainly with minor cases such as vandalism, minor theft, shoplifting and graffiti (Junger-Tas, 2004; de Heer-de Lange and Kalidien, 2010). In more serious cases, civil measures can be applied for offenders under 12 years old (Uit Beijerse and Van Swaaningen, 2006).

In 2002 two different policy plans on youth justice were published: one by the then ruling left-wing liberal government and the other by its right-wing successor. The first 2002 policy plan was entitled 'Persistent and Effective' and adopted a 'what works?' approach targeting juveniles at an early stage and monitoring the intervention (Uit Beijerse and Van

Swaaningen, 2006). Shortly afterwards, the new right-wing government took a harder tone towards juvenile delinquency with an increased focus on the swiftness of the reaction i.e. fast-tracking (van der Laan, 2010). The general principles of the 2002 Government Report 'Towards a Safer Society' for adult criminal justice, discussed above, were elaborated on in the 2003-2006 action programme on juvenile delinquency entitled *Jeugd Terecht* (an untranslatable pun meaning both 'youth recovered' and indicating juveniles are to be brought to justice) (Uit Beijerse and Van Swaaningen, 2006). This action plan was a strong advocate for the incapacitation of serious long-term offenders and its slogan was 'fast, efficient and cut to size' (Uit Beijerse and Van Swaaningen, 2006).

As a result of these measures, van der Laan (2010) comments that there is justification for the conclusion that juvenile delinquency became harsher. From the late 1980s to the mid-2000s there were increased police summonses issued, increased HALT referrals, fewer dismissed cases, prosecution of more cases, increases in court cases before the judge and increases in the number of juveniles in the juvenile rehabilitation service (van der Laan, 2010). This suggests the policy of minimal intervention came under pressure and the police and judicial approach became more punitive (ibid). However, it is important to note that the average length of juvenile sentences actually reduced, suggesting a restrained judicial response to juveniles in applying sanctions, and the increased potential to apply adult criminal law after the 1995 Act was not exploited on a larger scale (van der Laan, 2010). Further, Junger-Tas (2004: 343) argues there was a clear shift during this period from welfare thinking to thinking in terms of rights but 'the fundamental welfare orientation of Dutch juvenile justice has been preserved'. This supports the argument that a shift from penal-welfarism to a 'culture of control' cannot be wholly sustained for youth justice in the Netherlands (Uit Beijerse and Van Swaaningen, 2006).

C. 2007 to 2015: Renewed Interest in Youth Justice

Whilst the 'culture of control' may not have bitten as deep in the Dutch youth justice system, there is no doubt that there was a shift in approach towards juveniles from the 1990s. Stemming from the 1995 Act, it has been argued this shift was 'repressive' and is far from gone, however, there have been recent promising developments confronting it (Liefaard, 2012). Firstly, there have been several recent improvements in young offender institutions in

the Netherlands, including increased regulation (Weijers, 2018) and treatment programmes (*perspectiefplan*) such as the 'YOUTURN' programme which aims to gradually prepare the juveniles for their return to society (Liefaard, 2012; Smeets, 2014). Secondly, there has been increased attention to '"what works" and evidence-based programmes' (Liefaard, 2012) and a new non-custodial sanction 'Behaviour Influencing Measure' was introduced in 2008 (Uit Beijerse, 2016). This measure aims to influence the offender through individual therapy and behavioural interventions which indicates the youth justice system has returned somewhat to its original principles of focussing on the juvenile offender and their behaviour (Liefaard, 2012; Uit Beijerse, 2016). Thirdly, juvenile delinquency rates in the Netherlands have declined sharply since approximately 2007. The 2017 police statistics show a drop of around 65 per cent since 2007 in the number of juvenile suspects across all types of crimes (Schmidt et al., 2020) and the number of custodial/juvenile detention sentences imposed reduced by 77 per cent between 2007 and 2017 (Vink and van den Braak, 2018: 68). In 2007 there were 15 young offender institutions with 2,600 places but in 2016 there were only five young offender institutions with 500 places (Weijers, 2018). Fourthly, there has been 'concerted effort' in recent years by the Dutch judicial authorities to settle juvenile cases outside of court with the vast majority of youth justice cases being diverted and the majority of dispositions by the Youth Court resulting in non-custodial sanctions (Liefaard, 2012: 178; Weijers, 2018: 90). Further, since 2011 the prosecutor can establish the guilt of a defendant and order a sanction and thus plays a central role in youth justice in determining which cases are sent to youth court (Rap and Weijers, 2014). Fifthly, custodial sentences imposed on minors rarely exceed the maximum youth imprisonment sentence of two years and hardly ever exceed eight years imprisonment for very serious offences (Rap and Weijers, 2014).

In addition, building on legal provisions introduced in 1965, since 2009 there has been increased focus on young adult offenders aged 18 to 24 as a separate group within the criminal justice system due to their overrepresentation in the crime statistics and the emergence of recent scientific insights concerning adolescent brain development (Loeber et al., 2012; Uit Beijerse, 2016; Schmidt et al., 2020). The Adolescent Criminal Law Act ('*adolescentenstrafrecht'* and 'ACL') ('the 2014 Act') entered into force in April 2014 (van der Laan et al., 2019) and extended the current provisions that apply for 18 to 21 year olds to those up to the age of 23 (Schmidt et al., 2020). The intention is that public prosecutors play a central role in selecting cases that qualify for sentencing under the 2014 Act, based on forensic behavioural advice (van der Laan et al., 2019). The 2014 Act made some other amendments so that young adults can now be supervised by juvenile probation services and

16 and 17 year olds can be supervised by adult probation services. The maximum duration of juvenile detention was also raised from two to four years for 16 to 23 year olds held in juvenile institutions (Schmidt et al., 2020).

Since the implementation of the 2014 Act, however, the number of young adults being sentenced under youth justice law has only increased from one per cent in 2012 to five per cent in 2016. In practice there does not appear to be a uniform approach by the judiciary in applying this law due to lack of knowledge of the provision and ambiguity that surrounds the target group of the legislation (Schmidt et al., 2020). Many adult criminal law prosecutors are not specialised in youth criminal law and judges often follow the prosecutors' lead in this area (Mijnarends and Rensen, 2017). On a more positive note, the number of young adults being admitted to prisons has decreased significantly with the number of 18 and 19 year olds decreasing by 55 per cent and 20 to 22 year olds decreasing by 39 per cent between 2007 and 2017 (Schmidt et al., 2020). Further, the number of young adults (those over the age of 18) being admitted to juvenile institutions has increased from 51 per cent in 2007 to 71 per cent in 2017 with the vast majority of those being admitted for pre-trial detention (Schmidt et al., 2020).

6.2.3 Conclusion

Over the twenty-five year period in the Netherlands, both the adult and youth systems experienced substantial upheaval and change. It appears both penal-welfare justice systems shifted further in the direction of Garland's 'culture of control' from the 1980s onwards, although this 'culture of control' does not appear to have bitten as deep in relation to youth justice as seen in sentence length reductions. What stands out strongly in both justice systems is the significant discretionary roles of the prosecutor and judges and their approach to policy implementation in practice over the years. The youth justice system in the Netherlands has been 'riven with ambivalences' since the 1980s (Junger-Tas, 2004: 293). As stated by Junger-Tas (2004) changes that occur in the Dutch youth justice system are not independent of changes in the adult criminal justice system and since the 1990s, 'youth justice has increasingly come to resemble adult criminal justice' (Uit Beijerse and Van Swaaningen, 2006: 64). This raises the question of why this is the case in this jurisdiction but not in others? Further, while this convergence did occur between the two systems, the question remains why the youth system did not adapt or shift as deeply towards more punitive

measures as the adult system did in the 1990s? What is evident, however, is the coherent approach between the two systems meant that it was no coincidence that this jurisdiction saw the introduction of the ACL in 2014 for young adults up to the age of 23. The Netherlands has become a European pioneer in adopting this approach and is the only European country to provide a legal basis for extending the use of youth justice provisions to such a high age (Pruin and Dünkel, 2015; van der Laan et al., 2019).

6.3 Cross-sectoral Punitiveness in the Netherlands 1990-2015 by Index and Sector

The below discussion will examine cross-sectoral punitiveness in the three justice sectors in the Netherlands, namely, the adult, the young adult and the young adult criminal justice systems. As outlined in Chapter Three, the indices for this study are as follows: imprisonment/detention; sentencing; policing; alternative disposals; prison/detention conditions and human rights compliance (for the youth and youth adult justice sectors only) reflecting both the front and back-end of the criminal justice system. For the purposes of this case study, an adult is defined as aged 23 and above, a young adult as 18 to 23 and a young person as under the age of 18. The age limits were adjusted due to the availability and age breakdown of data in the Netherlands.

Index A: Imprisonment/Detention

Adult Criminal Justice Sector

The Netherlands ranks as having one of the lowest European prison populations in 2015 (Walmsley, 2018) with a rate of 53 per 100,000 population in 2015. As discussed earlier in the chapter, the prison population went on a strong upward trajectory from the late 1980s onwards (ibid; Pakes, 2000). As can be seen in Figure 6.1 below, it increased from a rate of 46 per 100,000 in 1990 to a rate of 134 in 2005. The imprisonment rate has gradually reduced over the years to a much lower rate of 53 per 100,000 in 2015. As can be seen in Figure 6.1, the 'corrected[33]'prison rate shows a less steep but still significant decline in the prison rate.

[33] There are two different sources of the prison population from 1990 to 2015 which resulted in a corrected and uncorrected rate. The uncorrected prison population rate reflects older Dutch figures provided to Space 1 data of the Council of Europe which included categories which were not included in the statistics provided by other

There has been much discussion in the literature on the complex explanations for both the increase and subsequent decrease of the Dutch prison population rate, some of which are discussed above, and the impact of sentencing and an increasingly punitive attitude in the police, prosecution, judiciary and prison services will be explored further below. As seen in Figure 6.2 both the remand and sentenced prison population rates increased from 1990 onwards, particularly the sentenced population, and both subsequently reduced since 2004. In particular, the population of those serving custodial sentences reduced more dramatically than the gradual decrease of the remand population but both are more aligned in 2015 with a remand detention population rate of 23 and a sentenced population rate of 22 per 100,000 of the national population.

Figure 6.1 Corrected prison population[34] rate per 100,000 population and uncorrected prisoner population rate in the Netherlands, 1990-2015.

Sources: Criminaliteit en rechtshandhaving 1999, 2004, 2006 and 2015.

European countries such as illegal immigrants, juveniles detained further to both civil and criminal law and mentally ill offenders in forensic psychiatric institutions (Boone et al., 2020).

[34] Population census as of 30th of September annually 1990-2015.

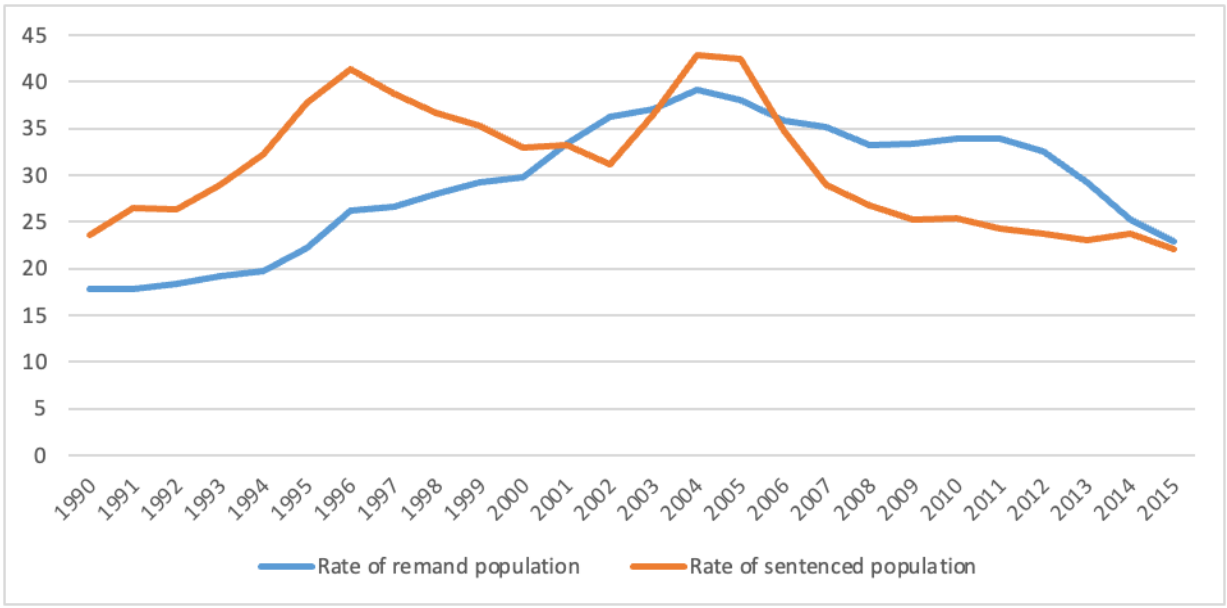

Figure 6.2 Remand[35] population rate and sentenced population rate[36] per 100,000 population in the Netherlands, 1990-2015[37].

Sources: Criminaliteit en rechtshandhaving 2007 and 2015.

In 2014 the Netherlands ranked as having one of the highest prison entry rates in Europe (Walmsley, 2018) at 246 per 100,000 national population. As can be seen in Figure 6.3, data were only available for the years 1991, 1993 to 2000 and 2002 to 2015. Like the imprisonment rate, the prison entry rate increased during the 1990s but peaked slightly earlier in 2000 at a rate of 309 per 100,000 population. The rate must have decreased at some point between 2000 and 2004 and started to rise again from a rate of 230 in 2004 to a rate of 273 in 2005 per 100,000 national population. Since 2005, the prison entry rate has slightly decreased to a rate of 227 per 100,000 national population in 2015. Whilst this is not as sharp and significant a decrease as seen in the prison population, it is still a decrease of 14 per cent. This difference between the prison population and prison entries indicates that a reduced sentence length may be the main driver of the trends as the sentenced prison population nearly halved from 2004 but the prison entry rate has not seen such a dramatic decrease.

[35] Remand refers to 'pre-trial detainees' i.e. those not serving a sentence.
[36] Those serving remand (pre-trial detention) and sentences of the total population census as of 30th of September annually 2004-2015.
[37] From 1990 to 2003 these figures are based on uncorrected population figures and from 2004 to 2015 are based on corrected population.

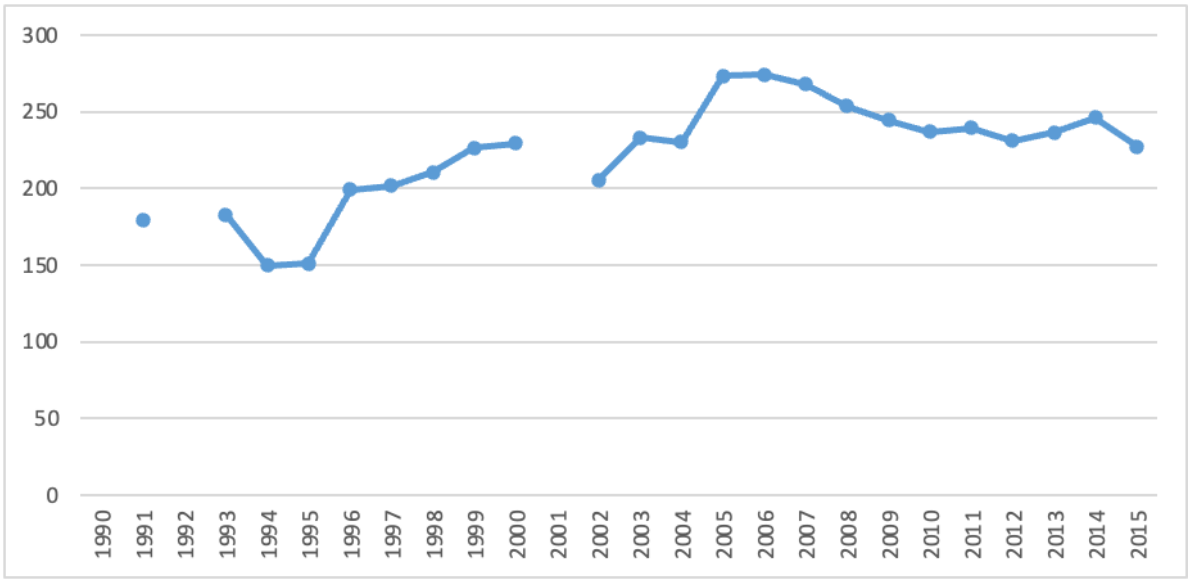

Figure 6.3 Total prison entry rate (inflow) in the Netherlands per 100,000 of the national population, 1991, 1993-2000, 2002-2015.

Source: DJI and Criminaliteit en rechtshandhaving 2015.

When analysing the type of prison entry, the data are recorded in three broad categories: prison entry on remand (pre-trial detainees), prison entry under sentence (convicted detainees) and self-reporters[38] and are only available for the years 2004 and 2015 (Kalidien, 2016) as seen in Figure 6.4. The prison entry on remand rate has decreased quite sharply between 2004 and 2015 from a rate of 140 to 82 per 100,000 national population. This decrease meant that the prison entry under sentence rate, which had fallen far short of the remand rate, surpassed the remand rate in 2006. The prison entry under sentence rate has increased since 2004 from a rate of 70 to a rate of 134 in 2015 per 100,000 of the national population. Therefore, while the overall prison population fell during this period, the prison entry under sentence rate increased, which again points to sentence length as the main driver behind these trends. The rate of self-reporters (those waiting to be admitted to prison, including electronic detention which ceased in 2010) has decreased from a rate of 20 in 2004 to a rate of 14 in 2015 per 100,000 of the national population.

[38] A self-reporter is someone who has been convicted of a custodial sentence and is sent to wait at home until they are summoned to report himself to prison. The Central Judicial Collections Agency determines whether a person who has been sentenced to a custodial sentence is eligible for the status of self-reporter (Dienst Justitiële Inrichtingen, 2020). The Netherlands is one of the few countries in the world with self-reporters i.e. those serving an 'ongoing sentence'.

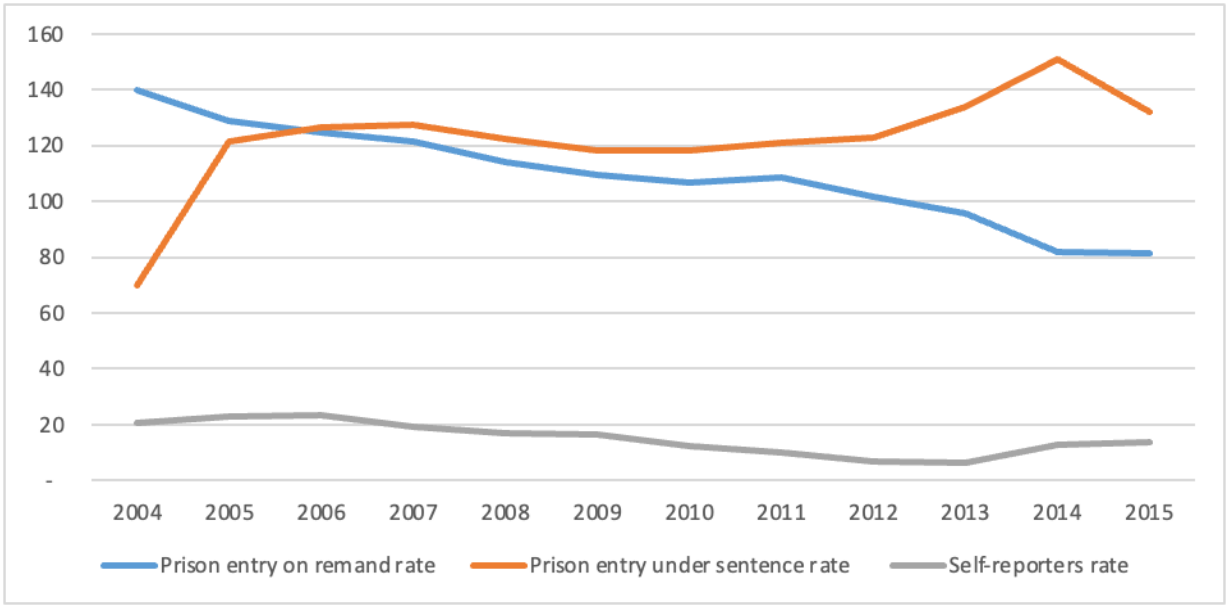

Figure 6.4 **Total prison entry on remand rate, total prison entry under sentence rate and total self-reporters inflow rate in the Netherlands per 100,000 of the national population, 2004-2015.**

Source: Criminaliteit en rechtshandhaving 2015.

Young Adults in the criminal justice system

The following section analyses data on young adults in both Dutch prisons and in Juvenile Justice Institutions (*Justitiële Jeugdinrichtingen* ('JJI')). Unfortunately, the data available for young adults are for under 25 year olds, as opposed to under 23 which is the age up to which the *adolescentenstrafrecht* applies. As can be seen in Figure 6.5, the rate of young adults aged under 25 years old per 1,000 population of 18 to 25 year olds (Muncie, 2008) in prison has increased from 1.4 in 1996 to a peak of 2.1 in 2005 and then reduced substantially to 0.7 in 2015, a 61 per cent decrease. Similarly, the prison entry rates for 18 to 25 year olds decreased from a rate of 7 in 2005 to 4.2 in 2015 (CBS, 2020). Both of these trends are similar to those in the adult prison population.

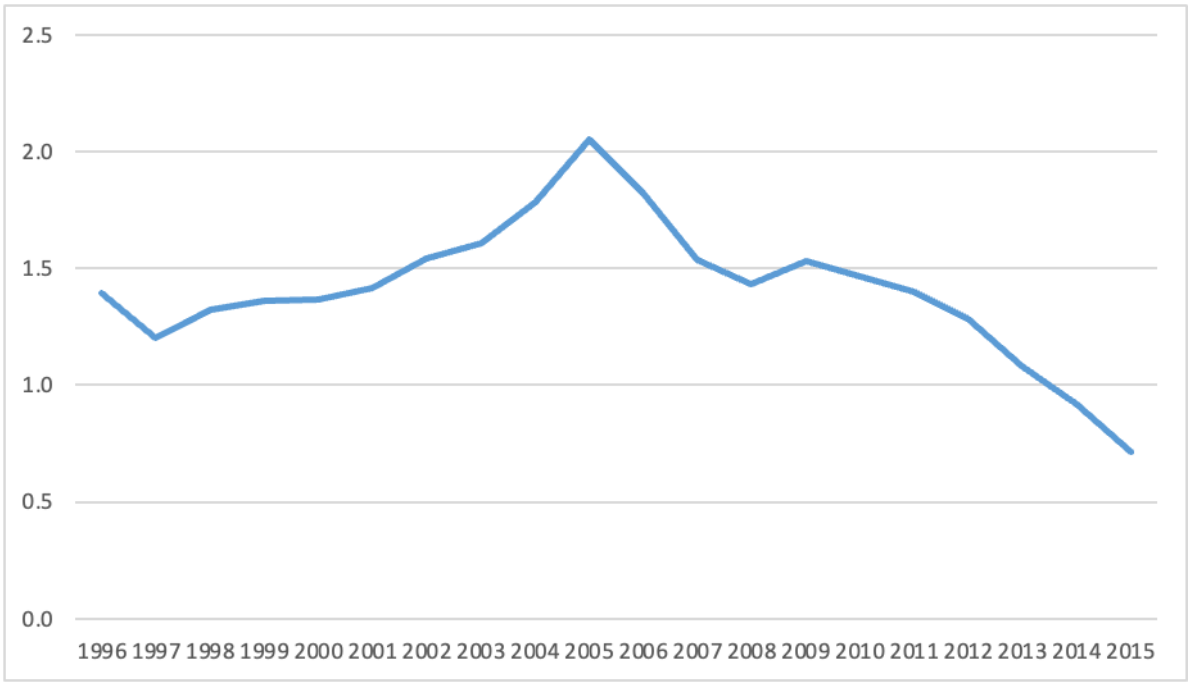

Figure 6.5 Rate of the under 25 prison population[39] per 1,000 of the under 25 year old national population, 1996[40]-2015.

Source: Centraal Bureau voor de Statistiek ('CBS') (2020).

Figure 6.6 below shows the percentage of criminal detainees in JJIs aged under and over 18. In 1992,[41] the percentage of under 18 year olds in JJIs was 90 per cent compared to ten per cent of those over 18 years old. In 2015, however, this had changed to 29 per cent of under 18 year olds and 71 per cent of over 18 year olds. This amounts to a near-complete reversal over a twenty-three year period, owing no doubt to the introduction of the new custodial treatment order ('PIJ') and perhaps anticipation of the introduction of the 2014 Act. There has been a corresponding decrease in the proportion of young adults (under the age of 25) in prison from 28 per cent in 1994 to 16 per cent in 2015.

[39] Population census as of 30th of September annually 1996-2015.
[40] Data were available from 1994 to 2015 however the national population statistics for under 25 year olds could not be obtained prior to 1996 therefore these years are not included.
[41] The reports only provide an age breakdown of the JJI population from the year 1992 onwards.

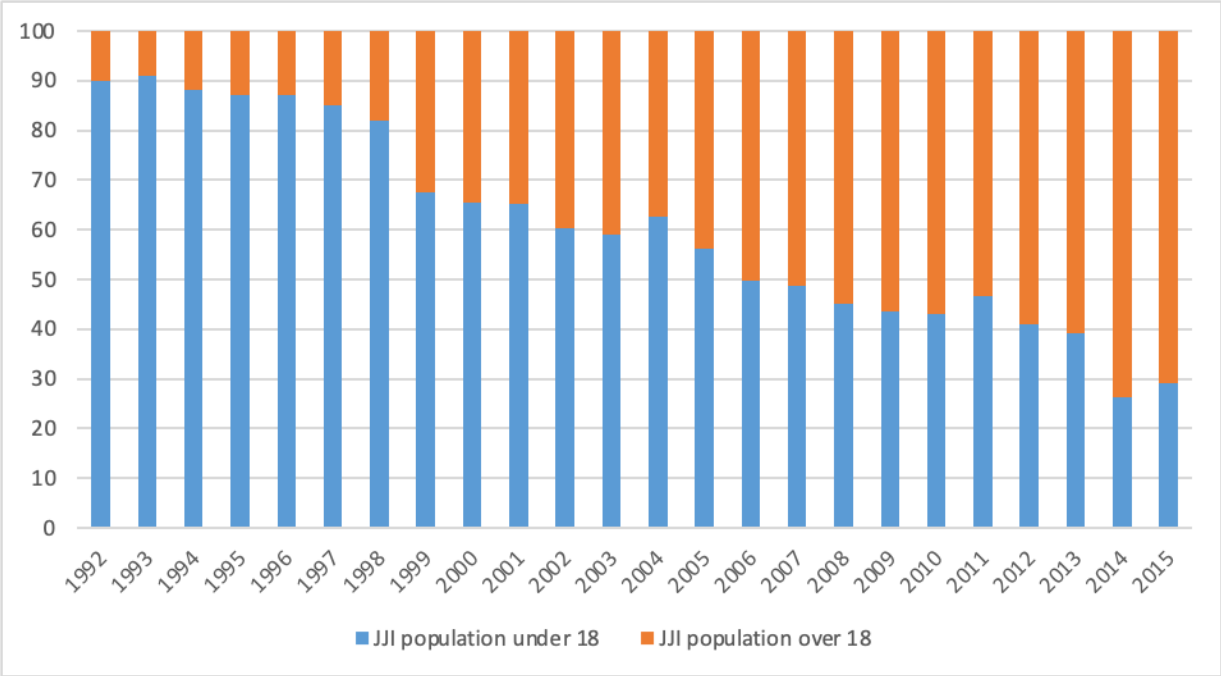

Figure 6.6 Proportions of criminal detainees over the age of 18 years old and under the age of 18 years old in Juvenile Justice Institutions (Justitiële Jeugdinrichtingen) ('JJI')[42], 1992-2015[43].

Source: Criminaliteit en rechtshandhaving 2007, 2008 and 2015.

Youth Justice Sector

In the Netherlands, as stated earlier, when a young person is sanctioned under criminal law they will be detained in a JJI. As can be seen in Figure 6.7 the number of detainees for criminal offences in JJIs rose substantially from 1990 (rate of 0.19) according to the uncorrected rate and peaked in 2007 (rate of 0.68), slightly later than the adult peak of 2005, before dramatically decreasing again to a rate of 0.20 in 2010. In analysing the corrected detention rate it has decreased since 1999 from a rate of 0.26 to 0.12 in 2015 per 1,000 of the under 18 national population, an 55 per cent decrease. In comparing the uncorrected rate and corrected rate while both experienced a decrease the corrected rate had a less dramatic decline.

[42] The reference point for the occupation of JJIs is a census on September 30 annually, 1999-2015.
[43] Figures used for the percentages 1992-1998 are of the uncorrected rate (see note 33).

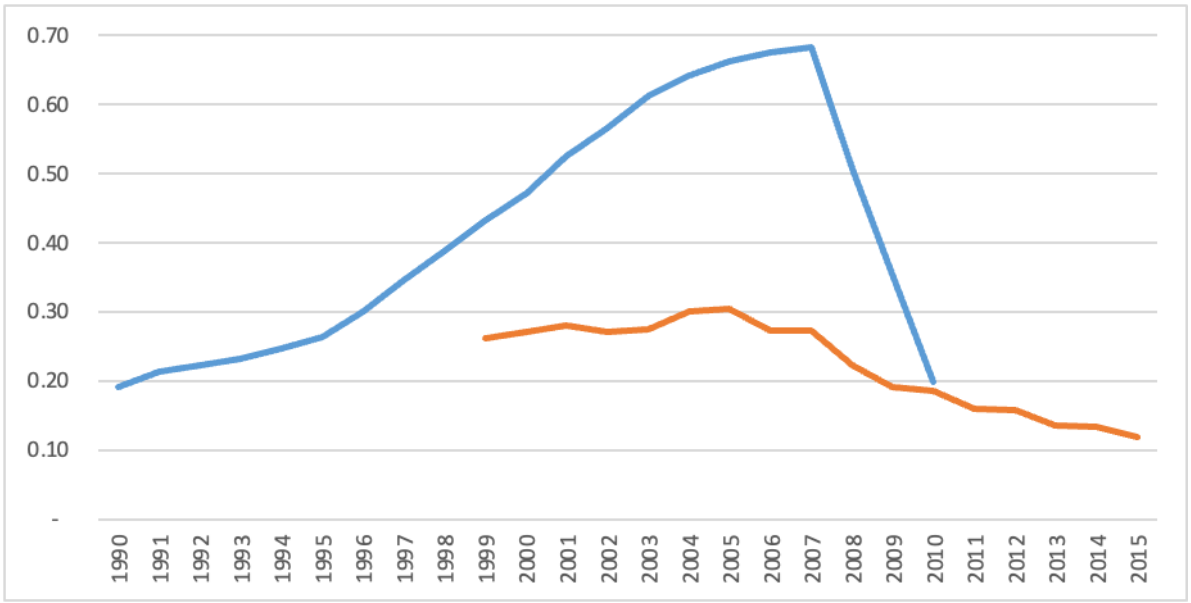

Figure 6.7 JJI population[44] uncorrected rate[45] and corrected rate per 1,000 of the under 18 year old national population, 1990 to 2015.

Source: Criminaliteit en rechtshandhaving 2007 and 2015.

An interesting picture emerges when the JJI population is broken down to show those on remand, serving sentences and serving a custodial treatment order ('PIJ'), as seen in Figure 6.8. From 1999 to 2015, approximately half of the detention population were there for a PIJ. This is particularly striking since, as discussed above, a PIJ can prolong the sentence of a juvenile for up to seven years, exceeding the statutory limitations of 12 months (for 12 and 15 year olds) or two years (for 16 and 17 year olds) (Liefaard, 2012; Uit Beijerse and Van Swaaningen, 2006). This clearly shows the heavy use of this order, with 48 per cent of the juvenile population under a PIJ in 2015 compared to ten per cent of the juvenile population serving a sentence. In addition, the proportion of the JJI population on remand has been remained relatively consistent with it comprising 42 per cent of the population in both 1999 and 2015. The use of remand in the Netherlands is discussed further below.

[44] The reference point for the population is the census of the occupation in JJIs on September 30 annually, 1999-2015.
[45] See note 33 regarding corrected and uncorrected rates.

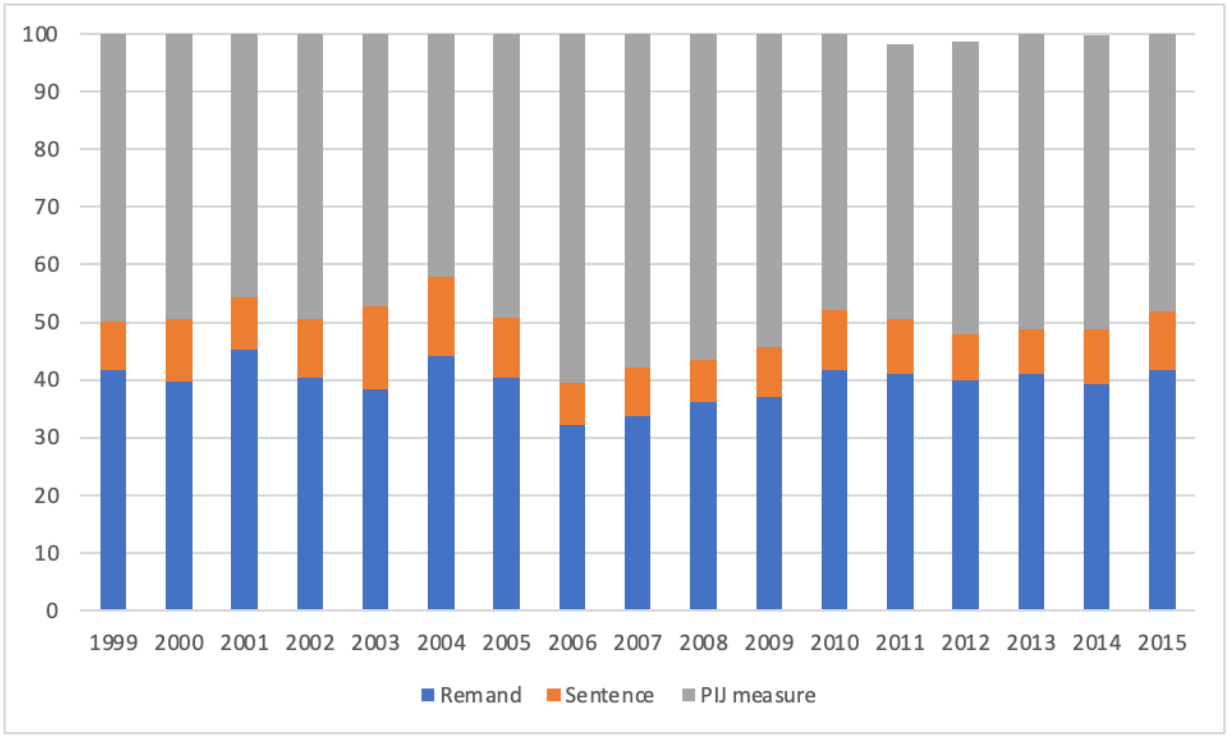

Figure 6.8 Proportion of the detention population on remand[46], under sentence and under a custodial treatment order (PIJ measure) in Juvenile Justice Institutions (Justitiële Jeugdinrichtingen) ('JJI') 1999[47]-2015[48]

Source: Criminaliteit en rechtshandhaving 2015.

The high number of juveniles on remand[49] in the Netherlands has been discussed above and is a prominent issue in the Dutch youth justice system. Initially, when a juvenile is placed in a JJI they are in a short stay group and after an average of three months or ninety days the juvenile is transferred to a long stay group (DJI, 2010; van den Brink, 2018). The vast majority of juveniles serving pre-trial detention, however, have their pre-trial detention suspended or lifted within 12 weeks, before the transfer to the long stay group (van den Brink, 2018) which can explain the inflow proportions in Figure 6.9. Data are not broken down by age so the chart includes over 18 year olds in JJIs. It is clear that the majority of

[46] Remand refers to those serving pre-trial detention or in temporary custody i.e. those not serving a custodial sentence.
[47] Data on the criminal population by residence permit in JJIs are only available from 1999 onwards.
[48] For the years 2011 and 2012, the data provided on the breakdown of the criminal population residence permits in JJIs do not match the total population figures (i.e. there are missing data on residence permit classifications for 10 young people in 2011 and 8 young people in 2012). This may be due to the introduction of the Principles of Juvenile Detention Institutions Act 2011 which reclassified the types of occupancy in JJIs; from reception and treatment institutions to short or long stays (Criminaliteit en rechtshandhaving, 2016: 53).
[49] See note 46 on remand.

those being sent to JJIs is for remand as seen in Figure 6.9. In 2015, 84 per cent of juveniles sent to JJIs were in remand or pre-trial detention compared to 11 per cent of those sent to serve a sentence. As commented by Uit Beijerse and Van Swaaningen (2006), however, this is due to youth justice sentences being relatively short so most of the time is already served on remand (ibid).

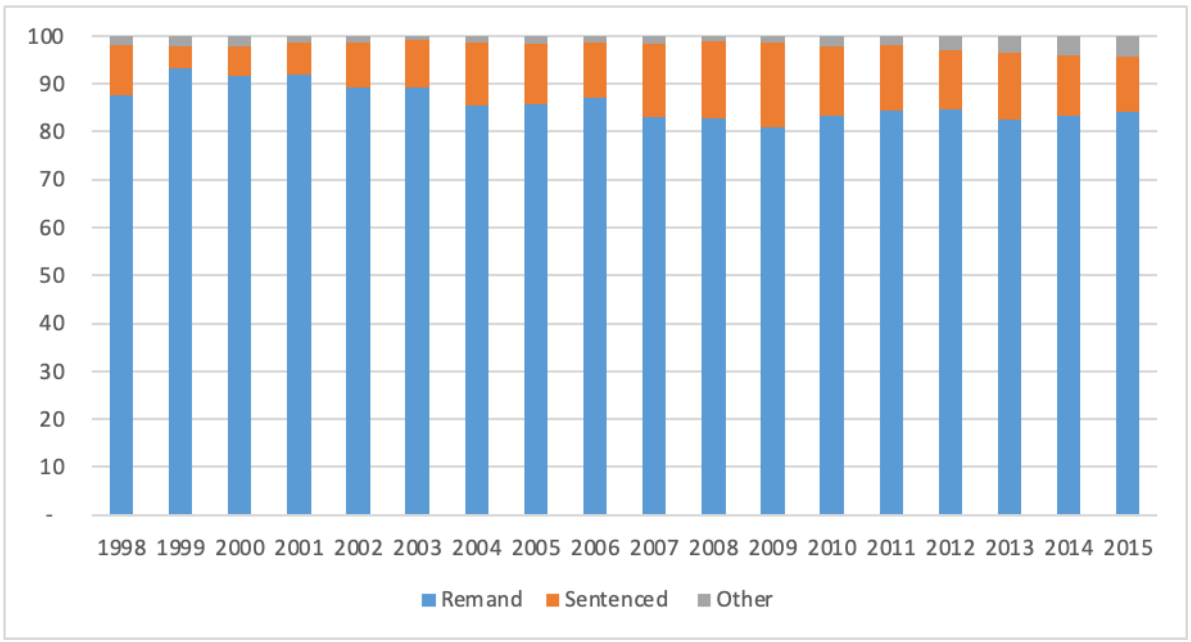

Figure 6.9 Proportion of detention entries on remand[50], under sentence and other[51] in Juvenile Justice Institutions (Justitiële Jeugdinrichtingen) ('JJI') 1998-2015[52]

Source: Criminaliteit en rechtshandhaving 2015.

Index B: Sentencing

Adult Criminal Justice Sector

As discussed above, imprisonment used to be relied on heavily in the Netherlands but this reliance has decreased since 2005. In explaining such a decrease, sentencing practices have

[50] See note 46 on remand.
[51] Other includes PIJ measure (placement in an institution for juveniles), Behavioural measure and hostage-taking (incl. unknown).
[52] Data on the criminal committals by residence permit to JJIs are only available from 1998 onwards.

been analysed. Firstly, the numbers of those who received a custodial sentence by the courts was obtained from 1994 to 2015 and broken down by sentence length given, as can be seen in Figure 6.10. Due to availability of the data, the sentence ranges focused on were under one year, one to two years, three to four years and four years and longer[53]. It seems clear from Figure 6.10 that it is the category of short sentences under one year, also the most common sentence given by the courts, which has experienced the most upheaval over the years. Generally, the number of those receiving under one year sentences doubled from 1,755 in 1994 to 3,757 in 2005. This has since reduced dramatically again to 1,844 in 2015. It is notable that the number of long sentences i.e. four years or longer is the second highest sentence range given by the courts, and has remained so over the years as seen in Figure 6.10. The numbers receiving four years or longer as a sentence by the courts increased from 1,285 in 1990 to 1,903 in 2005 and has since reduced to 1,307 in 2015. The increase and persistent use of longer sentence lengths indicates it is a driver behind the prison population trends.

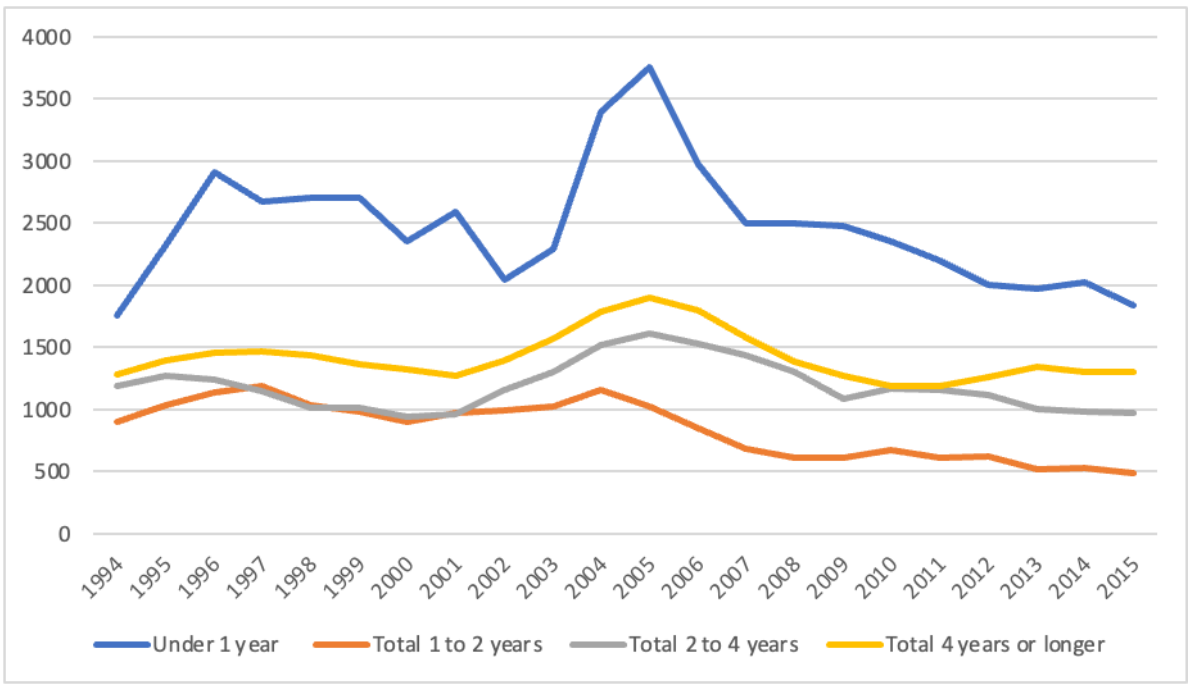

Figure 6.10 The total numbers of those who received under 1 year sentence, 1 to 2 year sentence, 2 to 4 year sentence and 4 years or longer sentence by the courts in the Netherlands, 1994[54] to 2015[55].

[53] Data were presented in different sentence length categories for the period 1994-2003 and 2004-2015 due to the data sets being obtained from different sources. See notes 33 and 55 for further explanation.
[54] Data on the duration of sentence imposed by the courts was only available from 1994 onwards.

Source: Criminaliteit en rechtshandhaving 2007 and 2015.

Secondly, in order to analyse the types of sentences given by the court a breakdown of court decisions was obtained as seen in Figure 6.11. In analysing custodial and non-custodial sentencing patterns by the court, the data are presented in four categories: custodial sentences, fine, community sentence and additional punishments[56]. As seen in Figure 6.11, custodial sentences given by courts peaked in 2003 with a rate of 331 but has overall decreased since then to a rate of 218 per 100,000 of the population in 2015. The courts have given increased numbers of community sentence sentences over the years as seen in the substantial increase from 1995 of a rate of 80 to 225 in 2006 and a slight decrease then to 204 per 100,000 population in 2015. It therefore appears the Dutch courts favoured custodial sentences as opposed to community sentence between 1995 and 2006m but since that date community sentences are preferred to custody. This supports van Swaaningen's (2013) argument that whilst there has been a decrease in the prison population rates, social control is being extended into the community.

[55] The figures for 1994-2003 were uncorrected and the figures for 2004 and 2015 were corrected. This is due to them being obtained from two different data sets. In addition, the large disparity between the two data sets was the figures concerning 'punishments not yet known' in the 1994 to 2003 data set which figures were not included in the 2004 to 2015 data set. This impacted therefore the overall number of sentences given and not the actual breakdown of the figures concerning particular sentence lengths given.

[56] This includes learning punishment, driving disqualification, confiscation and, among other things, payment in the guarantee fund, denial of certain rights, publication of a court decision and closure of the company.

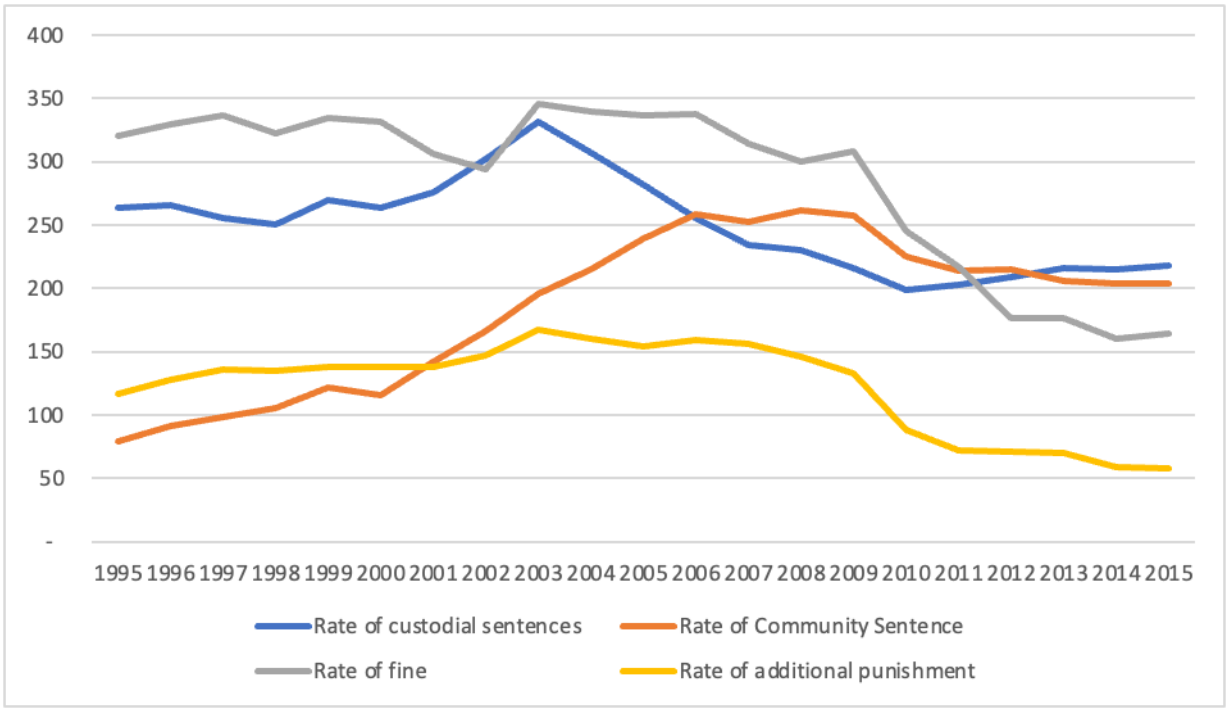

Figure 6.11 Rate of the total number[57] custodial sentence[58], fine, community sentence and additional punishment[59] from the court in the Netherlands per 100,000 of the national population in the Netherlands, 1995-2015[60].

Source: Criminaliteit en rechtshandhaving 2019.

Young Adults in the criminal justice system

Unfortunately, the data on sentencing young adults in the Netherlands are not broken down by age group.

Youth Justice Sector

Similar to the adult criminal justice system, the breakdown proportions of judges' decisions given to underage suspects was analysed as seen in Figure 6.12. The use of custodial sentences (i.e. sentencing of a 16 or 17 year old to prison) has overall reduced from 7.8 per

[57] The figures in the tables in Criminaliteit en rechtshandhaving 2015 have been rounded to fives.
[58] Includes custodial sentence to prison and juvenile detention.
[59] Includes learning punishment, driving disqualification, confiscation and, among other things, payment in the guarantee fund, denial of certain rights, publication of a court decision and closure of the company.
[60] The figures for the court imposed sanctions of either community service or a custodial sentence are only available from 1995 onwards.

cent in 1995 to 0.4 per cent in 2015 (i.e. 20 young people). The use of juvenile detention as a sentence was very high at 58.6 per cent in 1995 but since then the trend has accelerated downwards, particularly since 2004. It would appear that the increased use of community sentences clearly displaced juvenile detention sentences, again supporting Van Swaaningen's argument about dispersal of social control into the community. In 1995 only 7.2 per cent of underage suspects appearing before the courts received a community sentence, however, this increased to 66.7 per cent in 2015. This increase in community sentences also displaced the fines as a sentence which decreased from 22.8 per cent in 1995 to 3 per cent in 2015. These trends are similar to the adult system, discussed above, and become even more marked when regarding young people.

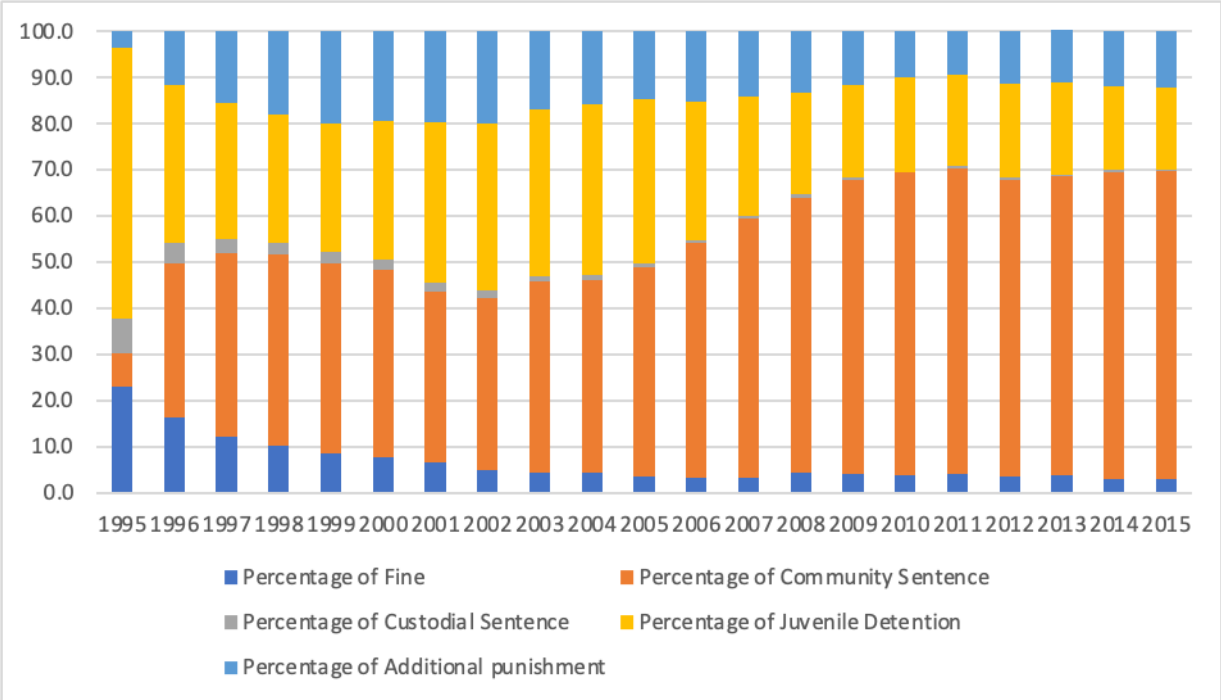

Figure 6.12 Percentage of custodial sentence[61], community sentence, fine, juvenile detention and additional punishments[62] given by the court to underage suspects in the Netherlands, 1995-2015[63].

Source: Criminaliteit en rechtshandhaving 2015 and 2019.

[61] Includes 'custody' and 'military detention'. This category also includes disciplinary school sentences and judgments imposed up to and including 1996. No duration is recorded for disciplinary school sentences, these are added to the fully unconditional juvenile detention.
[62] This includes learning punishment, driving disqualification, confiscation and, among other things, payment in the guarantee fund, denial of certain rights, publication of a court decision and closure of the company.
[63] The figures for the breakdown in the court decisions for underage suspects are only available from 1995 onwards.

Index C: Policing

Adult Criminal Justice Sector

As discussed in the previous two chapters, it is important to examine front-end measures such as policing as well as back-end measures such as imprisonment. Similar to Ireland and Scotland, there is a dearth of police research and data particularly concerning stop and search in the Netherlands. Whilst there have been several contributions to police research in recent years, as noted above, the lack of research into the operations of the Dutch police is astonishing particularly considering their power and discretion (Tonry and Bijleveld, 2007). The main focus of police research in the Netherlands over recent years is on the regionalised police system reforms in 1993 and the introduction of the national police force in 2013 (Tonry and Bijleveld, 2007; Terpstra and Fyfe, 2014; Terpstra, 2018; Salet and Terpstra, 2019). There have been some issues with the implementation of the national police force particularly at the local level of policing and the introduction of 'robust basic teams' that have responsibility for all routine local police tasks (Terpstra and Fyfe, 2015). In some areas the introduction of basic teams has been perceived as a way for police to focus on enforcement tasks while in other areas, the introduction of basic teams has been used as an opportunity to innovate seen with the introduction of community policing called context driving policing (Terpstra and Fyfe, 2015). In the Netherlands, the police operate under the 'authority' of the public prosecutor in respect of the enforcement of criminal law and criminal investigation. In practice, with regard to a criminal investigation the Dutch police have considerable discretion, and the prosecutor will usually only be involved in cases of serious and complex crimes (Salet and Terpstra, 2019). Since the introduction of ASAP, however, the public prosecutor is more directly involved in decisions about petty crime. ASAP (As Soon As Possible)[64] was introduced in 2011 to make the processing of high-volume petty crime more efficient and faster. ASAP has been seen as an example of managerialism with work processes standardised and the traditional discretion of the police being considerably reduced with increased involvement of the prosecutor. On the hand, ASAP has been successful in terms of the police and criminal justice service giving more attention to the settlement of petty crime cases (Salet and Terpstra, 2019).

[64] Literal translation of the Dutch abbreviation ZSM.

Young Adults in the criminal justice system

Similar to the adult justice system, there are very few studies on the interaction between police and young adults in the Netherlands. This is concerning, given the discretion and power that the police have traditionally held in the Netherlands and the importance of a tailored approach to young adults not only encompassing sentencing and detention but also policing (Police Foundation, 2013, 2018). One study carried out on young adults and their interaction with police in 2007 found that in the Netherlands the likelihood of a young adult being a suspect for a moderate or serious crime was one and half times more likely than an adolescent and adult (van der Laan et al., 2012). This may be due to the police being less inclined to deal with young adults informally as much as they would for adolescents, namely, where they give informal warnings and referrals to HALT. Whilst more young adults end up in court, van der Laan et al. (2012) comments that the cases are not as disproportionate as may be suggested by the high levels of police reports filed with the Public Prosecution Service ('PPS') as intervention by prosecutors may result in certain young adult cases not appearing before the courts. Due to this and the overrepresentation of young adults in crime statistics it led to them being identified as a separate group within the criminal justice system which led directly to the introduction of the *adolescentenstrafrecht* in 2014.

Youth Justice Sector

As will be discussed in further detail below, the police have multiple options when dealing with a young person involved in crime. The police can dismiss the case and send the young person to voluntary social support; issue a warning and take no further action; impose a fine; refer the young person to a community service project in the HALT programme or refer the charge to the prosecutor (Weijers, 2018). It has been stressed that diversion by the police and prosecutor and alternative sentences are key features of the Dutch youth justice system with the vast majority of juvenile cases being diverted (Liefaard, 2012). Traditionally in the Netherlands, the police and justice authorities took a 'without restraint' approach characterised as a minimal intervention approach towards young people i.e., the authorities only intervene when strictly necessary, a sanction is not given for its own sake and the intervention is no more than strictly necessary for behavioural change to occur (van de Riet et al., 2007). This approach results in a high level of diversion (ibid). Throughout the twentieth

century however, van de Riet et al. (2007) argue there was a shift from 'protective' to 'repressive' interpretations of police responsibilities towards juveniles. With the reorganisation of the police in 1994 this led to juvenile police departments disbanding that had been in place since 1911 and it was feared that this would stop the specialised form of juvenile policing. Fortunately, this doesn't appear to have been the case with juvenile policing remaining a priority and now in theory juvenile policing becoming the responsibility of every police officer (van de Riet et al., 2007). Similar to other Western European countries, juvenile delinquency rates have decreased sharply in recent years. In the Netherlands since 2007 police statistics show there has been a decrease of around 65 per cent in the number of juveniles arrested between the ages of 12 and 18 among all types of crimes (Schmidt, et al., 2020).

Index D: Alternative disposals

Adult Criminal Justice Sector

As discussed above, the police have broad discretion in the Netherlands, similar to other jurisdictions. What is unique in the Dutch criminal justice system is the fact that both the police and the prosecution have the power to dispose of cases (Weijers, 2018). Diversion can be imposed by the police through a transaction, punishment order or Halt referral or by the Public Prosecution Service ('PPS') through a transaction or punishment order. A transaction is considered a form of diversion where the offender voluntarily pays a sum of money to the Treasury or fulfils one or more other conditions such as community service laid down by the police or PPS in order to avoid further criminal prosecution (Tak, 2003; van de Bunt and van Gelder, 2012). The opportunity to settle criminal cases by way of a transaction has existed in the Netherlands for the PPS since 1983 and for the police since 1993 and is most often used for relatively minor crimes such as shoplifting and drunk-driving (Tak, 2003; van de Bunt and van Gelder, 2012). Since its introduction, however, the range of offences for which transactions can be offered has expanded from minor crimes to crimes that carry prison sentences of up to six years (van de Bunt and van Gelder, 2012). Since 2008, the PPS and police have been given authority to impose a punishment order which entails a fine, community service or entry into a training programme. Punishment orders can be imposed for crimes punishable by a prison sentence of up to six years. The distinction between a

punishment order and transaction is that the latter is a settlement between the PPS/police and the suspect but the punishment order is a sanction and thus departs from the principle that only courts can impose penalties (ibid).

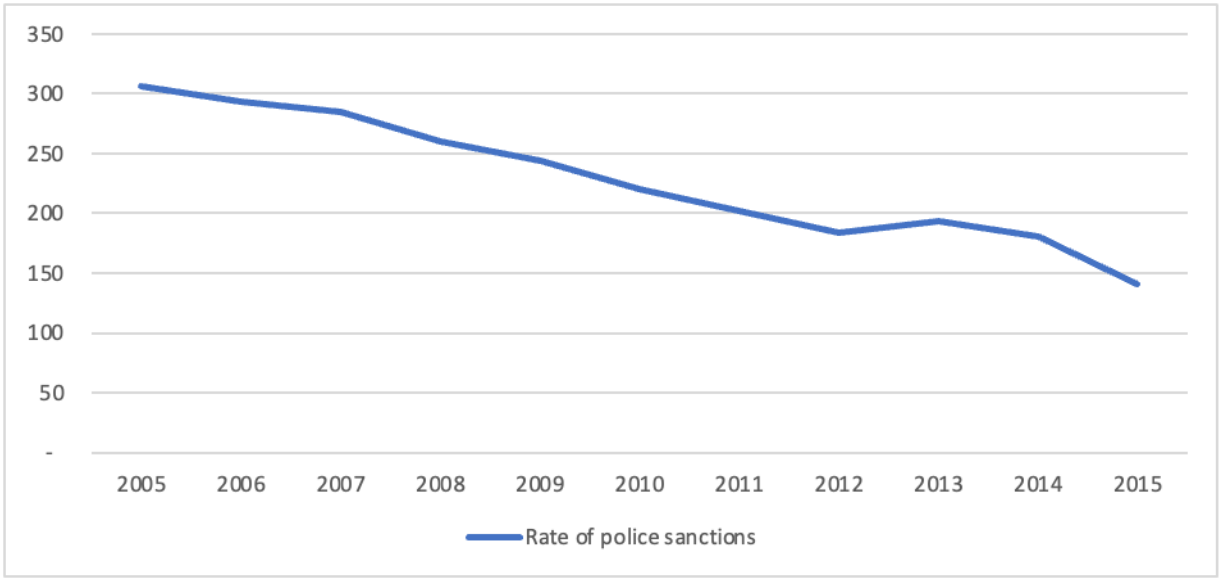

Figure 6.13 Rate of police sanctions[65] per 100,000 of the national population, 2005-2015

Source: Criminaliteit en rechtshandhaving 2015 and 2019.

As can be seen in Figure 6.13, the overall rate of police sanctions has decreased since 2005[66]. The rate of police sanctions has steadily decreased from 307 in 2005 to 141 in 2015 per 100,000 of the national population. This is in line with the decline in crime rates as there were fewer cases before the police from 2005 onwards (Van Dijk, 2011). The rate of PPS decisions and the rate of PPS summons issued is shown in Figure 6.14. As can be seen from Figure 6.14 the rate of prosecutor alternative disposals has gone down overall but is still at a high rate of 568 per 100,000 of the national population in 2015. In respect of the rate of summons issued by the PPS this rate gradually increased from 732 in 1995 to a peak of 908 in 2004. Since then, the rate of summons has decreased to 591 in 2015. This indicates more

[65] Police Sanctions include transactions, police punishment order and HALT referrals.
[66] There was no available data on police sanctions given prior to 2005.

people were being sent to the courts to be prosecuted between 1999 and 2012 which coincides with the prison population increase.

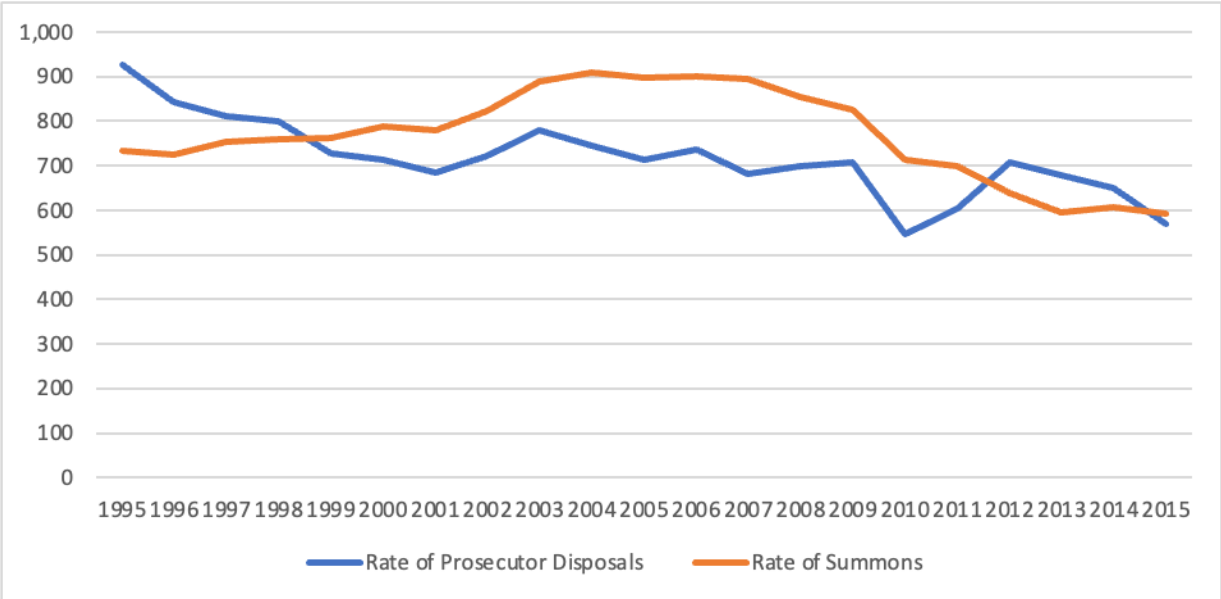

Figure 6.14 Rate of Public Prosecution Service ('PPS') disposals[67] and summons per 100,000 of the national population, 1995-2015[68].

Source: Criminaliteit en rechtshandhaving 2007, 2015 and 2019.

An alternative way in looking at the above rates of the PPS decisions is the specific breakdown and proportion of the Dutch PPS decisions available from 1995 to 2015 and is contained in Figure 6.15. As can be seen from Figure 6.15, 51 per cent of cases were prosecuted in 2015 which means that 49 per cent of cases were disposed of by the PPS. Over the 20 year period examined, the proportion of summons issued has remained relatively consistent. The introduction and increased use of the Punishment Order which the PPS has utilised since its introduction in 2008 has had an impact on how the PPS has dealt with cases. In 2009, two per cent of decisions made by the PPS were punishment orders and this increased to 16 per cent in 2015. The increase in the Punishment Orders also appears to have displaced transactions that were being given which reduced from 26 per cent in 2009 to six per cent in 2015. Whilst dismissals (conditional and unconditional) decreased from 22 per cent in 1995 to 12 per cent in 2007, this trend subsequently reversed, increasing to a rate of

[67] PPS Disposals include Unconditional Dismissal, transactions, punishment orders, conditional policy dismissals and other (other includes: summons to court following an objection to a punishment order, handled administratively, Addition ad informandum, Joinder for trial and method of resolution unknown).
[68] Data on the PPS decisions and summons were not available prior to 1995.

25 per cent in 2015. The use of Punishment Orders has led to up-tariffing in replacing transactions instead of impacting the number of summons the PPS issues.

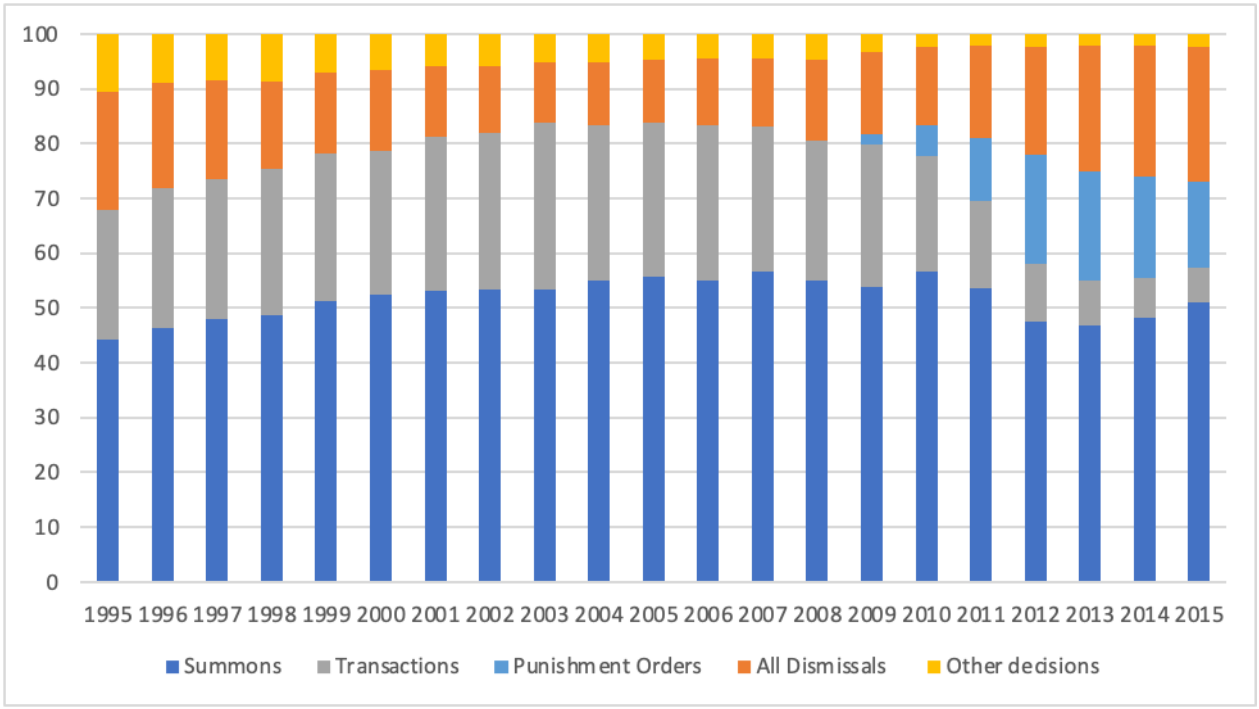

Figure 6.15 Proportion of summons, transactions, punishment orders, all dismissals[69] and other decisions[70] made by the Public Prosecution Service in criminal cases, 1995-2015

Source: Criminaliteit en rechtshandhaving 2007, 2015 and 2019.

Young Adults in the criminal justice system

Unfortunately, the data available on diversion and alternative disposals in the Netherlands are not broken down by age so it is not possible to examine this data specifically for young adults.

Youth Justice Sector

[69] Unconditional dismissals and conditional policy dismissals

[70] Other includes summons to court following an objection to a punishment order, handled administratively, Addition ad informandum (the PPS joins a criminal case without charge to another case brought before the judge, with the aim of having the judge take the joined case into account when determining the penalty), Joinder for trial and Method of resolution unknown.

As discussed earlier, the diversion project HALT has grown since its inception in 1981. Originally intended to be an informal sanction given by police, the 1995 Act placed HALT on a statutory footing as a formal interaction with the police (Junger-Tas, 2004). HALT is only available to young people aged between 12 and 18. As can be seen from Figure 6.15 the overall number of HALT referrals increased substantially since 1990 from 6,546 referrals to a peak in 2007 of 23,341 referrals. Since 2007 the overall number of HALT referrals has reduced to 16,493 in 2015. In analysing these figures however, the universal crime drop has to be acknowledged which could have contributed to fewer referrals (van der Laan et al., 2019). Figure 6.16 also includes the number of referrals for the STOP response programme which was introduced in May 1999 and ceased in December 2009 (Junger-Tas, 2004; de Heer-de Lange and Kalidien, 2010). This programme was for those under the age of 12 who had committed a HALT-worthy offence and was operated under the overall HALT programme. Over the nine years it was operational the STOP programme referrals overall reduced from 2,408 in 1999 to 1,707 in 2008.

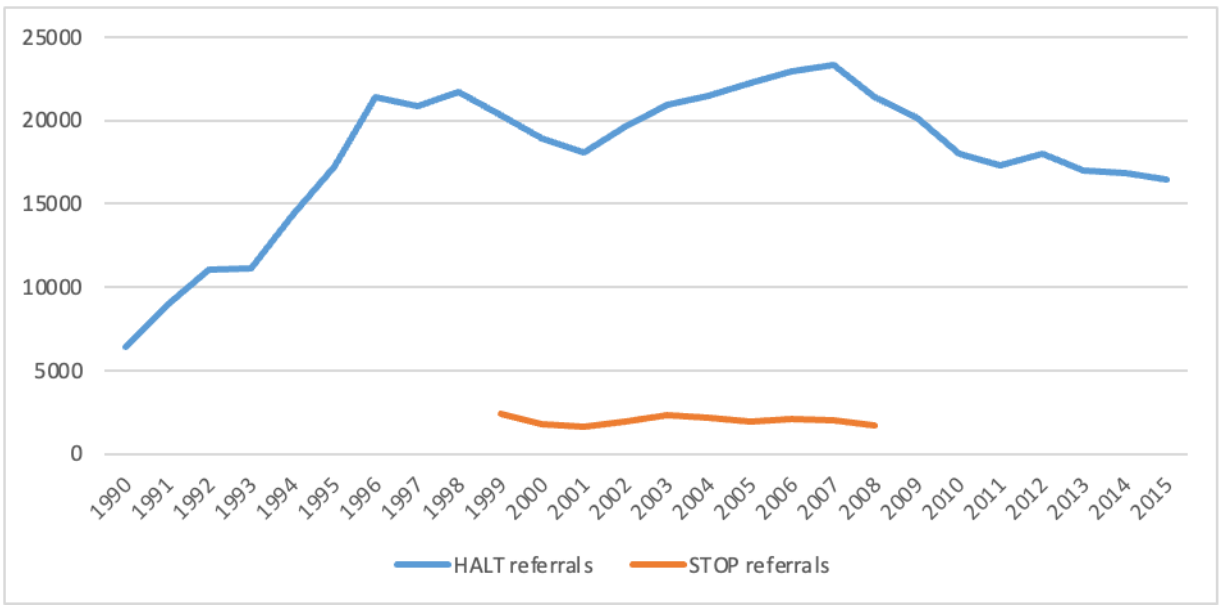

Figure 6.16 Total number of all HALT referrals[71] and STOP referrals, 1990-2015

Source: Criminaliteit en rechtshandhaving 2007, 2009, 2010 and 2015.

[71] All Halt referrals of a young person include referrals from police officer, special investigating officer (BOA) or Public Prosecutor to a Halt desk. This overall figure includes referrals between Halt offices.

PPS data for disposals relating to suspects aged under 18 are contained in Figure 6.17. For the youth justice sector the percentage of summonses issued by the PPS to underage suspects increased from 35 per cent in 1995 to 45 per cent in 2015. This increase in the PPS issuing summonses has resulted in a corresponding decrease of ten per cent in alternative disposals over the 20 year period between 1995 and 2015, pointing to a shift away from diversion. Several other points stand out when comparing the PPS decisions made involving adult suspects and those involving underage suspects. Firstly, the PPS did not impose Punishment Orders on underage suspects as frequently as adult suspects (with only 0.09 per cent receiving them in 2015). Secondly, the increased use of summonses to underage suspects follows the trend in PPS decisions concerning adult suspects where the proportion of summons increased also. Although it is worth noting that the increased use of summonses by the PPS is more apparent in underage suspects with a ten per cent increase over the 20 year period compared to a seven per cent increase in the adult sector. Finally, the percentage of dismissals (conditional and unconditional) followed the trend of PPS decisions concerning adult suspects with a decrease from 37 per cent in 1995 to 15 per cent in 2007 and then a reversal in the trend with an increase to 33 per cent in 2015.

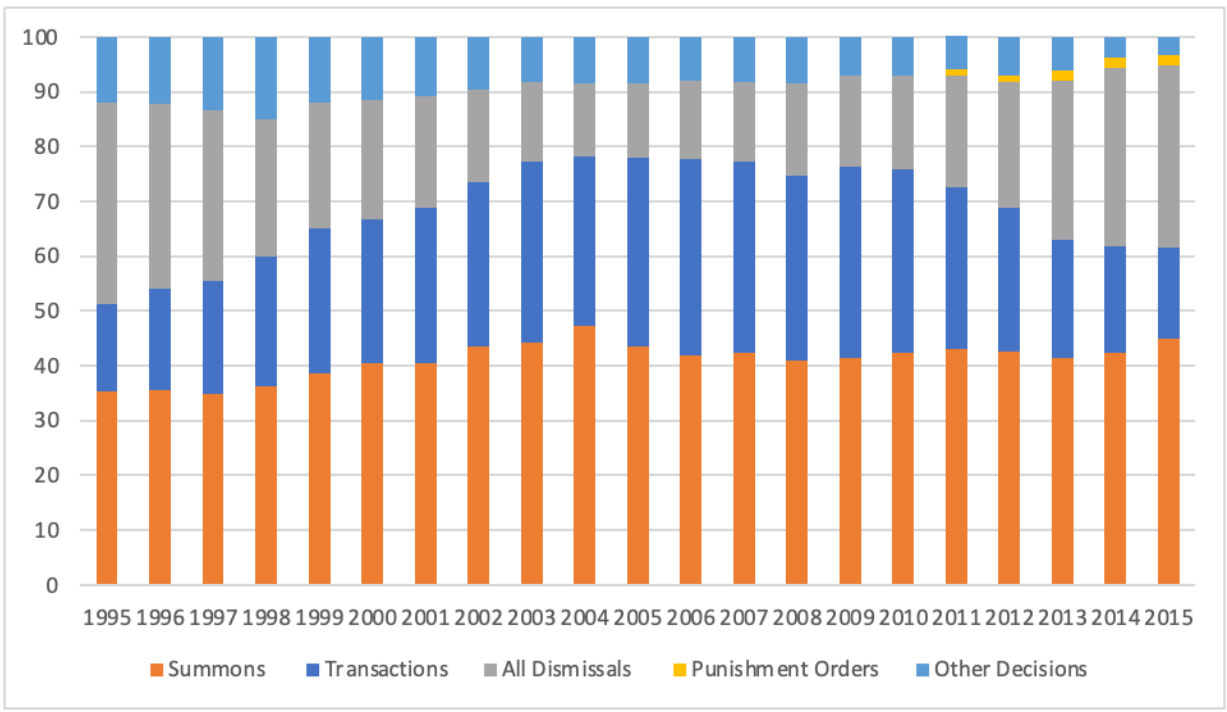

Figure 6.17 Proportion of summons, transactions, punishment orders, all dismissals[72] and other decisions[73] made by the Public Prosecution Service in criminal cases involving underage suspects, 1995[74]-2015.

Source: Criminaliteit en rechtshandhaving 2015.

Index E: Prison/detention Conditions

Adult Criminal Justice Sector

Prior to the late 1980s the Netherlands prison system was rated as the finest in Europe based on the 'principle of resocialisation' associated with education and a system of prisoner's rights. (Downes and van Swaaningen, 2007: 34). It has been argued that prison conditions deteriorated during the 1990s and 2000s due to budget cuts in 2004, decreased focus on rehabilitation, adoption of a rhetoric of 'responsibilisation', increased staff workload and basic regimes with more time spent inside the prison cell (Downes and Van Swaaningen, 2007; Kruttschnitt and Dirkzwager, 2011). However, Kruttschnitt and Dirkzwager (2011) found 'substantial continuity' in the lives of prisoners over the last two decades, using Downes's 'Contrast in Tolerance' (1988) findings as a baseline. According to the CPT, the Netherlands continues to provide a less damaging environment in terms of the invasiveness of prison life, particularly concerning material conditions with no issues being raised regarding in-cell sanitation and cells in good condition (CPT, 2017, 2012, 2008, 2002, 1998, 1993). Violence is also strikingly absent from prison life in the Netherlands as seen in limited inter-prisoner violence over the years and no allegations to the CPT of physical ill-treatment by staff (CPT, 2017, 2012, 2008; Kruttschnitt and Dirkzwager, 2011). In terms of rehabilitative programmes there is a detailed progressive regime in place for all prisoners in the Netherlands and the Prevention of Recidivism Programme was introduced in 2007 in order to reduce reoffending rates (Bosma et al., 2014, 2020; CPT, 2017). Even with the an increasing prison in the 1990s and early 2000s and the introduction of double-occupancy cells, there was no overcrowding in prison facilities, due to both the Dutch policy of keeping the occupation level in prisons below 100 per cent and increased prison capacity (from 7,195

[72] Unconditional dismissals and conditional policy dismissals

[73] Other includes summons to court following an objection to a punishment order, handled administratively, Addition ad informandum (the PPS joins a criminal case without charge to another case brought before the judge, with the aim of having the judge take the joined case into account when determining the penalty), Joinder for trial and Method of resolution unknown.

[74] Decisions made by the PPS in criminal cases for underage suspects were only available from 1995.

in 1990 to 17,630 in 2006) (CPT, 2008). Recently, the CPT (2017: 5,) welcomed the considerable decrease in the prison population over the course of the previous decade (from 2006 to 2016) and commented on how this was 'a situation almost unique in Europe'. In addition, the Dutch authorities has closed a number of prisons and rented out prison premises and custodial staff to other European states including Belgium, and Norway (CPT, 2017).

There are several key issues, however, remaining in Dutch prisons. There have been repeated concerns raised by the CPT (2008, 2012, 2017) in recent years regarding complaints by prisoners about pre-packed frozen food being provided to them, the frequency and manner of strip searches being carried out and the lack of reporting procedure and proper examination of allegations of ill-treatment. Further, the maximum-security institution, Extra Beveiligde Inrichting ('Extra Security Institution') ('EBI') which is reserved for potential escapees (Downes and van Swaaningen, 2007) has been criticised by both the CPT (1999, 2002) and the European Court of Human Rights[75]. There have also been criticisms of the rehabilitation programmes in prisons. Research by Bosma et al. (2020) highlighted that most offenders in the Netherlands do not get the opportunity to engage in prison-based treatment such as the Prevention of Recidivism Programme due to the strict legal inclusion criteria relating to sentence length. It was noted that the range of activities offered to prisoners was limited. The CPT (2017) recommended that more educational and vocational programmes should be offered to sentenced prisoners, particularly those serving long sentences. Other issues also concerned the low salary received by prisoners who work and foreign prisoners with 'VRIS'[76] status being disadvantaged concerning training and other activities compared to the general prison population (CPT, 2012, 2017).

Young Adults in the criminal justice system

In respect of detention for young adults in the Netherlands, it will be recalled that they can be sent to either adult prisons or Juvenile Justice Institutions (Justitiële Jeugdinrichtingen) ('JJI'). Young adults who are sentenced under the adult justice system and serve their time in adult prisons are mixed in with the general prison population therefore the above discussion concerning adult prison conditions also applies to this cohort. Their position is further

[75] In the case of *Lorsé and others v. the Netherlands* (2003) (Application no. 52750/99) in the European Court of Human Rights, Strasbourg.
[76] Vreemdelingen in de Strafrechtketen ('VRIS') means aliens in the criminal law chain (CPT, 2012: 18).

exacerbated when a youth justice rights lens is applied and when comparing their legal position to young adults in youth facilities. Although ideally, adult prisons should address the specific needs of young adult offenders this is not provided for in the Dutch penitentiary laws (Liefaard, 2012). There was an attempt to address this between 2002 and 2008 when prisons had designated young adult departments with a JOVO-regime[77]. This regime provided for a special, protected environment and intensive supervision aimed to limit the damage of detention and avoid 'criminal contamination' (Liefaard, 2012: 188). However, these departments closed down in 2007 due to evaluations pointing out they were of no real added value in terms of protection and reintegration (ibid). This is concerning considering the significant differences between adult penitentiary laws and the Youth Custodial Institutions Act (*Beginselenwet Justitiële Jeugdinrichtingen*) ('YCIA') especially relating to upbringing, education, family contact and limitation of their rights and freedoms. The penitentiary laws concerning adult prisons are far more repressive (Liefaard, 2012).

It has been argued that the practice and implementation of the 2014 Act has been difficult with the number of young adults being sentenced under this Act remaining rather low and only increasing from 1 per cent in 2012 to 5 per cent in 2016 (Schmidt et al., 2020). This increase, however, occurred irrespective of the general decrease in the number of young adults appearing before the court in the first instance (Van der Laan, et al., 2016). At the same time, in the space of one year (between April 2014 and May 2015), 252 young adults were transferred from adult prisons to juvenile detention institutions. The number of young adults in adult prisons has also decreased significantly (Schmidt et al., 2020). In 2015, the proportion of young adults under the age of 23 in adult prisons was nine per cent compared to 16 per cent in 2009. There have been several inspections of JJIs carried out in recent years by the Justice and Security Inspectorate (*Inspectie Justitie en Veiligheid*) (the 'Inspectorate')[78]. The Inspectorate highlighted recently the radical developments that have taken place in JJIs including the change in the nature of the population with an increase in young adult detainees (Inspectie Veiligheid en Justitie, 2017). The Inspectorate (2019) highlighted that this more complex target group requires a different range of treatment, care and training than is provided in JJIs. As discussed in more detail below, JJIs have adopted an approach called 'YOUTURN' which is based on an individualised treatment programmes addressing the specific needs of juveniles (Liefaard, 2012). In addition, education is compulsory in JJIs. The

[77] JOVO-regime is named after the Dutch word for young adults: jong-volwassenen (Liefaard, 2012).
[78] A Dutch government agency that supervises the Ministry for Justice and Security that has operated since 2012 and is an amalgamation of the Inspectorate for Public Order and Security and Inspectorate for the Implementation of Sanctions.

Inspectorate (2017, 2018, 2019) has found, however, that the current treatment and care based on YOUTURN does not meet the needs of the older and more complex target group. With an increased outflow of experienced staff and high rate of absenteeism among current staff leading to the suspension of training and mentorship, there has been an increase in violent incidents in JJIs (Inspectie Justitie en Veiligheid, 2018). It is clear that the older and more complex offenders in JJIs require a different approach to be taken and that knowledge and skills among staff need to be adapted to this different demographic.

Youth Justice Sector

In examining detention conditions for young people in the Netherlands, the differing treatment of 16 and 17 year olds, similar to Scotland, adds a layer of complexity. In accordance with the United Nations Convention on the Rights of the Child ('UNCRC') children are defined as under the age of 18 and should be dealt with in the youth justice system if in conflict with the law. In the Netherlands, all young people up to the age of 18 (now up to age 23) can be dealt with in the youth justice system, however, since 1905 adult criminal laws can also be applied to 16 and 17 year olds, in the particular circumstances clarified in 1965 and 1995 (Weijers, et al., 2009; Liefaard, 2012). The application of this provision, however, means the juvenile can be sentenced to up to 30 years imprisonment or to an adult treatment order which the court can indefinitely prolong and be placed, in principle, in an adult facility. In practice, however, specialised youth judges rarely use the provision, applying it to only one to three per cent of all criminal cases against this cohort (Uit Beijerse, 2016; Liefaard, 2012). Whilst this indicates, in practice, that for the most part adult and child prisoners are separated, the impact of the increase in young adult detainees in JJIs has to be taken into account. Young people between the ages of 12 to 23 can stay at JJIs and indeed while positive, has resulted in detainees under the age of 18 mixing with (young) adult detainees. It is unclear to what extent youth institutions differentiate between younger and older inhabitants (Liefaard, 2012).

In the Netherlands, placement in a youth institution means juveniles are accommodated in a specialised (open or semi-open) facility and its specific objective is to provide education (Liefaard, 2012). Under adult law in the Netherlands, remand, prison sentences and hospital orders (TBS) are served in different institutions, in youth justice all three are served together

in the one detention centre in addition to juveniles with a civil child protection measure (Uit Beijerse, 2016). There is a compulsory education programme in JJIs based on the 'YOUTURN' method which seeks to address the special needs of juveniles (Liefaard, 2012). Although issues arose following the 1995 Act regarding juvenile institutions being equipped with the same security measures as prisons therefore, with some arguing that they had developed 'the atmosphere of prisons', this doesn't appear to be the case anymore (Uit Beijerse, 2016: 3). The Inspectorates found in recent years that in all of the JJIs there was a positive living environment, young people were treated positively and good behaviour was promoted (Inspectie Veiligheid en Justitie, 2017; Inspectie Justitie en Veiligheid, 2018, 2019).

As discussed above, the Inspectorate commented on the radical changes that all JJIs have experienced in recent years. In addition to the change in the composition of the population, as discussed above, the number of young people in JJIs has fallen significantly resulting in a several establishments closing and the merger of three institutions into one government institution (Inspectie Veiligheid en Justitie, 2017). The Youth Custodial Institutions Act was introduced in 2001 to improve the legal status of juveniles in youth institutions and provide juveniles with strong legal status which stems from an international rights perspective (Liefaard, 2012). In order to guarantee their legal position a young person can file a complaint themselves in JJIs. It was found by the Inspectorates of the JJIs, however, that the handling of complaints often took much longer than the standard of four weeks which led to improvement plans being drawn up by the Ministry of Security and Justice to address this (Inspectie Veiligheid en Justitie, 2017). There are some other positive aspects to highlight regarding the different modalities of detention maintaining links with the community, including the operation of night detention and the option of the young person to spend the last part of the detention period outside the institution in employment or a vocational training course (Junger-Tas, 2004, Liefaard, 2012) Further, various research has been conducted on identifying other forms of youth detention such as staying in a small-scale facility near the young person's place of residence (Inspectie Veiligheid en Justitie, 2017).

Index F: Human rights compliance

Young Adults in the criminal justice system

Clearly, extending the upper age limit of the youth justice system is to be encouraged and the 2014 Act has made 'the Dutch system a leader in raising the age' (Matthews et al., 2018: 7). As discussed above, it appears that detention as means of last resort is applied in the Netherlands as the most common sanction among 18 to 23 year olds is community service followed by a prison sentence and fines (Liefaard, 2012). In respect of modes of criminal trial for young adults, whilst they do not appear before youth courts, an assessment is made at the early stage of the process to determine if they fit the criteria to receive a youth sanction. If this is agreed, the young adult in pre-trial detention can be transferred to a juvenile detention institution. In addition, the Judge can consider at this time if the young adult's pre-trial detention can be suspended and if so, the suspension conditions can consist of evidence-based youth interventions (Uit Beijerse, 2016). This is a new different approach towards young offenders compared to other countries such as Germany, Austria and Croatia who have extended the jurisdiction of the specialised juvenile court to include young adults up to 21. Indeed, it has been argued that it would have been better to follow these systems where all young adults are brought before the youth court in terms of organising the transfer (Uit Beijerse, 2016). Other issues surrounding the application of the 2014 Act concern the lack of a uniform approach by the judiciary in applying this law, ambiguity surrounding the target group of the legislation, and the lack of specialised youth criminal law prosecutors which the judges often follow in decision-making (Schmidt et al., 2020; Mijnarends and Rensen, 2017).

Youth Justice Sector

In the Netherlands, the upper age limit of 18 was set in the Children's Acts in 1905 and in 1965 an explicit lower age limit of 12 was introduced (Uit Beijerse and Van Swaaningen, 2006). As discussed above whilst the Netherlands ratified the UNCRC in 1995, it had to make official reservations due to the flexible approach taken to 16 and 17 year olds (Liefaard, 2012; Uit Beijerse, 2016). While the application of adult criminal law to 16 and 17 year olds is uncommon the UN Committee on Children's Rights has pressed the Dutch government to withdraw this restriction and abolish the option of transferring juveniles to the adult justice system (Liefaard, 2012; Uit Beijerse and van Swaaningen, 2010).

In respect of the mode of trial, a juvenile, unlike an adult, is compelled to attend their trial and since 2011 their parents or legal guardians have to be present too (Liefaard, 2012). An

important aspect of the criminal procedure (before and during the trial) in the Netherlands is the specific regard to the juvenile's personal circumstances (ibid). This is seen in the special role and involvement of the Child Care and Protection Board (Weijers, 2018). From the time a minor is arrested, a social worker conducts an initial assessment and is in touch with the young person throughout the trial and may start with early interventions if necessary (Liefaard, 2012). The involvement of the social workers from such an early stage differs to countries with a more adversarial nature in their youth justice process (Weijers, 2018). In addition, the hearings of young people's cases are before a youth court judge (*kinderrechter*) who specialises in youth law and compared to other countries, the Netherlands stands out as having a best practice in hearing the views of juvenile defendants (Rap and Weijers, 2014). The Dutch Criminal Code provides for a specific set of juvenile sentences (Liefaard, 2012). Whilst the 1995 Act increased the maximum sentences that could be given to juveniles, research has shown custodial sentences imposed on minors rarely exceed the maximum youth imprisonment sentence of two years and hardly ever exceed eight years imprisonment for very serious offences (Rap and Weijers, 2014 in Matthews et al., 2018). The regulations in the Netherlands concerning pre-trial detention of juveniles and its duration have received persistent international criticism and been critiqued for lacking a rights-specific and child-based orientation (Liefaard, 2012; van den Brink, 2019). The concerns raised by the UNCRC Committee, UNICEF and Defence for Children International are based on the consistently high proportion of pre-trial detainees among the total population of JJIs which indicates that at this stage of the process detention is not being used as a last resort (van den Brink, 2019) (see Figures 6.9 and 6.10 above).

6.4 Conclusion

As examined above, the Dutch justice system and its vacillating trends are unique in many respects. Both the adult and youth justice systems experienced a dramatic increase and then sharp decrease in imprisonment and detention rates. Whilst it appears both systems have followed similar trends, the drivers behind these respective trends are quite different. In the adult system the drivers behind the increase and subsequent decrease in the prison population appears to have been primarily due to an increase in the length of sentences given by judges, the increase in summons being issued by the PPS and the use of remand. In youth justice the extensive and increased use of remand rather than serving actual sentences drove up the detention rate together with an increase in the proportion of young people receiving

detention. The question still remains as to whether the Netherlands is less punitive since the decrease in imprisonment and detention rates evident since 2005. Several factors are of relevance here. Firstly, the proportion of adult offenders who receive a custodial sentence is quite high in the Netherlands compared to other European countries indicating there is an increased propensity (risk) to imprison offenders (Frost, 2008; Kalidien and de Heer, 2011). Whereas during the increase in the prison population from the 1990s to 2005 there was increasing intensity (duration) of imprisonment (Frost, 2008). Secondly, the remand rate for the adult system has remained one of the highest in Europe and in youth justice custodial remand is still used extensively (Walmsley, 2018). Thirdly, there has been a shift in policing resulting in a more managerial and repressive approach as seen in the creation of ASAP and the disbanding of juvenile police departments. Fourthly, whilst the introduction of the unique approach to young adults up to the age 23 has to be commended it has not been without difficulties, paradoxically leading to human rights concern for juveniles' experience in detention. Finally, as argued by van Swaaningen (2013: 354), there is a real question whether the 'penal-welfare complex' has been deployed as a means of disciplining the population. This is seen in several respects, van Swaaningen (2013) argues, including the policy shift from crime to 'anti-social behaviour' and 'pre-crime' and the reshaping of social crime prevention in an exclusive, repressive direction. This means the Dutch case may not be a true example of the punitive turn being reversed but rather the redeployment of welfare provisions 'in the fight against nuisance and insecurity' (van Swaaningen, 2013: 354).

6.5 Postscript

As discussed briefly in Chapter Three, since 2019 the Netherlands has been facing the question of whether the maximum youth detention sentences should be increased. This was raised initially in 2019, when some parents of young person victims of manslaughter committed by a young person offender petitioned the former Minister for Legal Protection (Dekker) to 'increase youth detention sentences' (Huls et al., 2022). This petition was signed than more than 90,000 people (NOS, 2019) and the Minister responded by commissioning a comparative study on sentencing criminal cases of young people and young adults aged 16 to 23 years old. This study resulted in a report which was published at the end of 2020 (Asscher et al., 2020). Following an expert conference in May 2021 with academics, youth criminal justice practitioners and representatives and relatives of victims, further issues and questions were raised by the Minister regarding cases of young offenders (Huls et al., 2022). As a

result, the Research and Documentation Centre of the Ministry of Justice and Security ('WODC') asked an independent research team to carry out a study resulting in a report published in 2022 (ibid). Both reports are valuable for the evaluation of the Netherlands' current practice in sentencing young people, but also indicate a more punitive appetite for youth justice growing.

The aim of the 2020 report was to firstly, provide insight into the sentencing of youth in various European jurisdictions and secondly, explore the extent to which these findings should influence a change in the Dutch criminal law for young people convicted of a serious sexual or violent offence (Asscher et al., 2020). The study considered both civil (Netherlands, Belgium, Germany and Sweden) and common law jurisdictions (Ireland, England and Wales) and their respective legal frameworks and practices concerning the sentencing of youth offenders (aged 12 to 23 years old) who commit serious offences. Ultimately the study concluded that none of the perspectives provided in the report, namely an international and European children's and human rights perspective, a European comparative perspective, and an effectivity perspective, required the amendment of Dutch criminal law in this area. While it did not directly answer the question as to whether the maximum detention sentences should be increased, the study did specify that the findings did 'leave some room for the legislature to make certain changes' (Asscher et al., 2020: 296).

Six issues of concern were brought forward based on the research outcomes which Asscher et al. (2020) stated the legislature and policy makers should take into account by when deciding whether to increase the maximum sentence length for youth who have committed a serious or violent offence. Whilst it is not feasible in this thesis to go through all of these issues in detail, some of them are of note so will be considered briefly. Firstly, the study emphasised the rareness of serious violent and sexual offences committed by youth and that these cases are not representative of the majority of youth justice cases in the courts. Therefore, if an increase in the maximum sentence length was to occur this could impact on less serious cases. Secondly, the study highlighted the need for further research in relation to the implications a potential increase could have on the relationship between youth detention and custodial treatment order for youth (coined mandatory/compulsory custodial treatment order in this thesis). The use of this order and potential issues are raised in this research, and are considered in the subsequent chapters (see Chapter Seven in particular). Thirdly, the study importantly highlighted that there is no evidence that a longer period of detention leads to less recidivism. In addition, the study questioned the impact of increasing the maximum

duration of detention of sentencing young adults under 23 years old under youth criminal law and the sentencing of 16 and 17 years old with adult criminal law, and this was an area that should be researched further. Finally, the study emphasised the urgent need in this area to monitor the sentencing of youth for serious offences as it is an underdeveloped area both in the Netherlands and in other countries (Asscher et al., 2020).

Following the publication of the 2020 report (Asscher et al., 2020), as discussed above a further report was commissioned in relation to obtaining the views of prosecutors and judges and their experience in sentencing serious or violent offences committed by youth or young adults (Huls et al., 2022). This study offered insight into the practice in the Netherlands in relation to these offences, even though they could not give an unequivocal answer to the central research question. The study found the majority of respondents indicated they can work with the current system of sentencing and had no wish for the maximum detention sentence to be increased for 16 and 17 year olds but respondents showed greater support for an increase for young adults aged 18 to 23 year olds. Some respondents in the study felt the maximum term of two years youth detention for young adults to be too limited, and that there should be some differentiation possibilities in sentencing. In increasing the maximum term of detention for young adults, it was noted by some respondents in the study that would bring about a more gradual transition between the youth and young adult sentencing framework (Huls et al., 2022).

The above two recent studies raise interesting points and considerations for the Dutch criminal justice system, and the potential reform it will face in the coming years in respect of sentencing serious offences committed by young people. This increased discussion whilst on the one hand does indicate a more punitive approach being considered towards Dutch youth justice, on the other the research and commissioned reports to inform policymakers and the legislature of the evidence in this area indicate an informed approach. This hopefully will lead to more research and further exploration in this area, rather than the introduction of any drastic and punitive measures to appease public concern.

PART III

Chapter 7 - Youth Justice contingencies and constitutive leniency

7.1 Introduction

It is proposed in this chapter to consider the findings relating to the first research question, namely what are the differences and similarities between the youth and adult justice systems in each of the three jurisdictions. First of all, it was found that in the three jurisdictions, there was a qualitative difference between the adult and youth justice systems with the approach to youth justice in all three jurisdictions being more welfare-based, tolerant and lenient than the approach to its adult counterpart. A second finding, however, was that this leniency was *contingent* on several factors which factors are explored in more detail below. Thirdly, despite the differences between the two sectors, it is argued that the two systems mutually constitute each other through both formal and informal means.

7.2 Differences between the adult and youth justice systems

As noted, all three jurisdictions had significant differences between their adult and youth justice sectors. Each jurisdiction and their justice sectors are considered in more detail below.

Ireland

As seen in Figure 7.1, the trajectories of imprisonment in the adult justice system and detention in the youth justice system have moved in opposite directions over the study period. As discussed in Chapter Four, this divergence began to manifest itself in the mid-1990s. Before this, both sectors experienced 'stagnation' and a relative neglect of policy issues (O'Donnell, 2008; Kilkelly, 2014) and this was reflected in comments made by Irish probation officers who noted that, prior to the implementation of the Children Act, the same approach was taken to both adult and juvenile offenders (Irish interviewees #11, 14). For the adult justice system, change began following the 1996 murders of Veronica Guerin and Detective Jerry McCabe which led to a period of legislative hyperactivity and the adoption of harsh criminal justice policies. In the youth justice system, change began with the introduction of the long overdue Children Act in 2001 (implemented in 2006), although as can be seen below detention rates were falling long before that.

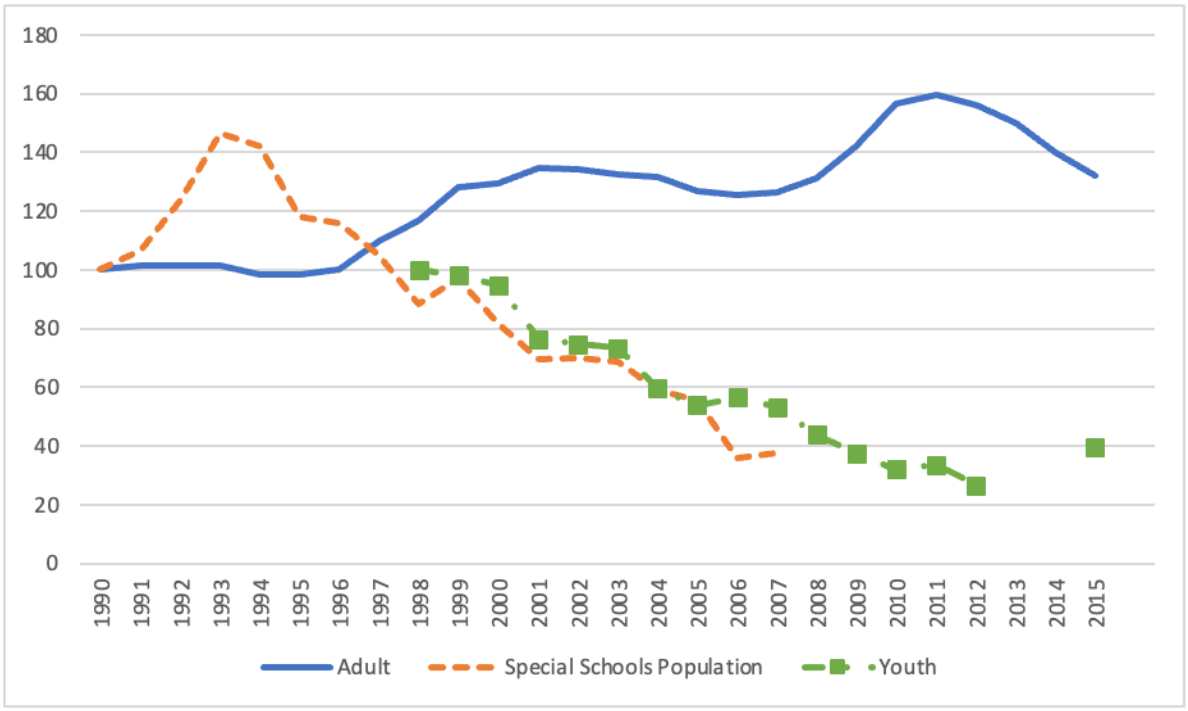

Figure 7.1 **Adult imprisonment rates, Special Schools population in Ireland 1990-2015 using 1990 as an index year and youth detention rates 1998-2015 using 1998 as an index year[79]**

Sources: O'Donnell et al. (2005) and Irish Prison Service, Annual Reports, various years; Irish Youth Justice Service requested data on Children detention schools in Ireland including St. Laurence's, FC; NARU, FCC; FCAC; Trinity House School; Oberstown Girls Centre and Oberstown Boys Centre 1998-2012; Oberstown National Detention Campus data 2015.

This divergence between the two sectors was commented on by several Irish interviewees whose overarching sense was that 'it's very different for children and adults' (Irish interviewee #5). The sectors are described as contrasting in terms of their core characteristics: 'for the adults I would say warehousing and for under 18s, for the youth justice part, hopeful' (Irish interviewee #8). This was similar to another interviewee who stated: 'I think under 18 is more restorative and creative and family systemic' but 'if you come into the system after 18 I think it can be… not restorative, retributive' (Irish interviewee #14). This optimism expressed for the youth justice sector, which was not expressed for the adult justice sector, can be seen in various progressive developments that stemmed from the implementation of the Children Act, 2001. As discussed in Chapter Four, these include: the establishment of the Irish Youth Justice Service, the rising of the age of criminal responsibility from seven to 12

[79] Young adult population data were not available for cross-sectoral comparison with the other sectors populations.

years old, and the definition of a child as a person under the age of eighteen years old (Seymour, 2006a: 123).

Interestingly, several interviewees directly commented on the 'issue of separateness' (Irish interviewee #12) and the 'disjointed, fragmented' (Irish interviewee #2) nature of the system in reference to the adult and youth justice sectors. The differing approaches between the adult and youth justice sector is also reflected through references to the 'cliff-edge' (Irish interviewee #5) of the youth justice system when a young person turns 18 and the lack of transitional arrangements into the adult justice sector. Indeed, the opening of Oberstown in 2016 together with the closure of St Patrick's Institution sharpened this transition. These progressive developments in youth detention led to all under 18 year olds being detained in Oberstown instead of an adult prison or institution. These developments can be seen in stark contrast with adults and young adults i.e. all those over the age of 18 where compliance with human rights has been a persistent challenge (despite some positive developments as discussed in Chapter Four).

Some interviewees did comment positively on the youth justice system as 'fair' (Irish interviewee #1: 2; Irish interviewee #12) and interestingly one interviewee viewed the Irish system as 'very lenient in certain crimes' (Irish interviewee #15). This can largely be attributed to the use of diversion for all types of offences outside of murder, with one interviewee noting that it is even used for rape cases (Irish interviewee #5). Further, the use of alternatives to prosecution by the adult and youth justice sectors differ considerably. Indeed, the GJDP has been in place, on a non-statutory basis, since 1963 (Kilkelly, 2011) whereas the adult cautioning scheme has only been in place since 2006. As can be seen in Chapter Four (Figure 4.18) there is a stark difference in the use of diversion between the two justice sectors for example in 2010, seven per cent of eligible incidents dealt with by way of adult caution compared to 72 per cent of young people receiving a caution. In addition, as discussed in Chapter Four, the stark contrasts between the GJDP and the adult caution scheme include the latter only allowing one caution per offender to be issued and the limited twenty offences listed in the schedule covering the scheme (Crowe, 2020). This is compared to subsequent cautions available in the GJDP and the majority of offences are considered for admission into the programme (An Garda Síochána, 2017). While, as is evident from Figure 7.2, the gap between the number of youth diversion incidents and adult caution incidents has closed between 2009 and 2015, and both the number of adult cautioning incidents and youth diversion incidents are on a downward trajectory, reflective of the universal crime drop, the

extent to which diversion is used in each of the sectors remains starkly different. (McAra and McVie, 2019).

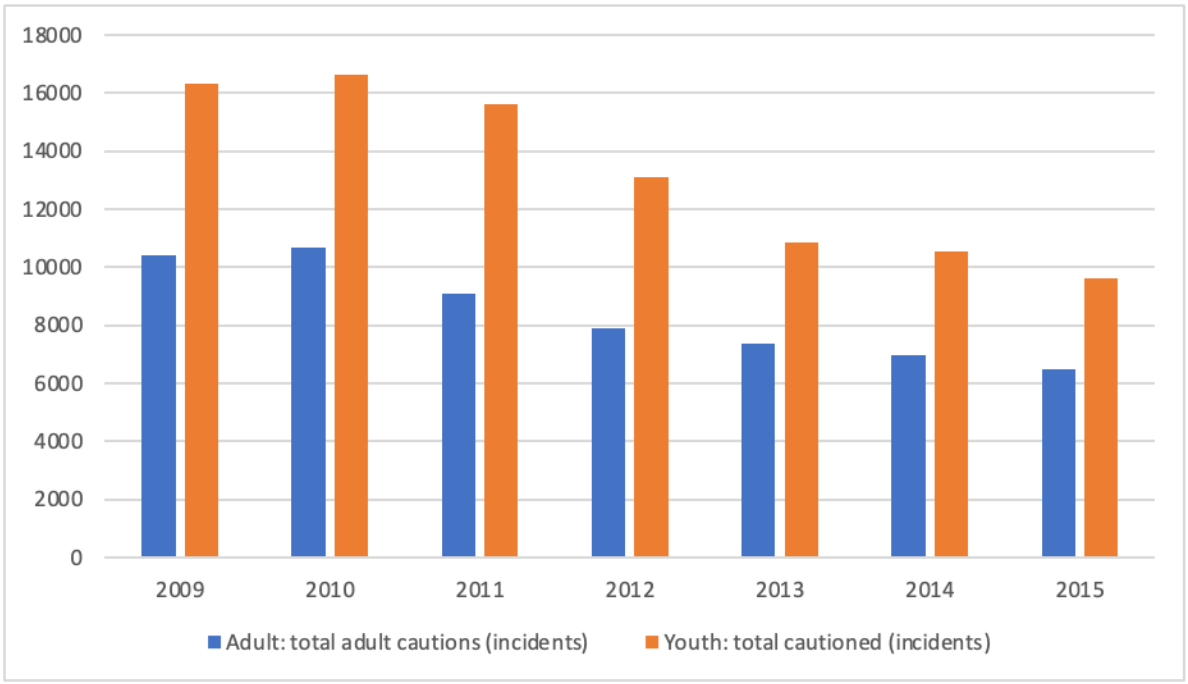

Figure 7.2 Total number of adult cautioning incidents and number of cautioned incidents under the GJDP 2009-2015.

Sources: Garda Recorded Crime Statistics 2003-2007; Annual Report of the Committee appointed to Monitor the Effectiveness of the Diversion Programme, various years; Crowe (2020).

Scotland

As evident from Chapter Five, the Scottish adult and youth justice sectors have historically operated differently and on the surface have experienced bifurcating trends. While the adult system always tried to maintain a distinctively 'Scottish' welfarist nature, this softer rhetoric couldn't cloak punitive trends in the system to the point that it had one of the highest prison population rates in Europe in 2015 (Walmsley, 2018). The Children's Hearing System (CHS) on the other hand, is often said to represent 'a triumph in welfarism' (McAra 2002: 446) in respect of both its soft rhetoric and practice, albeit limited to those under the age of 16.

These differences were largely confirmed by Scottish interviewees. Indeed, Scottish criminal justice as a whole was described as: 'inconsistent' (Scottish interviewee #12; Scottish interviewee #6) 'contradictory' (Scottish interviewee #2; Scottish interviewee #8),

‘disjointed’ (Scottish interviewee #10) and ‘bifurcated’ (Scottish interviewee #8). Interviewees specifically referred to youth justice as ‘quite progressive’ (Scottish interviewee #10) and ‘good’ (Scottish interviewee #7). One interviewee commented that the difference between the youth and adult system was that criminal justice: ‘[has operated] badly but [is] improving in some areas. We still send far too many people to prison for too long for no obviously good reason’ but on the other hand ‘oddly I think our approach to youth justice has probably been one of the more reassuring things in recent years’ (Scottish interviewee #1). Another interviewee was of the view that this was because: ‘there has been a lot more concerted effort policy wise for young people than there has been for the rest of the population, and I think that it’s politically regarded as OK to take more risks for young people than it is for other people’ (Scottish interviewee #8).

This is far from the whole picture, however. As can be seen in Figure 7.3, when trends in the use of imprisonment/detention for young adults and under 18 year olds are examined they appear convergent initially but over time have diverged from each other. Whilst both rates are falling, the rates for the under 18 and under 21 year olds are falling much faster than the adult rate. The under 18 and under 21 year old rate saw a decline of 80 per cent over the period whereas the adult rates declined by 20 per cent. As discussed in Chapter Five, the general downward trends since 2006 can largely be attributed to the SNP taking power in 2008, the Prisons (McLeish) Commission Report (Scottish Prisons Commission, 2008) and a potential behavioural change in young people (McAra and McVie, 2017).

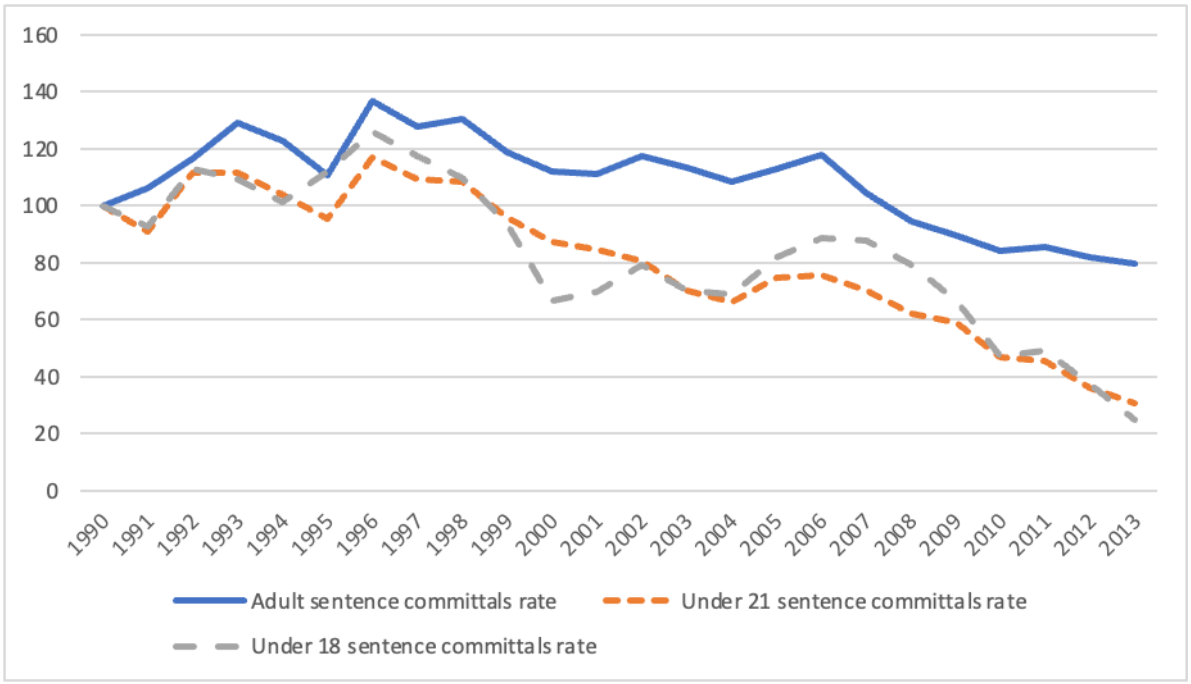

Figure 7.3 Adult sentence committal, 18 to 25 year old sentence committal, and under 18 sentence committal rates in Scotland 1990-2015 using 1990 as an index year

Sources: Scottish Prison Service Annual Reports 1990-1996, 2012-2013, 2015-2016, Scottish Executive: Statistical Bulletin: Prison Statistics Scotland 1997-2012, Scottish Government Prison statistics and population projections 2013-2014.

In addition, Figure 7.4 also points to divergence between the two sectors when the rates of custodial and non-custodial sentences are examined. As can be seen below, the under 21 group has experienced a significant reduction in custodial sentences (decreased by 65 per cent) whereas the courts have continuously used custody as a sentence for adults (increased by 35 per cent). This supports the contention that both sectors have grown more divergent from the other over the period examined. In seeking to explain why the rate for adults receiving custodial sentences has increased gradually over the period examined, as discussed in Chapter Five, it appears that the increase in the use of community sentences has displaced financial penalties and not custodial sentences. Whereas in the under 21 sector it appears that the drastic reduction in the number of young people appearing before the court can contribute to the explanation for the significant downward trend in under 21s receiving custodial sentences. Indeed, the number of under 21 year olds appearing before the Scottish Courts reduced from 43,808 in 1990 to 9,779 in 2015, a reduction of almost 80 per cent (Scottish Government, 1992, 2017).

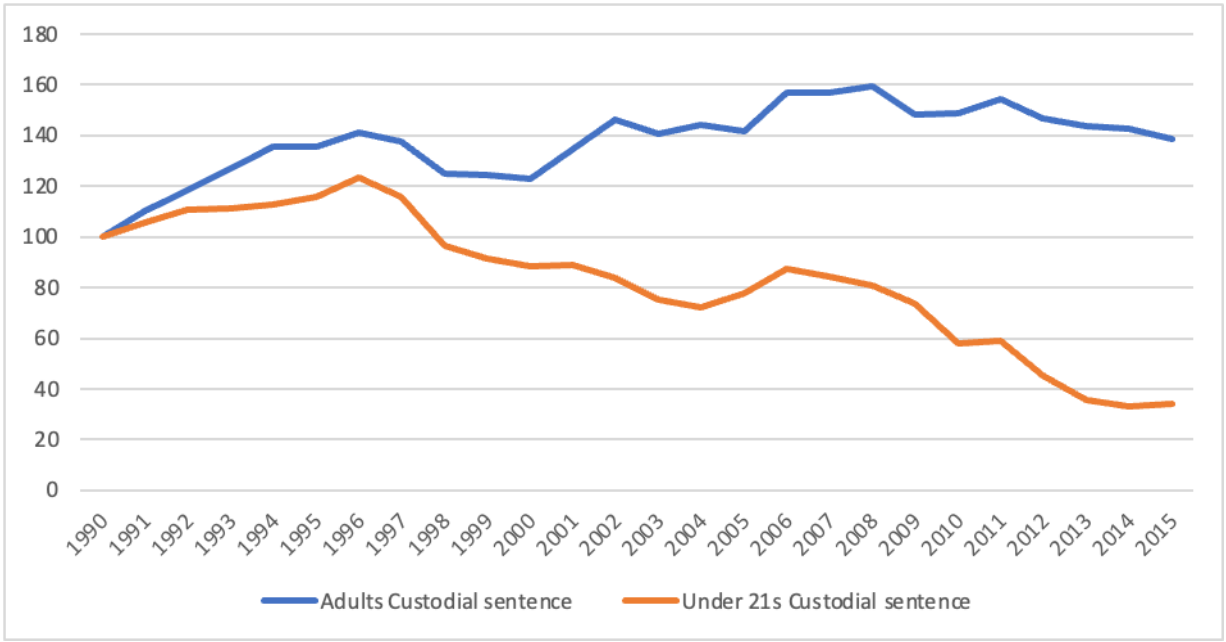

Figure 7.4 **Rate of custodial[80] sentences given as the main penalty to adults (per 100,000 of the national population) and under 21s (per 1,000 of the under 21 national population) from criminal proceedings 1990-2015 using 1990 as an index year**

Sources: Scottish Office Statistical Bulletin, Criminal Proceedings in Scottish Courts 1990-2015.

Netherlands

As discussed in Chapter Six, on the surface the two justice sectors in the Netherlands appear to have taken a similar approach and it appeared that changes that occurred in the youth justice system were not independent of changes in the adult justice system (Junger-Tas, 2006). Indeed, as seen in Figure 7.5, the imprisonment and detention rates (both corrected and uncorrected) follow a similar trajectory over the period. Interviewees' responses to this question were the most mixed in the Netherlands compared with Ireland and Scotland. One interviewee opined, 'I would say that it is probably similar, it is more similar than different I would say in orientation.' (Dutch Interviewee #2). Others noted that the 'punitive turn' had impacted both sectors so that youth justice had become more similar to adult justice (Interviewees #6 and 9). This was evidenced by the introduction of the Juvenile Justice Act 1995 which emphasised the increased maturity of young people, abolished distinctive youth

[80] Custody includes prison, supervised release order, extended sentence, and order for life-long restriction.

justice procedures and curtailed the power of youth judges, thus bringing the youth system closer to the adult justice system (Junger-Tas, 2004; Uit Beijerse and Van Swaaningen, 2006). Further, the maximum length of sentence for offenders between 12 and 15 years old was doubled to 12 months and for 16 and 17 year olds it was quadrupled to two years (Uit Beijerse and Van Swaaningen, 2006; van der Laan, 2010).

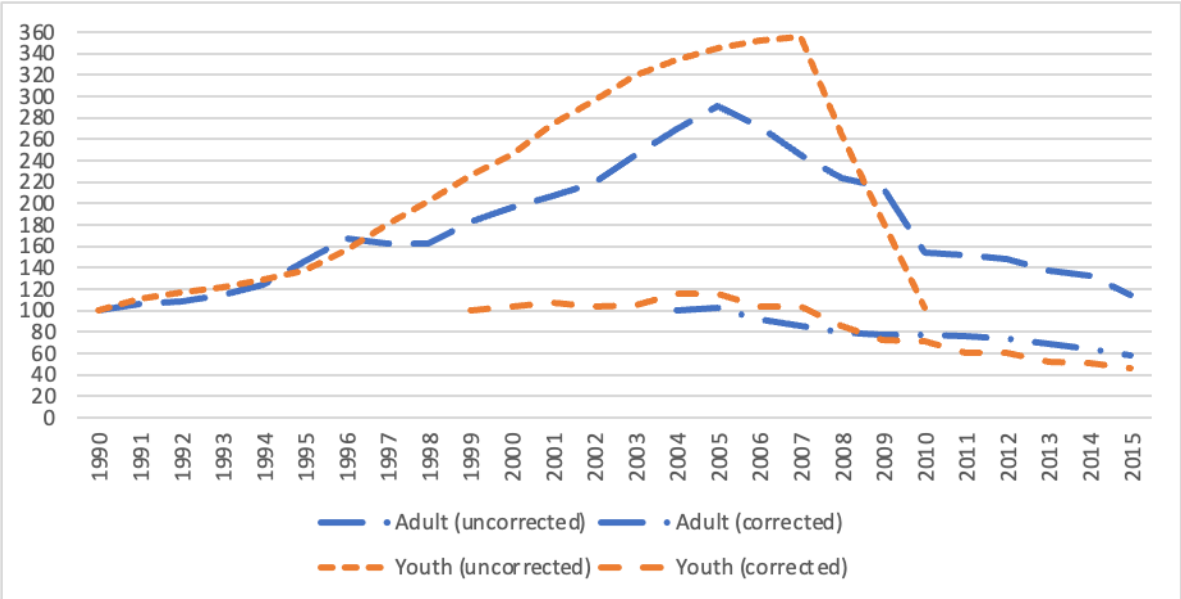

Figure 7.5 Adult imprisonment (corrected and uncorrected) and youth JJI detention (corrected and uncorrected) rates[81] in the Netherlands 1990-2015 using 1990 as an index year.

Sources: Criminaliteit en rechtshandhaving 1999, 2004, 2006, 2007 and 2015.

On the other hand, it was still emphasised by some interviewees that the youth justice system is different to the adult system: 'I feel there is a difference, a big difference, but public opinion and politicians and the… state of affairs in Holland is chipping off, is taking bites of the juvenile justice system which are not very preferrable' (Dutch Interviewee #4). While there was a shift in approach towards juveniles from the 1990s, the 'culture of control' (Garland, 2001) evidenced in the adult justice system did not bite as deep in the youth justice system. This was seen to be reflected in the different aims and values of the systems: 'I think,

[81] There are two different sources of the prison population from 1990 to 2015 which resulted in a corrected and uncorrected rate. The uncorrected prison population rate reflects older Dutch figures provided to Space 1 data of the Council of Europe which included categories which were not included in the statistics provided by other European countries such as illegal immigrants, juveniles detained further to both civil and criminal law and mentally ill offenders in forensic psychiatric institutions (Boone et al., 2020).

for youngsters it's protection and punishment and for adults it's more punishment than protection' (Dutch Interviewee #12). Some referenced the views and approach taken to young people: 'the educational goal for youth is clearly aimed at learning from your mistakes' (Dutch Interviewee #3) and 'our tradition of the development of a young person is the most crucial aspect of juvenile justice' (Dutch Interviewee #9). A Dutch adult probation officer stated: 'it's different because with juveniles they are very soft and they are trying to do anything that don't get them to jail… with the adults you are working much more with them, like they have to be responsible' (Dutch Interviewee #8).

Similarly, despite the shift to a more punitive approach in the 1990s in youth justice, interviewees were of the view that the welfare tradition remained under the skin of the culture: 'they [the punitive periods] are short and then they [are] overcome and the most prominent is the welfare approach' (Dutch Interviewee #12). Indeed, as can be seen in Figure 7.6 the number of juveniles receiving custodial sentences decreased dramatically from 1996 to 2015, with a reduction of nearly 100 per cent compared to a 20 per cent reduction in the adult trends. This illustrates the point neatly- the trends are in a similar direction but the welfarist ethos of the youth system served to protect it from the worst excesses of the adult system and similarly accelerated the post-2005 decarcerative turn.

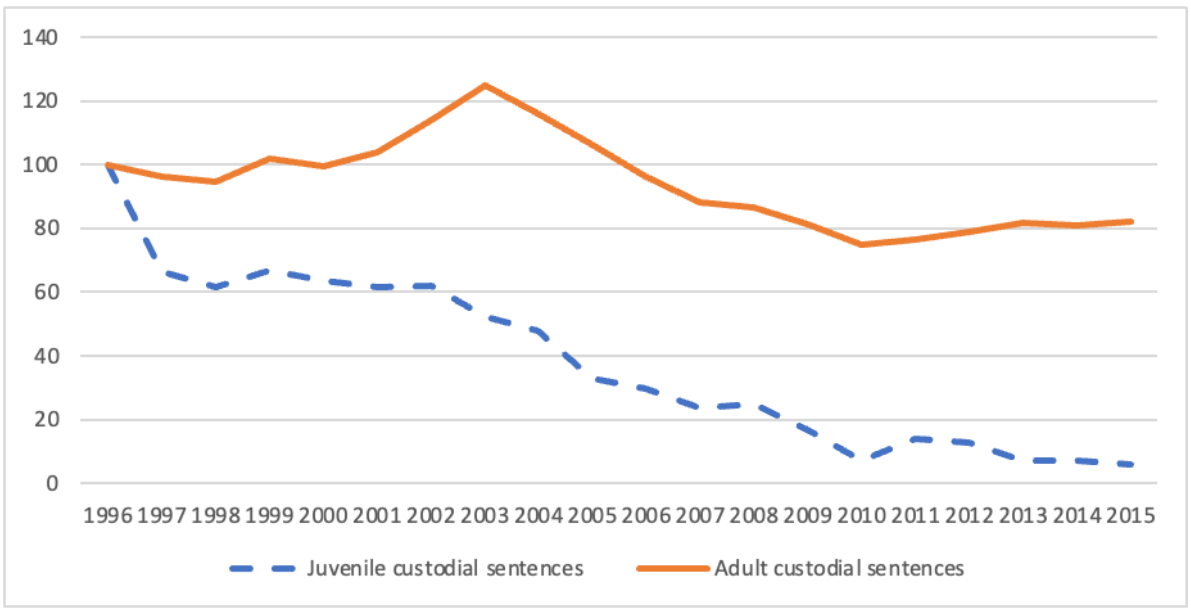

Figure 7.6 Rate of the total number[82] of custodial sentences from the court given to adults (per 100,000 of the national population) and underage suspects (per

[82] The figures in the tables in Criminaliteit en rechtshandhaving 2015 have been rounded to fives.

1,000 of the under 18 population) in the Netherlands 1996-2015[83] using 1996 as an index year

Source: Criminaliteit en rechtshandhaving 2015 and 2019.

This is further demonstrated when breaking down the Dutch PPS decisions as seen in Figure 7.7. While the increase in the use of summons from 1996 to 2015 was higher for underage suspects (ten per cent) than adult suspects (seven per cent), as discussed in Chapter Six, the overall proportion of summonses issued to underage suspects during this period has been lower (45 per cent in 2015) than the proportion issued to adults (51 per cent in 2015). Indeed, the presence of the welfare tradition remaining under the skin of the culture in the youth justice system in the Netherlands is evidenced by the fact that, despite the transitional arrangements put in place for 18 to 23 year olds in 2014, 95 per cent still end up in the adult system (Schmidt et al., 2020), something which interviewees attributed to 'the very different culture' within the adult and youth systems (Interviewee #5).

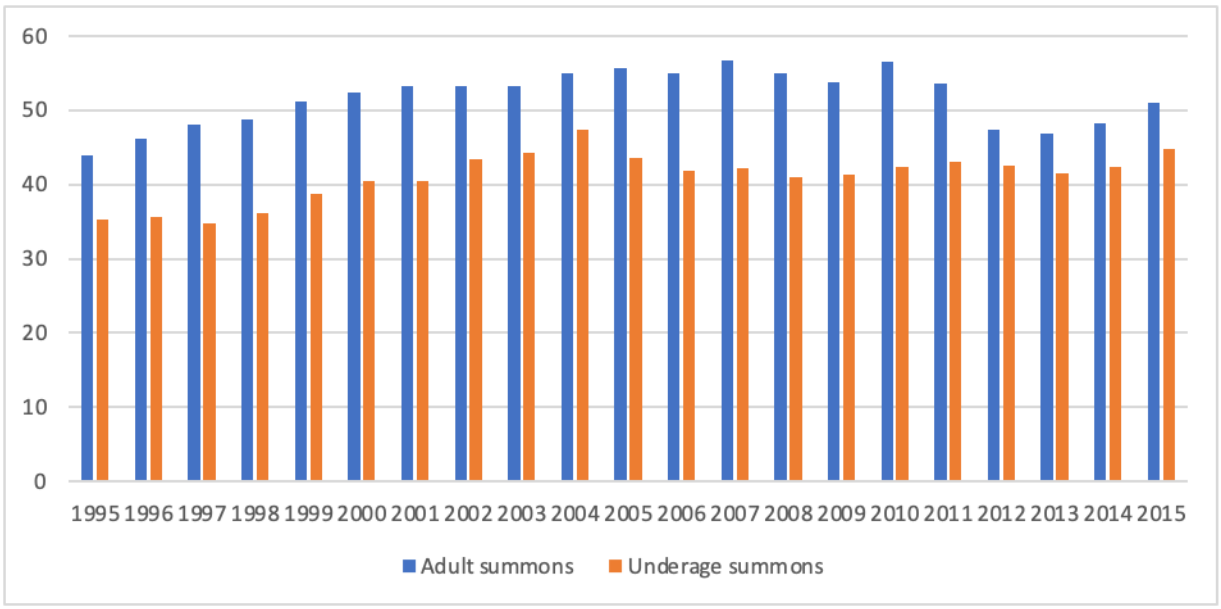

Figure 7.7 Proportion of summons issued by the Public Prosecution Service in criminal cases for adult and youth (underage) suspects, 1996[84] -2015

Source: Criminaliteit en rechtshandhaving 2007, 2015 and 2019.

[83] The figures for the court imposed sanctions of either community service and a custodial sentence is only available from 1995 onwards and the under 18 national population was only available from 1996 onwards.
[84] Decisions made by the PPS in criminal cases for underage suspects were only available from 1995.

7.3 Contingent leniency in youth justice

Whilst it was found in each country that there was a more lenient and welfare-based youth justice system, which differed from the adult system, there are important *contingencies* present in all three youth justice systems. Some of these related to geographical contingencies, what Muncie (2011: 53) has described as the 'local and regional spaces of difference (the *contingent* relations) … of youth justice reform' and Golson et al. (2021: 43) describe as 'spatial differentiation'. Other contingencies, relating to age, mental health, class, background, and disposition (Case and Bateman, 2020) link with statutory limits on the youth justice system, as well as high levels of discretion built into the system These contingencies will be explored in more detail below.

Ireland

Whilst, as noted, the Irish youth justice system is perceived as relatively lenient, this is contingent on several factors, namely, a child's background and geographical variation (Hamilton et al., 2016). Most notably, this is strongly connected to the high levels of discretion built into elements of the system, such as the Garda Diversion Programme (Kilkelly, 2014).

Contingency by social class

This contingency was evident from the discussion by some interviewees on the operation of diversion in Ireland for young people. It was commented by some interviewees that there have been concerns about whether diversion was being used fairly 'on the ground' in that some types of children from certain types of backgrounds were getting more favourable treatment 'than children from other backgrounds who are probably in more of need for it' (Irish interviewee #6). Indeed, one interviewee who works in the prison system commented on this difficulty with the programme not reaching all children who would need it:

> 'I think as well it's who it reaches. I know from dealing with young lads that their family name will just automatically exclude them from those sort of programmes, I know from people who have been in care and have been in the criminal justice system and have been going from care to prison and back out

> again… they have been in care their whole life… and would actually be like I don't know what a JLO is' (Irish interviewee #10).

There was a recurring acknowledgement amongst these interviewees that 'for different cohorts there is different levels of effectiveness' (Irish interviewee #2) in respect of diversion. Another interviewee referred to the small portion of young people of 'about 13-15%' who, for various reasons, such as more problematic offending patterns or more problematic socio-economic issues in the background, are not suitable for the diversion programme (Irish interviewee #12). This interviewee stated:

> 'That smallish section of the kids who don't get diverted is actually the most problematic one and it's the one that the system does the least for at the moment. So in that sense the diversion system doesn't help them. It impacts negatively not because of what it does but because there is nothing else in addition to the type of diversion that is there' (Irish interviewee #12).

This was also acknowledged by a Senior Garda/Police Officer in that there is a cohort which are hard to reach and are 'often times are not in detention, they are in the community but they are not necessarily looked after' (Irish interviewee #9).

Geographical contingency

The issue of variation of treatment in criminal justice across the country was also raised, as explained below by a judge operating in this field:

> 'you also had, within the courts, huge geographical difference so you know if you took a crate of beer down in a supermarket down in the country you might get off the first time but the second or third time you have a fair chance that you would have gone into detention, that would never have happened in Dublin' (Irish interviewee #5).

This geographical contingency can be attributed to a lack of resourcing outside of Dublin and a lack of expertise, given that only Dublin has a dedicated Children's Court. The same judge referred to the use of Day Centre Orders under the 2001 Act and this issue:

> '…there are three venues in Dublin but most of the country don't have any day centres so there [are] a lot of issues. Geographical variation is a huge problem and that's … coming down to lack of specialisation and lack of resources… the

> reality is that if I am in this field doing this every day I am going to become somewhat of a specialist in relation to it but if you are only doing it once a month in Donegal or somewhere like that you are not going to have the same amount of input in relation to it, you are not going to have the resources but you are not going to have that specialisation in regards to it' (Irish interviewee #5)

Similarly, another interviewee commented that if a young person did appear before a court outside of Dublin 'you can imagine how seriously that would be taken by a judge who probably has never dealt with or tried a child before. You see that in Oberstown, that they are the judges who send the children on remand and we are going, for what?' (Irish interviewee #3).

In summary, while the overall sense from interviewees was that there is a different approach to adult and youth justice in Ireland, with the youth system often viewed as more tolerant or lenient than the adult system, this leniency is contingent. In respect of both diversion in the youth justice system ('one of our most celebrated interventions' (O'Sullivan, 2015: 8)) and child-appropriate sentencing, this is dependent on what county a child lives in, the level of specialisation of practitioners in that particular county, and what background or previous experience that child has with the system.

Scotland

Whilst it is clear that the majority of interviewees perceived a distinct approach to adult and youth justice in Scotland there is a clear and stark exception to this which is the treatment of 16 and 17 year olds. In Scotland, only young people in conflict with the law under the age of 16 are brought before the Children's Hearing System whereas if a child is over that age (unless you are on already on a supervision order from the CHS) they are brought before the adult courts. Whilst many interviewees did comment on this later in their interviews, it did not immediately strike them as important qualifier in terms of the operation of the youth justice system in Scotland. This is in addition to geographical variation across the country which in turn sees some young people (from disadvantaged socioeconomic areas) being treated differently. As stated by one interviewee: 'Scotland tells itself this narrative that it is very different and it treats children very different from adults but there are some anomalies' (Scottish interviewee #5). These issues are explored below.

Contingency by age

As stated in Chapter Five, Scotland is the only country in Western Europe that routinely deals with 16 and 17 year olds before the adult courts (Muncie, 2011). As one interviewee observed, 'this is one of the anomalies, you have got a system for children except not these children in these circumstances, you can't have that' (Scottish interviewee #5). Another also expresses similar concerns about the youth system: 'I think there are overclaims about it, massive overclaims, because Scotland has always retained the right to prosecute children in adult courts' (Scottish interviewee #13). One interviewee commented that in their view 'the 16s and 17s in Polmont [Young Offender Institution] is the biggest atrocity that we have in Scotland' (Scottish interviewee #5). Another agreed that: 'we are [both] welfare based and… happy to put children in court and in prison' (Scottish interviewee #2). Indeed, echoing these views, one interviewee commented:

> '[it] comes back to the 16 and 17 year olds and what they are actually viewed as because they are getting dealt with in adult systems … Polmont is a young offenders institution, it is still a prison in our view so those children are not being protected any more than adults are in terms of their welfare and they are still being put in prisons' (Scottish interviewee #10).

Interviewees acknowledged throughout their interviews how changing this approach to 16 and 17 year olds has 'been talked about for so long' (Scottish interviewee #10) and 'going on for 20 years' (Scottish interviewee #12). Indeed, one interviewee commented: 'it was acknowledged that 16 and 17 year olds were getting a pretty raw deal and that they were just being treated as adults and that wasn't the best way of doing things' (Scottish interviewee #13). Yet, despite this no change has occurred. Another interviewee attributes this to the origins of the CHS which, in their view, was not 'ever set up for the serious cases' (Scottish interviewee #2).

Geographical contingency

As mentioned above, geographical variation was discussed by several interviewees. The fact that there are 32 local authorities that operate their own system connects with this variation. While some felt that high levels of discretion in sentencing were positive, in that they allowed for account to be taken of individual circumstances (Interviewee #9), interviewees also viewed variation amongst practitioners such Sheriffs negatively, with one stating that:

> ‘it can be different, sometimes Sheriffs are maybe different, they could be harsher in some regions because they are not seeing …or for particular offences, house breaking in rural areas, it’s always been anecdotal that you don’t want to do that in a rural area where trust is important and you would be more severely punished than if you were in a larger city’ (Scottish interviewee #2).

A prison officer also discussed this issue from their perspective of working in several different institutions, including young offender institutions for 16 to 21 year olds and that this is one of the biggest issues:

> ‘a prime example if you steal a car in Edinburgh you could get 1 year in prison, if you steal a car in Glasgow you could get 4 months. So we are very, very inconsistent across the whole structure of it and I think that is a massive problem’ (Scottish interviewee #6).

This geographical variation is connected with social class, with young people in deprived urban areas experiencing multiple disadvantages. Indeed, as discussed in Chapter Five, during the widespread use of stop and search in Scotland between 1992 and 2013, it was found by Murray (2014) that young people in the most deprived areas were being stopped and searched by police on a regular basis with some young people living in urban areas experiencing this practice daily (Lightowler, 2020). Moreover, in some parts of Scotland it was found that police were stopping and searching young people at rates many times higher than New York or London (Murray, 2014). On this geographical variation connected with social class, a Justice Social Worker Team Leader based in Edinburgh stated that, based on their experience:

> ‘There is a group that are just let down from a very early age… they get bent off from school, usually the kids that are most troubled that we work with… you start to see patterns of fighting, exclusions, drug taking… end up leaving school or being binned from school with next to nothing… how do you then repair that damage of folk that have just been written off and those are the kids that become the adults that occupy Sherriff’s time’ (Scottish interviewee #13).

On the other hand, another interviewee noted that in certain areas such as West Lothian in Scotland there are really good pockets of good multiagency working where the court, social worker and police are all in the same building (Scottish interviewee #2). It appears that even though on the face of the system there is an obvious and distinct approach to adult and youth justice in Scotland, this remains highly contingent on certain factors. Most significantly, the

age limitation on the Children's Hearing System results in an extreme variation for those who enter it at age 15 or age 16.

Netherlands

As noted, despite the more punitive turn in the 1990s, there appears to be a more welfarist and tolerant based approach to youth justice in the Netherlands, compared to adult justice. However, this welfarism is contingent on certain factors such as age, mental state and other dispositional contingencies (Case and Bateman, 2020).

Contingency by age

The flexible transitional arrangements for those aged 18 to 23 in the Netherlands have attempted to create a more consistent approach across the two justice sectors, as opposed to a dramatic shift to the adult justice system at aged 18. This cuts both ways, however, and, as explored in Chapter Six, provisions allowing adult sanctions to be applied to 16 and 17 year olds were retained when the system was reformed in 1995 (Uit Beijerse and Van Swaaningen, 2006). While the provision is applied very rarely, many interviewees were highly critical of it as contrary to the UNCRC (Interviewees #1, 4, 5). There is a fear, however, that if this possibility for 16 and 17 years olds is abolished, that the maximum period of youth detention (currently two years for 16 and 17 year olds) will increase. As one public prosecutor stated about this law:

> '[I]t has been a long time like that, it is quite rare that adult law is applied to 16 and 17 year old children. It should be an exception but I think for some very severe cases it will be necessary and that is because we have had some very severe cases… and because our maximum penalties are limited to one or two years detention or the placement in the detention [juvenile custodial treatment order], for some rare cases every year we have to apply adult law' (Dutch Interviewee #3).

Similarly, another interviewee stated: 'no one wants to skip it because they want to keep it for a safety measure if there is sometimes a 16 or 17 year old who commits a very serious crime' (Dutch Interviewee #1). Another stated: 'still some judges think it's necessary and some crimes ask for a severer punishment sometimes and then to use the possibility from the point

of view as a victim, as a society maybe you should use that' (Dutch Interviewee #4).

Contingency by mental state

As noted in Chapter Six, a key detention order is the custodial treatment order[85] ('PIJ') introduced in 1995 or, as one interviewee stated, 'the pain measure as we call it' (Dutch Interviewee #1). In order to receive a custodial treatment order, three conditions (article 77, s.(1) Criminal Code) have to be in place. Firstly, the young person must have committed a serious offence for which pre-trial detention is allowed. Secondly, the order must be demanded by 'reasons of public safety in general or for the safety of others in particular – the "danger criterion" (*gevaarscriterium*)' (Liefaard, 2008: 390). Finally, the treatment order must serve the best interests of the young person's best development, the 'assistance criterion' (*hulpverleningscriterium*) (ibid). The court can only order a custodial treatment order following the reports of two independent behavioural experts from different academic disciplines such as a psychologist and social worker (Liefaard, 2008; 2012). The behavioural experts will assess the juvenile and criteria to advise the court if the order is appropriate for the young person. In addition, the behavioural experts have to establish there was a mental disorder or limited development when the offence was committed (van der Leij, 2013) which means the young person cannot fully, or only partly, be held criminally accountable (Liefaard, 2012).

Unlike a standard detention order which can last for two years for 16 and 17 year olds and one year for 12-15 year olds, a custodial treatment order can last for seven years, with the final year suspended. The treatment order is initially imposed for two or three years, however, it may be prolonged to seven years, depending on the nature of the crime and the personality of the juvenile offender. A young person may have to serve this order consecutively to a standard detention order up to the maximum sentences allowed. One interviewee expanded that the big difference with this treatment order to a normal detention order was that, 'getting this treatment order, you know it can be prolonged so if you don't comply… or cooperate then you know … the prosecutor will ask the judge to prolong this order' (Dutch Interviewee #4).

Before 2014, the extension of the treatment order was limited to seven years and could not be converted into an adult treatment order, which could be in place for life (Liefaard, 2012). The

[85] Some Dutch interviewees referred to the PIJ order as the compulsory or mandatory juvenile treatment order.

Adolescent Criminal Law Act 2014, however, changed this position and allowed the juvenile treatment order to be converted into an adult treatment order in the cases of the most serious offences and dangerous individuals (Schmidt et al., 2020). This means that, in theory, individuals can be deprived of their liberty for a very long period of time, even though both the juvenile and adult treatment orders have to be periodically reviewed by the Courts (ibid). One interviewee explained this change in the law in 2014:

> 'so if the prosecutor has reasons to believe that the risk of reoffending is very high because the child is not treated fully and he wants to transfer to the adult system then within the 6th year the prosecutor has to file this request to the court, this is since 2014, so we are now 7 years later so now in 2021 we have the first case that a prosecution is asking to transfer the child to the adult system so that is the first case so I'm very curious if that is going to happen…' (Dutch Interviewee #4).

This type of order was referred to by interviewees as a frequent sentence, with the average stay in detention between 3.5 and 4 years for this order (Dutch Interviewee #9). Indeed, the proportion of young people in JJIs under this order has been consistently high since 1999 (50 per cent) to 2015 (48 per cent) (see Figure 6.8). Two interviewees observed that since the 2014 reforms, the young people before the courts and in juvenile institutions are older than they were before:

> '[they] got sentenced for a longer time and that has to do with the mandatory treatment order because the sentences in the Netherlands are not that long, one year until 16 and two maximum at the higher age, but the mandatory treatment order especially in combination with a sentence well give a longer time that they stay in institutions' (Dutch Interviewee #9).

> 'we get them at 22, and they get two year sentence and six years mandatory treatment order, they stay because of the youth law so they can stay up to eight years inside so until 30. But I think we don't see them, most of them the average stay is between three and half and four years for the mandatory treatment order' (Interviewee 9).

In light of these observations, it may be seriously questioned whether these orders are being used as a back-door mechanism to longer sentencing. One interviewee speculated that one of the reasons behind the order is that 'people think well maybe the two year maximum detention is not enough in terms of accountability and deterrence so maybe we should increase this to 4 years' (Dutch Interviewee #5).

Dispositional contingency

In addition to both the age and mental illness contingencies in the Netherlands, it is worth discussing briefly the dispositional contingencies that were also found to be present. As explained by Case and Bateman (2020: 477) dispositional contingencies refer to 'children's deference, attitude, acceptance of social norms, willingness to comply with youth justice processes'. This is problematic in the Netherlands given that a child who is not willing to comply and plead guilty may well face a much less favourable outcome. Indeed, several interviewees expressed concerns about due process and the right to be presumed innocent until proven guilty. As one interviewee stated:

> 'if the case gets as far as the court room the defendant is pretty much toast, and get found guilty, it's not like it's an absolute done deal but all the checks and balances beforehand basically make it such that if the case gets to court your odds are not great at all' (Dutch Interviewee #2).

This is particularly problematic in the context of remand where a young person who is found to be not-guilty has already served time in detention. As one interviewee discussed on pretrial detention for young people in the Netherlands, 'the presumption of innocence is applied less strict[ly] here in Holland':

> 'We don't know if he is innocent or not [so] we don't take our chances with that. … if the times comes and he is innocent well at least he had everything going for him, and they are taking care of him and now he has enough foundation to go on by himself with the help of parents and probation office' (Dutch Interviewee #5).

Another stated that in their experience 10% of defendants who were remanded in custody before trial were acquitted at trial, and thus were imprisoned unjustly:

> 'judges think "OK we don't mind about the 10%, better safe than sorry"… I think its cowardly, it's all out of welfare, help them now and put them on his feet, get a programme, get treatment and then you will see if he is acquitted: "well it was worth it, because it was helpful"' (Dutch Interviewee #4).

In this regard, it is worth noting that the heavy use of custodial remand in the Netherland has been the subject of persistent international criticism (Liefaard, 2012; van den Brink, 2019).

7.4 Constitutive leniency?

The above discussion relating to the highly contingent 'leniency' of the youth justice systems in the three jurisdictions leads on to some interesting questions about the boundaries between the two systems and the degree to which they mutually constitute or even legitimise one another. This is an issue that has received relatively little attention within criminology, outside of discussion of the transfer or waiver of juveniles from the youth justice system to the adult justice system in the US (although see, Viterbo, 2022). As Fagan (2008) has observed, however, in his discussion of 'border disputes' between the two systems, transfers to the adult system 'helped maintain the legitimacy of the juvenile court by removing hard cases that challenged the court's comparative advantage in dealing with young offenders—cases that critics could use to launch attacks on the court's efficacy and therefore its core jurisprudential and social policy rationales' (ibid: 12). As Bateman and Case (2020: 478) have argued, this process of adulterisation is 'socio-historically contingent', as well as demographic and dispositional. This strongly echoes the findings in this chapter, with contingencies relating to the young person's (perceived) level of risk and/or social undesirability. This will be explored below by firstly examining each jurisdiction's formal (i.e. minimum and maximum ages in the youth justice systems) and informal boundaries, drawing on the discussion above. The examination of both formal and informal exceptions, together with highlighting the 'rhetorical cover' provided by the youth justice systems, allows us to unravel the (hidden) connections between the two systems, much in the same way that McBarnet, (1981) claimed that grandiloquent statements about due process protections served to mask the day to day reality of crime control in the courts.

7.4.1 Formal Boundaries

As stated by Doob and Tonry (2004) qualifications and exceptions to youth court jurisdiction are important because, as they note, these result in young people in conflict with the law becoming 'instant adults' (ibid: 9) with their 'offender' status outweighing their 'child' status (Forde et al., 2022). These qualifications/exceptions or 'justice principles' embody the 'loss of innocence because they are predicated on responsibility for the criminal behaviour' leading to an 'adulteration' process in which children are conceptualised and treated as if they are significantly older (Case and Bateman, 2020: 477). When young people are transferred out of the youth justice system to the adult justice system the implications are

significant in respect of their procedural and fair trial rights. These implications include an impact on whether the young person can effectively participate in the proceedings, the potential compromise of a young person's right to privacy, the potential of a more punitive sentence and if it relates to a serious crime committed by a young person, the public and media interest (especially when many of the victims are also a young person) (Forde et al., 2022). Another concern at this deeper end of youth justice is the disproportionate impact on vulnerable groups of children such as children from racial or ethnic minorities or children from migrant backgrounds (ibid). As argued by Goldson et al., (2021: 194) the age at which young people 'might enter and exit' youth justice systems require serious review. Of the three case study jurisdictions this has the strongest application in relation to Scotland where, as discussed, children aged 16 and over directly enter the adult system. As can be seen from Table 7.1, however, there are also several exceptions to the upper and lower limits of child court jurisdiction in the other two jurisdictions all of which are discussed below.

Table 7.1 ***Minimum and maximum ages of the Irish, Scottish and Dutch youth justice systems***

	Ireland	**Scotland**	**The Netherlands**
Minimum age	12*	12*	12
Maximum age	17	15**	23*
Exceptions	*ten for specific serious crimes including murder, manslaughter, rape or aggravated sexual assault *children aged between 12 and 17	*Only recently raised from the age of 8 with the Criminal Responsibility (Scotland) Act 2019 *1995 Act created a 'public protection' exception to the best	*16 and 17 year olds can receive adult sanctions and youth law can be applied to 18 to 23 year olds, however this is optional *Juvenile Treatment Orders can be imposed

	can be sent to the adult justice system if the Judge is of the opinion the offence is too serious to be dealt with in the Children's Court	interests of the child principle **Only young people up to the age of 16 can be referred to the CHS	which exceeds the statutory limit for those aged 12 to 23 years old, if they are sentenced under youth law
Upper limits of sentences that can be imposed	No limit on sentence in the Children's Court	Three months in secure accommodation (12- 15 year olds)* No limit for those over the age of 16 year old	12 months (12-15 year olds)* 4 years (16 to 23 year olds)*
Exceptions	N/A	A child cannot be kept in secure accommodation for longer than three months unless the Children's Hearing continue that authorisation, on review of the case.	*Juvenile Treatment Orders can be imposed for a period of 7 years and can be converted into an adult treatment order

In Ireland, if a young person is charged with a specific serious crime, including murder, manslaughter or rape, from the age of ten, then they must appear in the adult justice system (with some child protections in place) (Kilkelly, 2006; O'Connor, 2019). This can also be the case if a Children's Court judge decides (under s.75 of the Children Act 2001) that they do not have jurisdiction to deal with the matter because the offence is too serious to be dealt with in the Children's Court (which does happen on occasion, see Tuite, 2022). Relevant factors here include the age and level of maturity of the child concerned, in addition to any other factors the court considers relevant. Whilst, admittedly, a young person under the age of 18 receiving a custodial sentence, from whatever court they appear before, will be sent to the national youth detention centre rather than an adult prison, they will nonetheless experience a much more punitive trial process, and potentially harsher sentence, due to this exception.

The ‘serious crime’ exception to Ireland’s age of criminal responsibility came about as a result of what can be seen to be an ‘angry assault’ (Zimring, 2000) on Ireland’s youth justice system via the Criminal Justice Act 2006, a rare instance of a punitive adult approach being applied to the youth justice arena. These children are transferred to the unspecialised adult courts and therefore experience ‘adult-like justice’ (Forde and Swirak, 2023: 127). This shift to the lower age of criminal responsibility was justified by the Minister for Justice at the time, Michael McDowell, with vague references to the experience of other jurisdictions ‘where there have been murders by 11 year olds’ and public opinion in Ireland ‘demand[ing]’ that criminal prosecutions should be pursued against young people accused of homicide or sexual offences. He further went on to justify the introduction of this exception by stating:

> ‘The age of criminal responsibility is just one aspect of a much wider youth justice policy, the legislative framework for which is set out in the Children Act 2001. A substantial portion of this Act is already in force, I am happy to say replacing the somewhat dated 1908 Children Act…. These along with other developments are already creating improvements in our youth justice system and delivering better outcomes for children who come into contact with the law’ (Dáil Eireann Debate Vol. 624 No. 3 Responses to Q141 and Q194, 3 October 2006).

This particular example identifies an interesting rhetoric justifying the exception to the age of criminal responsibility for serious offences in Ireland being ten instead of 12 whereby the, otherwise progressive, nature of the youth justice system provided rhetorical cover for the introduction of this adulterising and punitive exception with the system being portrayed as unable to cope with such offenders. Indeed, Ireland’s ‘relatively punitive’ (Forde and Swirak, 2023: 121) approach in this area is far from exceptional and other jurisdictions have experienced significant difficulties in responding to children who commit serious crimes in accordance with international children’s rights standards (Lynch et al., 2022).

Similarly, in Scotland, the exclusion of 16 and 17 year olds from the system is key to maintaining the legitimacy of both the adult and youth justice systems. As can be seen below, this is not only on account of the significant exceptions carved into the system, but also on account of the ‘rhetorical cover’ provided by the renowned Children’s Hearing System:

> ‘I think the reason that the Hearing System has existed is because there were always ways around it, so exceptional acts would have been prosecuted and still

will be prosecuted in the courts and will be tried like adults' (Scottish interviewee #13).

'Our adult criminal justice system is simply incapable of having a child's rights respecting approach, perhaps ironically because we have been very complacent that our child welfare, our Children's Hearing System is the panacea or the answer to this all, Scotland is so righteous by it recognising the needs of children must come first before any punitive action' (Scottish interviewee #12).

This has resulted in both justice sectors constituting or legitimising one another. With the strong symbolic significance attached by Scots to both the Hearing System and the Kilbrandon philosophy, hard questions about what it is achieving and, more importantly, what it is inhibiting are simply not asked or avoided. One interviewee insightfully asked:

'why isn't Scotland better given that we have had this [Kilbrandon philosophy] since 1964, given that we are all signed up to this [philosophy which] is [about] improving the outcomes for everyone and the best way to do this is to support and care for children… why have we not made more progress, why have we not seen the next big idea since 1964 about what we are doing and why we are doing it?' (Scottish Interviewee #5)

Indeed, this finding concerning the rhetorical cover provided by the Hearing System, and its limited reach align with Brangan's (2019) work on Scottish penal exceptionalism. As argued by Brangan, Scotland's penal transformation in the 1980s and 1990s was 'civilizing' with a 'concealment of its penal pains' as opposed to the rhetoric created in Scotland that it was welfarist and progressive. Whilst the penal transformation in Scotland was not as punitive as other jurisdictions, Brangan (2019: 795) argues 'this does not suffice to characterize it as exceptionally moderate or progressive'. While Brangan's work concerns the Scottish penal system, it is argued that it can be extended to the Hearing System whose exceptionalist reputation does not take into account its limited reach and which is also arguably therefore also concealing its 'penal pains'.

Turning now to the Netherlands, there are two important exceptions, as outlined in Table 7.1, namely, the option for a judge to sentence 16 and 17 year olds under adult law, and the statutory provisions relating to juvenile treatment orders which allow the statutory limits on sentencing to be exceeded (see Chapter Six). As discussed earlier, the option to sentence 16 and 17 year olds under adult law has been in place for over a century, since 1905, and was further clarified in 1965 and retained in 1995 (Uit Beijerse and Van Swaaningen, 2006;

Weijers, et al., 2009). While in practice it was stated these provisions are rarely used (only one to three per cent of all criminal cases against this cohort (Uit Beijerse, 2016; Liefaard, 2012)), one interviewee argued that the mere existence of this provision breaches the UNCRC: 'that doesn't make sense, because according to the UN Convention it should be 18 or above 18 and not below' (Dutch Interviewee #1).

The second formal exception derives from the more punitive approach taken to youth justice in the Netherlands in the 1990s, which led to several changes introduced by the Juvenile Justice Act, 1995 such as the increase in the statutory limits on sentencing for young people and continued flexible treatment of 16 and 17 year olds in the Netherlands. Of particular note in terms of the boundaries between the two systems is the juvenile custodial treatment order ('PIJ'). It is clearly aimed at risky offenders, as it can only be imposed 'if required for the safety of society' (Liefaard, 2012: 180; Uit Beijerse and Van Swaaningen, 2006). The exception that it constitutes to the youth system meant that significant contingencies were now put place to 'fast track the child to offender transition' resulting in the 'adulterisation' of children (Case and Bateman, 2020). As the same authors have argued, these exceptions are 'socio-historically contingent' and led to certain 'risky' young people being fast-tracked to the adult system, thus ensuring the constitutive relationship between the two sectors remained intact.

7.4.2 Informal Boundaries

Of course, in addition to formal boundaries in the youth justice system lie the informal 'working rules' governing inclusion and exclusion. As stated by Tonry and Doob (2005: 17) 'the distinction between law as it is written and law as it is administered… is crucial in understanding a youth justice system'. This is applicable to all three jurisdictions where, as we have seen, professionals retain considerable discretion in terms of decisions around entry to the diversion programmes and decisions relating to remand, with these decisions strongly mediated by a child's background and class.

In the Netherlands, for example, police can decide whether to refer young people they encounter to HALT, the diversion programme or refer the charge to the prosecutor (Weijers, 2018). As discussed in Chapter Six, the vast majority of juvenile cases are diverted with it being a key feature of Dutch youth justice. Indeed, interviewees discussed how the net has been widened in recent years to include more crimes that can be referred to HALT with the importance placed on keeping young people 'out of the system' (Dutch Interviewees #1 and

#4). In addition, the prosecution also has the power to divert cases in the Netherlands with the introduction of the punishment order in 2008 for both police and prosecutors to utilise. Since 2005, the prosecutor also has the option to use the 'prosecutorial settlement' (*Wet OM-afdoening*) which allows the prosecutor to settle the case and impose non-custodial punishments such as a fine or community sentence (van Swaaningen, 2013; Boone et al., 2020). Interviewees discussed the general procedure for cases: 'three steps, first the police can deal with cases, then the public prosecutor can deal with a lot of cases and the third step the most severe cases go to the judge, so it's always been a three-way system' (Dutch Interviewee #3). Prosecutors can 'give the punishment order based on the file and that is it, so there is not really a hearing going on' (Dutch Interviewee #5) and interviewees noted the increased power they have which results in 'most of them are acting like they were judges' (Dutch Interviewee #9).

In Scotland, in addition to police discretion, both the Procurator Fiscal and Youth Justice Managers enjoy considerable discretion concerning what young people are dealt with by the CHS or by the criminal justice system. The Whole System Approach introduced in 2011, applies generally to those under 18 and as discussed in Chapter Five, the Procurator Fiscal will notify the Youth Justice Manager in a Local Authority of any diversions being considered and support workers then carry out appropriate assessments. Interviewees discussed the role of the Procurator Fiscal in the increase in diversionary mechanisms in Scotland from 1990 and 2015 (discussed in Chapter Five) with the increase in the range of offences that can be considered for diversion being central (Scottish Interviewee #1) in addition to the Procurator Fiscal's presumption to divert young people from prosecution (Scottish Interviewee #2). One interviewee discussed the Procurator Fiscal's role in respect of remand with the service having 'a role to play in deciding who goes to prison' as 'it's very much on the Procurator Fiscal who opposes bail' (Scottish Interviewee #3). Research has shown that whether a young person is on remand or bail it can have a knock-on effect in terms of who is sentenced to detention (see Naughton et al., 2019).

The exercise of discretion is particularly striking in Ireland, however, where, as we have seen, certain children are considered 'beyond the reach' of the diversion programme, and where An Garda Síochána have control over all stages of management, administration and review of the programme (Kilkelly, 2011). As argued by Smyth (2011: 163) in this context, wide police discretion can be 'prone to being used in ways that discriminate (in effect, if not in intent) against the poor, powerless, and unpopular in our society' (see further Chapter Four).

7.5 Conclusion

The finding that the youth justice systems of the three case study jurisdictions retain strong welfarist elements, distinct from their adult counterparts, is perhaps to be expected, particularly given their reputations for relative 'leniency'. Yet, as we have seen, this is not the full picture, with '"youth justice"[remaining] contingent and ever-changing and its logics and drivers defy[ing] tidy explanation' (Goldson et al., 2021: 46). Indeed, a key finding of this research is that leniency in youth justice systems is highly contingent, varying according to a child's age, address, background, class, disposition, guilt, and mental state. Children falling into these categories are therefore 'instant adults', excluded from the relative leniency of the youth justice system on account of their social undesirability or level of risk. Related to this, in all three jurisdictions there remain significant formal and informal exceptions to the protections afforded by the youth justice system, resulting in certain cohorts of young people experiencing the system in a much more punitive way than others. As suggested by the interview data, these exceptions may be key to maintaining the legitimacy of the youth justice system, by protecting the system's comparative advantage in dealing with young offenders from 'hard cases'. More than that, however, they may also shore up the legitimacy of (an otherwise punitive) adult system, particularly in jurisdictions such as Scotland, where the youth justice system is world renowned. All of this suggests that, while the boundaries between the two systems tend to be regarded by criminologists as mere frames around which the (more important) business of the justice systems go on, they arguably merit much greater attention. By examining who is included or excluded from the youth justice system and why certain lines have been drawn, both formally and informally, we have an opportunity to learn substantially about the values and assumptions behind those systems.

Chapter 8 - Drivers of differences in youth justice systems

8.1 Introduction

It is proposed in this chapter to consider the findings relating to the second research question, namely, what are the key drivers behind these differences and similarities between the youth and adult justice systems in each of the three jurisdictions. These will be discussed drawing on both the risk and protective factor framework devised by Tonry (2007) and Melossi's (2001) arguments concerning the 'cultural embeddedness' of penality. As recalled from Chapter Two, Tonry (2007) devised a framework of risk and protective factors to understand the determinants of penal policy. The risk and protective factors identified in the framework increase or decrease the likelihood of punitiveness respectively. By extension, it is argued that a risk and protective factors framework can also be used to explain the differences of approach between the adult and youth justice sectors in a jurisdiction. Finally, the chapter will examine these explanatory factors through the lens of path dependency frameworks which examine both stasis and change, mechanisms of inertia such as 'feedback effects' (downstream consequences) and exogenous shocks (sudden external events) triggering change (Mahoney and Thelen, 2009).

8.2 Ireland: Contingent divergence

As explored in Chapters Four and Seven, the trends in the Irish adult and youth justice systems over the period examined appear divergent. Indeed, not only is this evident from the trends in imprisonment and detention examined over that period but also from the Irish interviewees and their characterisation of the Irish criminal justice system ('it's very different for children and adults' (Irish interviewee #5)). While, as we have seen, leniency in Ireland is highly contingent, there are also strong indicators of relative leniency, including the disposal of very serious offences (rape, drugs trafficking, etc) through the diversion system. In this regard, we can point to a number of factors that have exerted a protective effect on youth justice such as: the role of the gardaí, historical factors such as the history of institutional abuse in the state, the desire to comply with international human rights standards, the role of

individual actors, and stagnation within the system (Tonry, 2007). On the other hand, a risk factor that emerged from the interviews was the informal nature of the system.

Protective factors

As discussed previously in Chapter Four, diversion was the cornerstone of the new approach to youth justice under the 2001 Act (Seymour, 2008), yet other jurisdictions such as England and Wales were abandoning diversion during that time. Many interviewees commented on the organically grown nature of youth diversion in Ireland, which had operated on an informal basis since the 1960s and which meant that the 2001 legislation merely 'wrapped around practice' (Irish interviewee #3). This meant the Garda 'really bought into it' (Irish interviewee #2) with another interviewee commenting 'I think then the Gardaí own it, at least the JLOs do, so it's theirs, it's not something that was imposed on them' (Irish interviewee #3). This stood in sharp contrast to the adult cautioning scheme, which, as noted by one interviewee, 'hasn't got the same foundations' (Irish interviewee #2). The high level of support for diversion among An Garda Síochána is important given exceptionally high levels of public confidence in the Gardaí and its perceived status as a guardian of the community (Hamilton and Black, 2021). Advocacy work by gardaí was also mentioned frequently as an important factor in the commitment to diversion, which may not be present in other areas:

> 'I really believe the people that are doing that day job are very committed, they are well selected, they are well trained, and insofar [as] the diversion programme is a parallel process, it's an alternative to court, but there is a small very much dedicated cohort of Guards running it, and they have been consistently addressing the behaviour of children and their families from a welfare driven perspective and philosophy, that it is more about a restorative model than it is about an adversarial or harsh model so we are in the space where we believe that rehabilitation is far better than incarceration' (Irish interviewee #9).

Turing now to historical factors, the Irish state's history in respect of the use of industrial and reformatory schools ('coercive confinement' per O'Sullivan and O'Donnell (2007)) formed another important backdrop to youth justice reform. It was specifically referred to by some interviewees, 'as a society we have had to come to terms with some really uncomfortable things about how children in general were dealt with' (Irish interviewee #12) with another

interviewee referring to the state's deplorable treatment of young people which was to them '… one of the great embarrassments of Irish criminal justice' (Irish interviewee #6). The interviewee referred to how people were more aware of this treatment and history leading up to the 2001 Act which could have contributed to a decrease in detention rates for young people at that time (decrease beginning in 1996). This was also against the backdrop of increased public awareness of historical child abuse with a documentary series 'States of Fear' being broadcasted in 1999 on RTÉ (Ireland's national television channel). This series detailed abuse suffered by children between the 1930s and 1970s in the industrial schools and reformatories run by religious orders (RTÉ, 2010). Another interviewee also discussed the impact of the Murphy and Ryan Reports (2009), amongst others, on child sexual abuse which led to 'a growing, certainly, consciousness that hang on, we haven't done right here as a society' (Irish interviewee #12). This backdrop and scandals of the 1990s and early 2000s meant that proposals to increase youth detention or impose tougher treatment of juvenile offenders during the 1990s/2000s (the 'get tough' period in other western jurisdictions) were probably politically unpalatable. One interviewee discussed in depth their views on why the approach to adult and youth justice is different based on the historical religious treatment of children:

> '… the extent to which the state relied on the religious [orders], I don't even want to say the churches, but the religious in order to deal with children who got into trouble with the criminal law or with the authorities and it was bad enough that we were relying on the religious [orders] to do that but there was no transparency, no oversight, no scrutiny of how the religious [orders] were doing that… when you consider the notion that children were sent into the custody of some of these religious institutions for virtually no crime at all in situations was deeply, deeply disturbing and that did not happen in the adult. The adult criminal justice system was based much more on law and to some extent transparency and the religious [orders] didn't have the same input into that so historically there was a big difference, and most historical traditions I think haven't entirely gone away… when we do try manage [young offenders] in the community it hasn't been sufficiently detached from the old religious history behind all this so in that sense yeah I see a big difference' (Irish interviewee #6).

A more lenient approach to young people may also have articulated with our 'communitarian Catholic culture, where family life was paramount to the national order' (Brangan, 2021: 49).

This echoes Melossi (2001) on how religious traditions indirectly impact upon a state's punitiveness with Hamilton (2014) finding the presence of elements of the Catholic indulgentist tradition in Ireland. One interviewee referred to the different approach taken to young people in Ireland: 'there is a lot of acceptance on the outside, "ah they are only kids", I have heard that being said so many times, "ah they are only kids"' and 'it's an Irish thing. You wouldn't get it anywhere else, the level of acceptance for young people, groups of youth' (Irish interviewee #15).

A third critical factor is the influence of international human rights with some interviewees arguing that pressure from international rights bodies brought about the change in Irish youth justice (Seymour, 2006a; Quinn, 2002; Walsh, 2005). This was emphasised in the interviews as a factor driving the different approach taken to youth justice. As interviewees stated: 'we have been very attentive to international standards' (Irish interviewee #3) and 'it definitely has a huge impact, it can be very slow at the same time in terms of driving it but definitely in terms of the ending of kids in St Patrick's Institution, it was pivotal' (Irish interviewee #4). As stated by one interviewee when discussing the lead up to reform:

> 'I think we were so far behind, we had done nothing during the 20th Century at all… our history… it was a very harsh welfare type system that we had and children being put away for years in industrial schools, very much poverty driven and all the rest, stuff that just never would happen now, so we neglected that and then I think once we signed the UNCRC, people felt they had to do it' (Irish interviewee #5).

This was deemed particularly important with Ireland being a small nation. As one interviewee put it, 'Ireland fails to be the leader, we really do watch what happens internationally and then follow suit' (Irish interviewee #4). Two other interviewees agreed that it was viewed as embarrassing not to be in line with the international standards (Irish interviewee #6; Irish interviewee #8). The majority agreed that there was not the same pressure on the adult sector, for whom, 'there is no sympathy' (Irish interviewee #10). One interviewee stated:

> 'I think the public generally, especially in the last few decades, are much less amenable to international human rights arguments about dealing with crime or at least to the benefit of the offender or to the benefit of the suspect so there isn't

> the same political pressure on the government to be fairly sensitive about those things... the periodic reviews come up, they do attract publicity but the publicity I think in respect of adults doesn't have the same effect, it doesn't have the same force as it might do in respect of children' (Irish interviewee #6).

It should be noted that these international human right standards and their impact were leveraged by activists in Irish youth justice. The international standards gave a basis for activists to advocate and lobby the Irish Government for change in youth justice who were therefore seen as 'champions for change' (Irish interviewee #9). In discussing the lead up to the 2001 Act, the influence of key stakeholders was mentioned by several interviewees including the work of organisations like the Irish Penal Reform Trust, the Ombudsman of Children, Emily Logan, and academics such as Ursula Kilkelly (Irish interviewee #7). It was further added by another interviewee:

> 'individual people with vision were really influential and whether that is TK Whitaker or whether that's… Sylda Langford … that committed to international standards driving Irish youth justice… So I think the influence of very visionary and influential policy makers actually was important, I mean civil society certainly played its role and academic voices were important too' (Irish interviewee #3).

Working in conjunction with advocacy by key individuals were policymakers such as Government Ministers (on the role of personalities on Irish criminal justice, see Rogan, 2011; Hamilton, 2014). In youth justice, a key personality was Francis Fitzgerald who became Minister for Children and Youth Affairs in 2011 and who was a trained social worker. As seen by one interviewee, Fitzgerald was key in the closing down of St Patrick's Institution:

> 'we had to wait until we had the person prepared to do it, I think Frances Fitzgerald in the main was politically experienced enough. Not everybody wants to be associated with closing a prison… it simply wasn't the thing to do' (Irish interviewee #3)

Indeed, St Patrick's Institution was recommended for closure as early as 1985 with it attracting censure from the UNCRC, the CPT, the Council of Europe Commissioner for Human Rights and the European Committee of Social Rights (UNCRC, 2006; CPT, 2011; European Committee of Social Rights, 2011; Muižnieks, 2012). In addition, in 2012 the

Inspector of Prisons concluded the human rights of inmates detained at St Patricks were either violated or ignored (Inspector of Prisons, 2012). Therefore, the closing down of St Patrick's Institution was an overdue progressive step in youth justice brought about by Fitzgerald and the advocacy of key individuals.

A final protective factor may well be the slow pace of reform in Irish youth justice. As discussed in Chapter Four, this stagnation is seen in both the political neglect of the youth justice agenda for almost one hundred years and the subsequent slow pace in which the Children Act, 2001 was implemented. While this stagnation may appear to be punitive and a negative aspect of Irish youth justice, one interviewee argued that:

> 'I think that has been one of our strengths. And I say that acknowledging that we haven't moved fast enough but it has protected our system from the vagaries of influence and change that have gone and come with the wind in other countries' (Irish interviewee #3).

This view supports O'Donnell's (2011: 17, 14) argument that a 'lack of capacity for criminal justice policy formulation, implementation and evaluation together with the lack of criminological expertise and the unformed nature of the discourse' may have in fact have been a benefit to Ireland it was 'a protection against a "punitive turn" (or a turn in any direction for that matter)'.

Following the above analysis, with an emphasis on stagnation and the role of historical factors (such as the legacy of institutional abuse, the historical involvement by the gardaí), it is argued the lens of path dependency offers a valuable theoretical lens through which to examine the explanatory factors explored in this chapter. Rubin (2021: 4) states that path dependency 'identifies the ways in which early conditions can create lasting and important consequences for a given institution or organization's course of change or stasis.' The protective factors identified above appear strongly rooted in Ireland's past, grounding and protecting it from any divergence from the path of diversion, even at a time when the adult system was moving in a much more punitive direction.

Risk factors

Reform was long awaited in the Irish youth justice system, with the Children Act being introduced in 2001 and fully implemented six years later in 2007. As a result of the long-awaited reform, it appears that youth justice practice has diverged from its legal framework (Kilkelly, 2014) with discretion being used heavily by stakeholders. Whilst it is acknowledged the use of discretion can be positive, it is argued that it is a double-edged sword resulting in informalism and a lack of oversight or infrastructure in the youth justice system. This can, as discussed in Chapter Seven, result in contingencies which result in some young people experiencing the system in a more punitive manner than the legal framework intended. As one interviewee stated: 'there needs to be a level of flexibility and discretion built in so that we get the right outcomes but in that there is the frustration… [that] you cannot see what is happening' (Irish interviewee #3). Another interviewee expanded on the discretion used by Garda:

> 'Guards will tell you oh we do a bit of that, JLOs [Juvenile Liaison Officers] might have what corresponds to a very loose version of a family conference and probation officers… so there is a lot of restorative bits happen, [but] in the best of Irish traditions it's all very informal and it's all down to the willingness and ingenuity of the individuals involved which is again not good enough in terms of a system because if you have a Garda or Probation Officer who doesn't want to bother than they don't have to bother. Most of them do, but the system really should ensure it does get done' (Irish interviewee #12).

This point connects to critical commentary on the lack of infrastructure in the Irish youth justice system (Kilkelly, 2006; Carr, 2010) which appeared to have been curbed by the creation of the cross-department Irish Youth Justice Service ('IYJS') in 2005. The apparent closure of the IYJS in 2021[86], despite its central role in the development of a policy framework, again gives rise to questions about transparency and accountability.

[86] There are no references to the IYJS in the current Irish Youth Justice Strategy 2021-2027 (Department of Justice, 2021). In particular, the IYJS is not mentioned as a member of the expert Steering Group (convened in February 2019) or as a state body/partner to implement future key actions contained in the Strategy. This contrasts with the IYJS authoring the Strategy's predecessors: the National Youth Justice Strategy 2008-2010 (IYJS, 2008) and Youth Justice Action plan 2014-2018 (IYJS, 2013).

8.3 Scotland: Contingent Divergence

As explored in Chapters Five and Seven, viewed from the perspective of its adult and youth justice systems, Scotland's two systems can be classified as divergent. This can be seen clearly in terms of the sharp contrast between the high imprisonment rates in the adult system and the welfare-based Children's Hearing System. Trends also appear to suggest a much steeper decline in the use of detention for children and young adults over the study period. As with Ireland, however, the 'leniency' of the system is heavily contingent, particularly on the grounds of age. The 'abrupt propulsion of 16-year olds… into the adult criminal system' (Munro et al., 2010: 264) results in a highly punitive experience for young people, which is also replicated in the field of policing. As discussed in Chapter Five, young people often bear the brunt of the 'pains of policing' in Scotland (Murray, 2014; Harkin, 2015: 44-46), with children and young people, particularly those from socio-economically disadvantaged areas, being much more likely to be searched than adults. Clearly this indicates that Scotland is not a 'land of milk and honey' (Mooney and Poole, 2004: 459) when it comes to all young people and points up the need to examine both protective factors that may have shielded Scottish youth justice from increased punitiveness over the period, but also factors cutting across and impacting both sectors. In this regard, the protective factors exerted on youth justice include the Kilbrandon ethos linked to Scottish identity, and in turn, linked with a receptiveness to evidence in this area that is not mirrored in the adult arena. Risk factors that emerged from the interviewees include the independence of the judiciary in relation to sentencing and Scotland's strong association with England and Wales.

Protective factors

In Scotland, as noted by McAra (2005), their legal system has come to be viewed as an important 'carrier' of Scottish identity, which is reflected in their unique youth justice system for those up to the age of 16 i.e. the Children's Hearing System. This has resulted in a strong pride in the Scottish legal system with a reluctance to change it; the 'institutional conservatism' of Scottish legal culture as O'Neill (2004) has described it. This can be linked back to Scotland preserving its separate legal identity based on the guarantee contained in the 1707 constitutional agreement between Scotland and England (Hamilton, 2014). Several interviewees spoke of Scottish identity as a factor protecting the under 16 year old system against any transfer of punitive developments in the adult system after devolution in 1999:

> ‘we are very proud of our Children’s Hearing System and I think it was protected from [the upheaval and changes brought by different governments in the adult criminal justice] and it came under child care legislation and not justice legislation. And we have got our own bodies… we have got our Scotland’s Children’s Reporter Administration’ (Scottish interviewee #2).

Linked with this, interviewees discussed the importance of the Kilbrandon philosophy from 1964 and it ‘is still really thought of’ (Scottish interviewee #10). Indeed, many discussed how this is still relevant to Scottish youth justice:

> ‘since Kilbrandon in Scotland that is a strong driving force of what we are doing, what youth justice is about, what the purpose is and I think that has remained pretty strong and solid and most practitioners in Scotland still they reference Kilbrandon… I think that strand has probably been deeper than the ebbs and flows of other things, that is not to say they don’t have an impact but I think that [is] what we are trying to do’ (Scottish interviewee #5).

> ‘Kilbrandon philosophy, that has really been instilled, that needs and deeds are the two sides of one coin, that offending behaviour is indicative of underlying vulnerabilities, adversities and needs, it’s not some satanic evil act that these certain kids have. And it’s weathered the storm’ (Scottish interviewee #13).

The Hearing System and the influence of the Kilbrandon philosophy is therefore bound up with Scottish nationalism and whilst many interviewees were proud and emphasised this point, others were willing to point to its flaws, most significant of which, as has been noted, is its neglect of over 16 year olds and the potential legitimation of a punitive adult system.

Linked with this is a tradition of receptiveness to evidence-based critique and political will in relation to youth justice that is not present in the adult arena. The influence of key research studies impacting youth justice was also discussed with many referring to the Edinburgh Study of Youth Transitions and Crime in 2010 which was ‘very influential’ (Scottish interviewee #2) in the introduction of the Whole System Approach in 2011. Another stated ‘I think that was a policy decision… the advocates both within government and outside of government who were really, really strongly pushing for a different approach’ (Scottish interviewee #8). Another interviewee discussed how this research is still ongoing and

therefore is ‘really quite at the centre of a lot of decisions that are made as well… so an agreed approach by the Scottish Government’ (Scottish interviewee #10).

This is a particularly interesting point because the Prisons (McLeish) Commission Report, ‘Scotland’s Choice’ (Scottish Prisons Commission, 2008), as discussed in Chapter Five, set out a target for a dramatic decrease in the adult prison population to an average daily population of approximately 5,000 (from an average daily population of approximately 8,000 in 2008) and, whilst imprisonment rates have decreased from 2011, it did not meet its targets (with a prison population of 7,676 in 2015). This is despite the reduction in crime rates in line with the universal crime drop (Scottish Government, 2013; McAra and McVie, 2019). When interviewees were discussing the reasons for this many echoed the view that ‘they [the government/policymakers] didn’t take the report seriously enough’ (Scottish interviewee #1) with another stating: ‘there is no national narrative that challenges imprisonment as the right response’ (Scottish interviewee #3). This is interesting considering the ‘national narrative’ that surrounds the Children Hearing System as discussed above with its unique approach and the influence of key research studies in youth justice. Yet reducing imprisonment, even after the publication of Scotland’s Choice, did not find itself similarly part of the ‘national narrative’. In line with this view, one interviewee stated: ‘nobody signed up to Scotland’s Choice politically… I don’t think it was ever a binding target that people accepted, it was a thing that this commission recommended’ (Scottish interviewee #8). One interviewee who worked in the Scottish Government discussed how the Government got side-tracked by the Independence Referendum (which occurred in 2014) and therefore reducing the prison population in accordance with the Report’s recommendations was not a priority. The interviewee expanded that in the Government there hasn’t been people who have ‘been prepared to be particularly bold… so all this comes down to political will, you need to have the political will’ (Scottish interviewee #4). This is highly contrasting to the response to the Edinburgh Study where evidence-based critique was acted upon, and change was implemented or accepted. Indeed, the Edinburgh Study began in 1998 and still operates and releases publications from the Study every few years (see recently McAra and McVie, 2019).

Risk Factors

Risk factors that can be seen in Scotland include a fiercely independent judiciary in terms of sentencing and the association with England and Wales, both of which are explored in further detail below.

It is acknowledged that previous research has identified the role of the judiciary as being a protective factor in Scotland with McAra (2008) arguing that the role of the Scottish 'quasi-state' comprising, *inter alia*, the judiciary was of key significance in the pre-devolutionary period, particularly their ability to forge a connection between Scottishness and welfarism. Further, Hamilton (2014) discussed the strong attachment built up over time within the legal system to the independence of the individual sentencer and how this has been critical in resisting attempts to introduce mandatory sentences in the late 1990s. Whilst it is acknowledged the trend of sentencing has been downwards for both cohorts, it would appear that this discretion cuts both ways, with interviewees identifying the wide discretion enjoyed by the Sheriffs when sentencing can operate as a risk factor in terms of the sentencing of young people. This risk factor for sentencing young people can be seen particularly for those in rural areas which feeds into the geographical contingency found in Scottish youth justice, as discussed in Chapter Seven. This wide use of discretion by Sheriffs can result in inconsistencies between urban and rural areas in respect of sentences that young people receive, with those in rural areas being 'more severely punished than if you were in a larger city' (Scottish interviewee #2).

Many interviewees discussed the role of the Sheriffs in justice in Scotland and in particular 'a lot comes back to the fact that nobody can tell a Sheriff what to do, so the independence of the judiciary is hugely important but is also not unproblematic' (Scottish interviewee #13). Another interviewee also commented: 'Sheriffs, they are making decisions completely independently and it's difficult to sway them sometimes' (Scottish interviewee #10). A Queen's Counsel stated:

> 'that the children and young people that needed the most help, by the time that they were appearing in court, some social workers were really wiping our hands of them and saying we have tried everything we possibly can so the court, options were sometimes narrowed, and it was mostly Sheriffs were all really savage sentencers...' (Scottish interviewee #1).

This discretion did not appear in any way limited when sentencing under 18 year olds, as acknowledged by interviewees who argued that that Sheriffs 'would claim that they all take the needs of all individuals in front of them into account and they don't need to be specialist for children' (Scottish interviewee #2). One interviewee pointed to the gap between youth justice professionals and judges:

> 'I am not surprised about the sentencing because if anything has not changed is that sentencing and the sentencers' attitudes and their ability to work in partnerships, so you have got this broader cultural and attitudinal change going along with everyone else working to support children and young people and families but you have got this big gap and you have got sentences over there and the lack of conversation and dialogue and engagement and obviously real reluctance if ever there is any indication that you are seeking to change or educate or train…' (Scottish interviewee #5).

Other interviewees agreed, stating that Sheriffs often argue in relation to young people they 'have just got no choice, they always say that' (Scottish interviewee #8) and that a custodial sentence is less likely to attract criticism from the community (Scottish interviewee #1). However, the interviewee did acknowledge: 'there are attempts… in relation to the treatment of the sentencing of young people where we are showing some signs of thought and humanity' (Scottish interviewee #1). Sentencing is even less constrained on the adult side: 'the judges have loads of independence, they feel like even though they prisons are a last resort, they just send a lot of people to prison' (Scottish interviewee #3).

Another 'risk factor' identified by Scottish interviewees was their country's relationship with England and Wales. Interviewees discussed why Scotland's imprisonment ranks as having one of the highest imprisonment rates in the western world (with a rate of 145 per 100,000 in 2015) and also increased significantly from a rate of 93 to 154 per 100,000 of the national population between 1990 and 2011. Interestingly, England and Wales's imprisonment rates were also increasing with an increase from a rate of 124 to 153 per 100,000 of the national population between 2000-2012 (World Prison Brief, 2021). Some interviewees commented on the Scottish relationship with their southern neighbours with one stating:

> 'and I think we are part of the same, we are swimming in the same cultural sea with England and Wales, we really are… but still in Scotland we talk about

> many of the same things that are happening, we have got national news and are part of the same island… I think the wider currents which were driving the prison population rates in England and Wales were happening here, and then obviously we had devolution … I think the parliament has really played into that especially in the early years, and then it just became something that gathered momentum that people weren't willing to reverse on because it created a new norm' (Scottish interviewee #4)

This was echoed by another interviewee who stated: 'I think being tied into being part of the United Kingdom probably doesn't help' (Scottish interviewee #1). Another interviewee also commented on this relationship: 'I think there is also something about that connection to England because I think if you look at the imprisonment rates of England and Scotland they pretty much track each other and that is interesting' (Scottish interviewee #3). In agreement, another interviewee commented:

> 'there is a strong desire to think of ourselves as aligned with the Scandinavian countries… we are not… we are economically and culturally much, much, much, much more similar to England and Wales than we are to the Scandinavian countries, and that just pervades everything, it pervades the media, it pervades what the man, the women on the street think of as being fair, and all of these things' (Scottish interviewee #8).

Therefore, despite the presence of significant risk factors when it comes to 16 and 17 year olds (very independent judiciary, cultural links with England and Wales) and other cohorts of young people, very similar 'force of history' and status quo biases can be seen to exist in Scotland as in Ireland. Similar to Ireland, we can see Scotland has very strong protective factors present in its Hearings System, namely, a separate legal system and culture (Kilbrandon/evidence-based ethos), firmly linked to Scottish identity, which have created a type of 'path dependency' (Rubin, 2021) and (largely) protected it from the upheaval and change that occurred in the adult justice system over the same period.

8.4 Netherlands: Convergence

As explored in Chapters Six and Seven, whilst there continue to be strong welfarist aspects to the youth justice system in the Netherlands, the youth and adult justice sectors appear to have taken similar approaches over the study period, in terms of the sharp upward, and then downward trajectory of imprisonment/detention rates. This was reflected in the responses from Dutch interviewees who acknowledged similar factors impacting the two sectors: 'I would say that it is probably similar, it is more similar than different I would say in orientation.' (Dutch Interviewee #2). In attempting to explain this, what appears to separate the Netherlands from Ireland and Scotland is an absence of very strong protective historical factors. As argued earlier, in line with arguments about path dependency (Rubin, 2021), explanatory factors for a distinct youth justice system in Ireland and Scotland are historical in nature, connecting to, for example, in Ireland the history of diversion and in Scotland the strong association of Kilbrandon with national identity. In the Netherlands, however, there appears to be an absence of these cultural and historical factors which therefore allowed 'exogenous shocks' such as occurred in the late 1990s/early 2000s to alter policy in a punitive direction. This will be explored further below.

Protective factors and exogenous shocks

As explored in Chapter Six, the Netherlands historically 'held a symbolic position as an example of penal enlightenment' (Cavadino and Dignan, 2006: 113). The country was historically associated with penal tolerance (Downes, 1988) and saw a reduction of the imprisonment rates to an extremely low rate in 1973 of 18 per 100,000 of the national population. This period of tolerance and decarceration began with the broad reformist programme set out by the Fick Committee guidelines in 1947 and the establishment of the Utrecht School in the 1950s (Downes, 2007). Added to this there was a prisoners' rights movement during the 1970s and 1980s which led the character of imprisonment in the Netherlands to be rated as one of the finest in Europe (Downes, 2007; Downes and van Swaaningen, 2007). In addition, the Netherlands has several of the protective factors outlined by Tonry (2007) in his framework including: a consensus political system, non-partisan judges and prosecutors, expert-led criminal justice policies and high levels of trust in government and governmental institutions.

While these factors did not disappear overnight during the 1990s, it would appear that they were insufficient to withstand the 'exogenous shock' (an external event that breaks 'path dependency') constituted by the 'moral panic' over crime in the 1990s. Thus, no sooner had Downes's famous research been published, than the Dutch prison population went on an upward trajectory from mid 1980s reaching its peak in 2005. Unpicking the reasons for this 'punitive turn' of the 1990s, analysis must go back and question the decline of this Dutch tolerance and the related concept of '*gedogen*'. *Gedogen* be traced back to the 80 years' war (1568-1648) and the Dutch 'Golden Age' (17th Century) and is embodied in the so-called '*poldermodel*': a system of negotiation that focusses on consensus instead of confrontation (Hoogenboom and Vlek, 2002). In essence, it can described as turning a 'blind eye' to practices (e.g. gambling, prostitution and drugs) that would have attracted enforcement in other countries (Brants, 1999). Tolerance, as discussed above, also extended to the legal system as famously depicted by Downes in his 1988 book *Contracts in Tolerance.* Despite its embeddedness in Dutch culture and history, it is worth recalling the observation of Nils Christie (1993: 41) that Dutch tolerance has always been 'tolerance from above' led by professional elites who were more 'tolerant' than the public. As observed by Buruma (2007: 84), from the 1980s to the 2000s, the tacit support provided by the public to this leniency came under severe strain, with 'something snapp[ing]' around 2000. The same author detects a significant change to the legal culture in the 1990s and 2000s, when the Dutch people, and their judiciary, increasingly rejected minor incivilities and began 'defining their crimes up' (Garland, 2001).

As discussed in Chapter Six, policymaking in the Netherlands from the 1990s was dominated by the populist (or extreme) right focussing strongly on the threat posed by 'foreigners and Islamic terrorists' to Dutch Society (Adler, 1983; Pakes, 2004; van Swaaningen, 2013). This was compounded following the Twin Towers attack in 2001, the murder of right-wing political leader Pim Fortuyn in 2002 and the murder of film director Theo van Geogh in 2004, which led to a social climate of fear and panic and to the popular impression of a 'country in despair' and the rise of a 'politics of discontent' (Pakes, 2004: 284, 285; Downes and van Swaaningen, 2007).

This increased hostility to crime and antisocial behaviour was very clearly reflected in the responses from Dutch interviewees: 'punitivity really increased in the 1990s and the system accommodated it' (Dutch interviewee #2). Explaining the increase in punitiveness, the same interviewee opined:

> ‘around 1980 in terms of the social climate, the salience of crime was a real social problem, drugs, hard drugs, the increase in crime associated with hard drugs… really marked a phase where politics and culturally, socially there was this idea that crime is really bad now and we have to do something.. before that… crime was there but it wasn’t really a social… not on the forefront of policy makers or opinion makers, that changed in the 1980s and we had government reports… So overall that paved the way for a more punitive response in a way to all crimes big and small… there was a massive prison building programme in the 1990s, and so they say if you build prisons, you fill them and that definitely happened’ (Dutch Interviewee #2).

Another interviewee described what he perceived as a backlash against the traditionally more tolerant approach:

> ‘in the 90s I think there was a reaction towards that movement that all prisoners are people, they are the same as us, there were in different circumstances and that is why they are doing this but we have to treat them and help them but I think the political situation in the 90s… and we had a big problems with big criminal organisations at the end of the 80s, beginning of the 90s, we had like mobs, gangs doing drugs and murders etc... For Holland there was a sense that nothing helped and… there should be a reaction to this lawlessness and this pampering of the prisoners so that had to be done and also if you see the 1995 juvenile justice [Act] there was also a growing knowledge… that children had to be accountable as well, or to some degree accountable and we had to bring them to the right path [or] they end up being big criminals’ (Dutch Interviewee #4).

Another interviewee commented on that period that it was:

> ‘like a toxic cocktail, the economic situation in our country… we had cut costs and the government had to cut spending and then a lack of insight about what works... So that might have contributed to that cocktail, there was an increase in imprisonment’ (Dutch interviewee #4).

Therefore, the system accommodated the more punitive response, for example, by building more institutions and this impacted both the adult and youth justice sectors. This rise in capacity was seen by many interviewees as significant as ‘it made it a lot easier for courts to

be as stringent, as harsh as the courts would feel the population wanted them to be, that is the story of the 1990s…' (Dutch Interviewee #9). Before the punitive response in the 1990s, the Netherlands had a waiting list for their prisons. In this situation, someone would be sentenced and told to go home and they would call him after a few months to come in to prison to serve their sentence and 'that was really normal prior to the 1990s, and it all changed then' (Dutch Interviewee #2).

Interviewees argued that the judiciary responded to 'the wish of society to punish more' so that 'the whole system was very punitive from 1995 and even earlier from 1990' (Dutch Interviewee #9). This pressure from the public was emphasised by several interviewees: 'public opinion is hugely influential on the policy of the government' (Dutch Interviewee #3). In respect of the 1990s one interviewee discussed: 'just a few cases of very severe crimes then get the attention of the public, especially of politics and there will be a reaction to that… it does tend to get to much more severe punishment' (Dutch Interviewee #3). Therefore, as suggested by the interviewees, punitiveness in the Netherlands had a much longer gestation with traditional Dutch tolerance coming under intense public scrutiny in the 1980s and 1990s. Expressed in the language of path dependency, it would appear that the traditional policy of '*gedogen'* or institutional leniency began to experience 'negative feedback effects' which rendered that policy or path increasingly untenable (Weaver, 2010). Unlike in Ireland and Scotland, where historical and cultural contingencies served as positive feedback effects to 'lock' diversion or the Children Hearing System in, the Dutch 'culture of tolerance' gradually became a source of delegitimization for both the adult and youth justice sectors.

Of course, this is not to say that Dutch tolerance has completely disappeared. As found in Chapter Six, the judiciary did exert some protective effect on the youth justice system and the drivers behind the adult and youth convergent trends were quite different. In the adult system one of the drivers behind the increase and subsequent decrease in the prison population was primarily due to increase in sentence length given by judges. In the youth system, however, it was found the extensive and increased use of remand, rather than sentences, drove up the detention rate. Sentence lengths in the youth justice system did not increase to the same degree as the adult system, as discussed in Chapter Six.

Return to 'business as usual'?

Since the peak in imprisonment and detention rates and the subsequent apparent reversal of more punitive penal policies, discussed in Chapter Six, there was an increase in community sentences or interventions seen in both the adult and youth justice sectors. One interviewee stated the reason for the increase in community sentences or interventions is 'that there has been a shift for judges and some policy makers as well, that prison time isn't very useful or effective' (Dutch Interviewee #4). Another interviewee agreed that this was the case also in the youth justice system with increased awareness of the impact of detention and children's rights (Dutch Interviewee #5). As one Dutch interviewee commented, the decline in the use of imprisonment, 'came as a surprise', particularly given that 'in the early 2000s, you would not say that at that point the conditions were in place for a radical decrease' (Dutch Interviewee #2). This interviewee expanded on the apparent reversal of the 'punitive turn', particularly seen in the decrease in imprisonment rates:

> 'there was never this grand design to reduce the prison population or to shorten sentences, it was contingent on other variables, so there is still something interesting that in a way the reduction of the prison population didn't stir immediately a moral panic, sure … made some comments, it's not like no one every muttered a word but it just happened and when it became highly visible and also socially visible was because prisons were closing, and it became a HR, an employment issue as well, 'what are we going to do with these prisons and where are these prison officers going to work?' and 'can we retain them?'… I think you say that it wasn't necessarily a centrally intended and orchestrated punitive turn again, I think that is fair to say' (Dutch Interviewee #2).

This supports one of van Swaaningen's (2013) hypotheses on the reversal of the 'punitive turn', namely, that it was the reduced impact and attention given by media and politicians to law and order issues, as outlined in Chapter Six, that drove it. In addition, the persistence of Dutch tolerance is revealed in the fact that this dramatic reduction of the prison population which followed the 'punitive turn' did not immediately prompt a moral panic. In the youth justice system, despite the introduction of the 1995 Act, and its exposure to more risk averse and punitive tendencies (visible in, for example, recent debates about raising the maximum custodial sentences for youth), the welfarist and 'pedagogical' characteristics of the system have been preserved (van den Brink, 2021).

The increased power of the Prosecutor is worth mentioning in regard to the decrease in imprisonment and detention rates. As discussed in Chapter Six, the 'prosecutorial settlement' (*Wet OM-afdoening*) was introduced in 2005 which allows the prosecutor to settle the case and impose non-custodial punishments such as a fine or community sentence (van Swaaningen, 2013; Boone et al., 2020). In addition, prosecutors can waive minor cases and in 2008 punishment orders were introduced for the PPS and police. Interviewees discussed the Punishment Orders and increased power the prosecutors now have: 'I think most of them are acting like they were judges.. the position of them has changed from them not only being a prosecutor but… also to be responsible for the contexts of the interventions' (Dutch Interviewee #9). One interviewee also commented on this power:

> 'the prosecution just can give the punishment order based on the file and that is it, so there is not really a hearing going on and I think those minor offences… if you are coming before a children's judge then a sentence will be on your criminal record so for a child it is in their best interests to not come before a children's judge but that means the prosecutions office has a lot of power regarding those offences and we know from research that not all files there was enough evidence to really, for a conviction… it all depends on the integrity of the prosecutions office, are they mastered enough to really make a good decision' (Dutch Interviewee #5).

A Dutch defence lawyer thought they were 'dreadful' which was based on the release of research on the use of the punishment order which found that for the majority of cases the burden of proof was satisfied which 'is what the District Attorney decides… even if you don't agree or admit to the crime we are going to do a punishment order' (Dutch Interviewee #4). Such comments suggests a transfer of penal power from the judiciary to the prosecutors (Garland, 2013) and indeed supports Van Swaaningen's (2013) argument that the post-2005 decrease in the prison population may be due to the transformation of police and community safety into the main strategies of crime control. Rather than a complete transformation, therefore, one could argue that public sentiment against tolerance has been 'layered' (Mahoney and Thelen, 2009) on top of traditional aims such as rehabilitation and (in the youth justice system) commitment to welfare values, allowing for the evolution of penality over time.

8.5 Conclusion

The findings of the drivers of divergence and/or convergence in the three case study jurisdictions have been explored through the lens of path dependency in conjunction with Tonry's risk and protective factor framework. Different characterisations have been made in respect of the three case study jurisdictions with the Irish and Scottish adult and youth justice systems displaying (contingent) divergence, and the Dutch adult and youth justice systems displaying convergence.

Adopting a path dependency perspective, it would appear that it is the absence of strong historical and cultural protective factors that distinguishes the Netherlands' experience from Ireland and Scotland. Whilst it is acknowledged that the Dutch judicial culture did exert some effect, overall the traditional protective factors in the Netherlands (e.g. the Dutch culture of tolerance) were not strong enough to protect the youth and adult justice systems from the moral panic they experienced about crime in the 1990s. As argued above, this is probably due to the 'negative feedback effects' that the policy of tolerance or *gedogen* had experienced in the 1980s and 1990s.

As recently argued by Rubin (2021: 6), one of the benefits of path dependency as a lens is the shift in focus 'from the beginning and end of the story to the underexplored middle' and therefore from change to stasis. In respect of Ireland and Scotland strong historical protective factors militated in favour of 'stasis', or the continuation of (relatively) progressive approach to youth justice, and thus to divergence between their two justice sectors. In the Netherlands, on the other hand, the lack of such 'culturally embedded' (Melossi, 2001) factors meant that 'exogenous shocks' such as occurred in the late 1990s/early 2000s were able to alter policy in a punitive direction. This is only part of the story however, as seen in the above discussion. In the Netherlands punitiveness had a much longer gestation period with the institutional leniency or traditional policy of *gedogen* beginning to experience 'negative feedback effects' (intense public scrutiny) in the 1980s and 1990s (Weaver, 2010). The Dutch 'culture of tolerance' gradually became a source of delegitimization for both the adult and youth justice sectors unlike Scotland and Ireland where historical and cultural contingencies served as positive feedback effects to 'lock' diversion in.

Chapter 9 - Transitions and young adults in the justice systems

9.1 Introduction

It is proposed in this chapter to consider the findings relating to the third research question, concerning the presence or absence of transitional arrangements in place for young adults in the three justice systems. It will be recalled that these adults are at a distinct stage in their life and are not yet fully mature. Internationally, there has been an increasing focus on transitional arrangements and the needs of this specific group given increasing evidence that brain development and maturing continues well into early adulthood (Farrington et al, 2012; Transition to Adulthood Alliance, 2009; Irish Penal Reform Trust, 2015; Pruin and Dünkel, 2015). Despite this, only one of the three jurisdictions has transitional arrangements in place for this cohort. The following chapter will explore why each jurisdiction has taken the approach it has towards young adults and transitional arrangements. Before doing so, it will examine trends in respect of the sentencing of young adults in each jurisdiction and compare these with those in the youth justice and older adult cohorts.

9.2 Ireland

As previously noted, in Ireland there are no transitional arrangements in place for young adults. While some attempts at such approaches had been made within the prison system in the past during the period following the closure of St. Patrick's Institution between 2002 and 2017 (which housed 16 to 21 year olds) in 2017, these did not appear to be particularly successful. Part of the reason for this is the perception of young adults within the criminal justice system, which, according to interviewees, does not appear to differ significantly from the adult offender population:

> 'you have to be always conscious that you need to be able to sell this politically to the wider community and with the level of offending that goes on in the 18 to 24 age group compared to other age groups it is a more difficult sell' (Irish Interviewee #2).

This is confirmed by Figures 9.1 and 9.2 which show that trends in the young adult cohort largely track those in the adult cohort, rather than youth justice trends. In Figure 9.1 the rate of the St Patrick's Institution population holds steady or slightly increases between 1996 and 2013, much in line with the adult trends, whereas we can see the youth detention rates decreasing during this period. In Figure 9.2, interpretation is hampered by the fact that data for the different age cohorts were only available from 2006, but even in that short period of time it can be seen that the prison entry rate for young adults aged 18 to 25 is following the same trend as the adult prison entry rate, with the youth entry rate diverging away for both cohorts. It is important to note that the while the number of young people in St Patrick's was decreasing, particularly from 2013, these young people were being transferred to either Oberstown if they were under 17 or Wheatfield Prison if they were over 17. The relatively small population in St Patrick's Institution (e.g. 204 daily average population in 2012) explains why the transfer of the young adults from St Patrick's Institution to Wheatfield did not significantly impact the adult prison population.

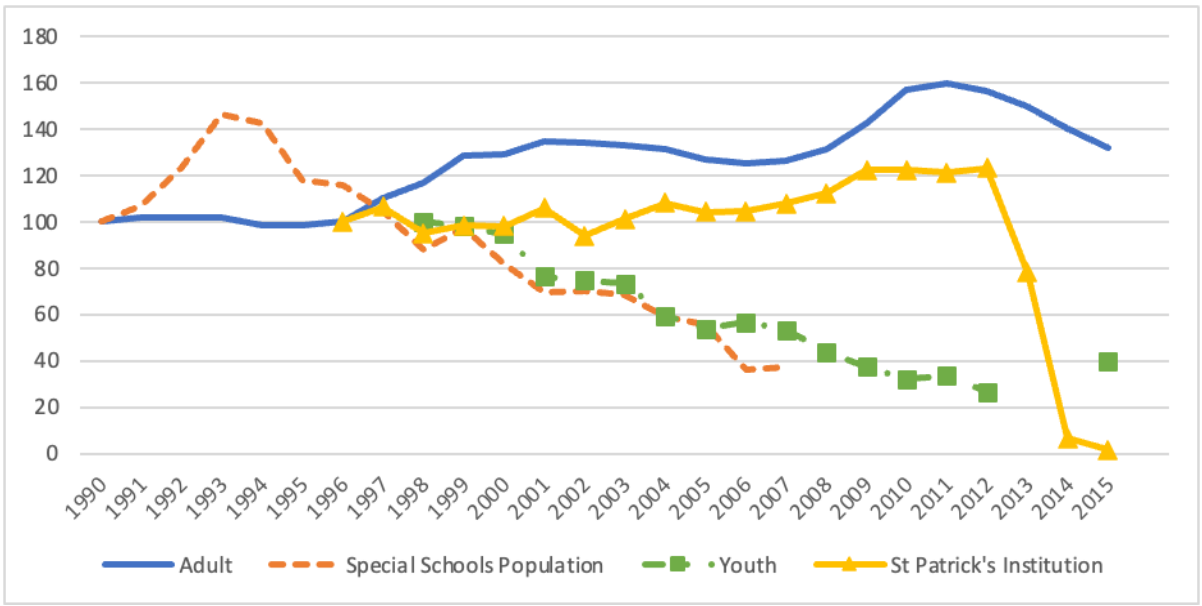

Figure 9.1 **Adult imprisonment rates, Special Schools average population in Ireland 1990-2007 using 1990 as an index year, St Patrick's Institution detention rate (16 to 21 year olds) in Ireland 1996-2015 using 1996 as an index year and youth detention rates 1998-2015 using 1998 as an index year**

Sources: O'Donnell et al. (2005) and Irish Prison Service, Annual Reports, various years; Irish Youth Justice Service requested data on Children detention schools

in Ireland including St. Laurence's, FC; NARU, FCC; FCAC; Trinity House School; Oberstown Girls Centre and Oberstown Boys Centre 1998-2012; Oberstown National Detention Campus data 2015.

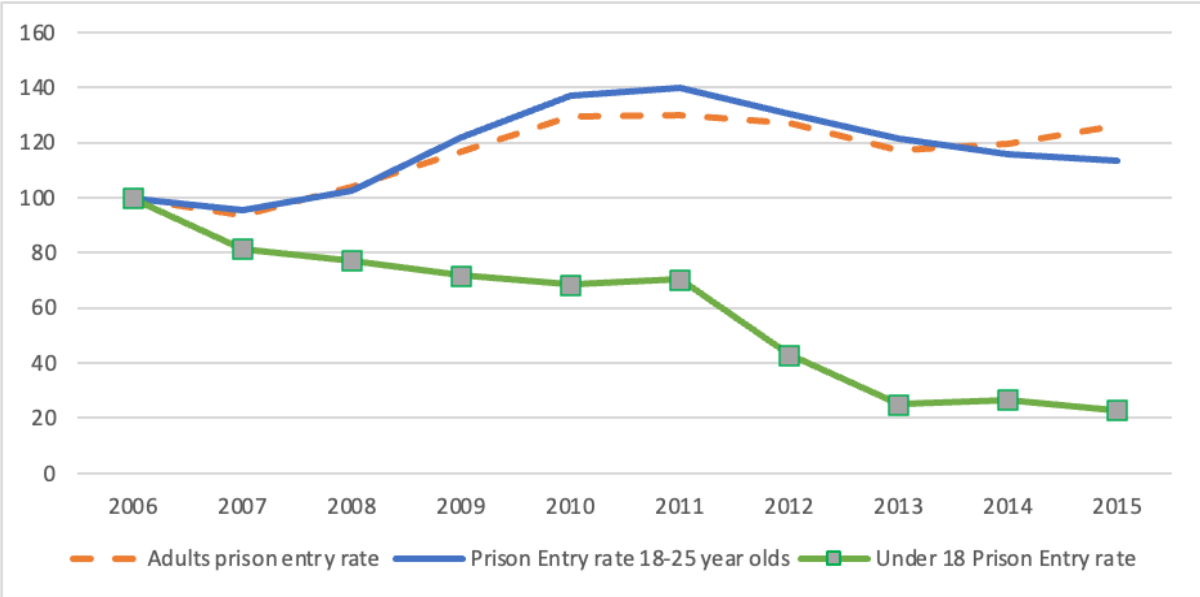

Figure 9.2 Adult Prison Entry rates, Prison Entry rates for 18 to 25 year olds, and Prison Entry rates for under 18 year olds in Ireland using 2006 as the index year

Sources: Irish Prison Service, Annual Reports, various years.

Interviewees were largely in agreement regarding the lack of transitional arrangements, although it was found there are two notable exceptions to this. Firstly, the extension of the Young Persons Probation ('YPP') to include up to 21 year olds and secondly, the existence (until 2017) of St Patrick's Institution (for 16 to 21 year olds) and subsequent setting up of a young adult (for 18 to 21 year olds) wing in Wheatfield Prison. In respect of YPP, and the approach taken to young adults up to the age of 21, if already in the YPP the Probation Officer can choose to retain supervision until they are 21. This change of approach came about after the Children Act 2001 and the implementation of the YPP in 2007. Senior Probation Officers highlighted the informality and convenience of taking this approach: 'it was just a thought yeah, we would keep them. It was about accountability as well, you [the offender] are accountable for your actions' (Irish interviewee #14). It is important to note that

this doesn't apply to someone over the age of 18 gets who is referred to the Probation Service for the first time- these offenders are treated in the adult system. Moreover, Probation Officers have a lot of discretion as to whether to keep a young person in YPP or refer them to adult probation: 'if I [get] back a fella that we have had and he is 19… I can then make the choice to let him off to the adult, away he goes' (Irish interviewee #14). Therefore, whilst there is some form of a transitional arrangement in the Probation Service for young adults, this is discretionary (non-statutory), it is only available for those who have already been referred and is therefore quite limited.

Turning now to the arrangements in prisons, as noted, following the commencement of the closure of St Patrick's Institution in 2013 Wheatfield Prison set up a juvenile wing for 17 year olds where young people would have remained on that juvenile wing until they turned 18 (Irish Interviewee #13). Shortly afterwards, in or around 2013/2014 a young adult wing for 18 to 21 year olds was opened in Wheatfield but closed in or around 2015/2016 (Irish Interviewee #13). As stated by one interviewee the juvenile wing 'was basically to help with integration into [the] general population' (Irish interviewee #15) of juveniles that had transferred from St Patrick's Institution. There were several innovations introduced in this unit including having an amended incentivised regime and a reward scheme (Irish interviewee #13). Initially, when the unit was set up interviewees discussed the resourcing that went into it:

> 'there was a lot of resources being put into this unit... there was a special school area built... accommodation was made a lot better… they were given their pool table, their table football and PlayStation… so there was a lot of resources put in and the enthusiasm was there, we were enthusiastic for this' (Irish interviewee #13).

On training the prison officers for this unit, one interviewee commented:

> '…we d[id] a few seminars with people who work with children… We did the Children's First course, we did positive communication and that kind of stuff, we were better equipped to communicate with these guys [young adults on that unit]' (Irish interviewee #13).

Ultimately, however, this was short-lived as despite 'the enthusiasm [that] was there right at the start, … we didn't just have the resources for it.' (Irish interviewee #13). This interviewee gave the example of school teachers not being able to come in and so activities would not go ahead in the unit. Unfortunately, both interviewees who had worked in the wing at the time were of the view that this unit was not a success and expressed concern about several incidents occurring within the unit: 'five or six cells were set on fire and flooded and all that kind of stuff' (Irish interviewee #13). The interviewees argued that this was due to competition among the young men: 'somebody is still going to want to be top dog and unfortunately that is just the way it is. There is a hierarchy in any social area, it's the same in prison, it reflects what happens out here' (Irish interviewee #13). However, they found 'when they mixed with adult prisoners from the age of 18, that a lot of them settled down' (Irish interviewee #13). The unit closed in 2016/2017 and therefore there are no longer any transitional arrangements for young adults in Irish prisons.

This data makes it clear that it is not enough to merely create units and distinct regimes for young adults, but that consistent resourcing and collaboration are imperative for it to be a success. Irish research has outlined the complex unmet needs of young adults, particularly in prison (IPRT, 2014; JCFJ, 2016). As stated by Pruin and Dünkel (2015: 72) if countries do create separate young adult institutions or units then they would have to 'to be equipped to promote individual outlooks and positive trajectories and provide opportunities for personal development'. This would include offering a range of possibilities for education and vocational training, and fostering and strengthening social bonds by opening the institution up to the community via work-release programmes, prison leaves and visitation rights (ibid). In addition, re-entry/re-settlement strategies need to be tailored to the particular problems associated with early adulthood (Farrington, 2012).

Indeed, as confirmed by the interview data, young adults are really complex prolific offenders as 'it is the norm, not the exception, that young adults in contact with the criminal justice system have multiple vulnerabilities arising from a variety of social, psychological and economic factors' (Saunders, 2014: 3). As stated by Liebling (2012: 65), young adults in prison are a particularly vulnerable group whose 'troubled histories and complex unmet needs' differentiate them from other cohorts in prison. Therefore, it is important that in adopting any distinct approach to young adults in the criminal justice system, these complex needs are met which require *inter alia* 'some form of support or intervention to enable them

to desist from future offences' (IPRT, 2014: 22). In agreement, one interviewee commented that:

> 'many of the [young adults] who have come through [the criminal justice system] as teenagers at th[at] stage do not just [have] your normal brain development but they will have huge issues, they might have attachment [issues], they might have mental health issues, so they are even more affected and the idea [they] suddenly get adult sentence is terrible' (Irish Interviewee #5).

In terms of why there was an absence of transitional arrangements in Ireland, this can be attributed to two prevalent factors. Firstly, a lack of political will and public sympathy for this cohort of offenders and secondly, the siloing of the youth justice system and lack of departmental collaboration. Interviewees therefore referred to a 'lack of understanding' (Irish interviewee #1) about the needs of young adults, which in their view 'was nobody's problem' (Irish interviewee #3). Another interviewee commented that this goes back to public perceptions of young adults, that 'as a society, I think we are less open to arguments for investing more resources in dealing with offenders… there isn't a political will there to invest in resources' (Irish interviewee #6). Echoing this, another interviewee commented that: 'you need to be able to sell this politically to the wider community' but the issue relates to 'the level of offending that goes on in the 18 to 24 age group compared to other age groups, it is a more difficult sell I suppose' (Irish interviewee #2). This links to the issue of resourcing with one interviewee arguing that: 'they are just afraid of how much it's going to cost' (Irish interviewee #8) and there is a 'fear of it as well' (Irish interviewee #8) as to whether that type of investment will work. It's interesting to compare this attitude to the Netherlands, discussed below, where the overrepresentation of young adults within the crime statistics prompted a political response to create a distinct approach to this cohort, rather than militating against it (Schmidt et. al., 2020). There, this overrepresentation and interdisciplinary research relating to young adult offenders indicated an urgency to address this cohort, rather than it being viewed as 'a more difficult sell' to bring about change.

In respect of the siloing of youth justice in Ireland, it was also acknowledged by a Senior Civil Servant that 'it's always been a challenge to have that continuity across the youth, the young adult and adult systems. Especially when we had two departments [children and justice] dealing with it' (Irish interviewee #2). One interviewee commented that this may

have been due to 'that fragmentation of responsibilities' and 'consistency was difficult where one department were responsible for up to 18s and the other department were responsible for everybody over 18' (Irish interviewee #2). This was echoed by another interviewee who stated that with the different departments 'if an issue falls between two stools it usually falls' (Irish interviewee #7). There is therefore no one to champion the issue internally. As an interviewee commented: 'you really need to have somebody who believes in it and can drive it through to get that type of investment early on' (Irish interviewee #8). In addition, one interviewee commented: 'we are all probably a bit exhausted from the amount of reform that it took to get to where we are now' (Irish interviewee #3). Indeed, as noted in the previous chapter, the slow pace of change in youth justice has been an issue historically in Ireland with a former Minister stating: 'there's so many hurdles to get over before you can get anything done that's it's very hard to get anything done' (Beesley, 2022). Systematisation and departmental collaboration has also been historically poor, with the Irish Youth Justice Service ('IYJS') becoming, in 2005, the first structure to co-ordinate youth justice service delivery in the Republic of Ireland, across the Department of Justice, and Department of Children and Youth Affairs. Despite the success of this cross-department Service, including being central to the development of a policy framework, appears to have closed in 2021[87]. This points up the challenges for Ireland in attempting to establish any transitional arrangements between the two justice sectors.

Despite the lack of progress in Ireland with regards to transitional arrangements, the majority of interviewees agreed that these arrangements *should* exist. One interviewee stated: 'it is unarguable, you know I mean the cliff-edge, doesn't just happen just because it's your 18th birthday you suddenly become endowed with magical powers' (Irish interviewee #5). Another significant element in the support for these transitional arrangements was the increase in the number of young offenders under the age of 18 receiving long custodial sentences. This means that they will therefore have to transfer into an adult prison which would usually be Wheatfield Prison unless there is a sexual nature to the offence (Irish interviewee #15). All interviewees generally agreed that the young adult age cohort should extend to 24 or 25 with one stating that, '24 seems to be one that the evidence suggests is the right one to go for, but I don't think we should set it in stone either' (Irish interviewee #12). Whilst there are several types of transitional arrangements that can be put in place for this age cohort, including a young offender institution or separate young offenders wing, the main

[87] See note 86.

consensus was for there to be a more flexible system such as the introduction of 'maturity assessments [during sentencing] and the ability for the courts to decide' (Irish interviewee #8).

9.3 Scotland

As explored in Chapters Five and Seven, Scotland has a sharp contrast between the high imprisonment rates in the adult system and the welfare-based Children's Hearing System. The 'abrupt propulsion of 16-year olds… into the adult criminal system' (Munro et al., 2010: 264) means that 16 and 17 year olds largely fall to be considered together with adults and there are no waivers or transfer laws in place for this age cohort. This is confirmed in Figure 9.3 where the trends between the under 18 and under 21 sentence committals appear to be largely convergent (data are presented in this way given that in Scotland there are YOIs for those aged 16 and 21). This is confirmed by Figure 9.4 which examines population trends from 1997 and which shows mostly convergence between the young adult and juvenile prison population trends. The adult justice sector increases by 20 per cent between 1997 and 2015, compared to the other two sectors which have experienced significant downward trends, particularly after 2009, and particularly for the juvenile cohort. As discussed in Chapter Five, this may be attributed to a falling crime rate, a shift in policy towards young offenders, the introduction of the Whole Systems Approach, and a potential behavioural change in young people (McAra and McVie, 2017).

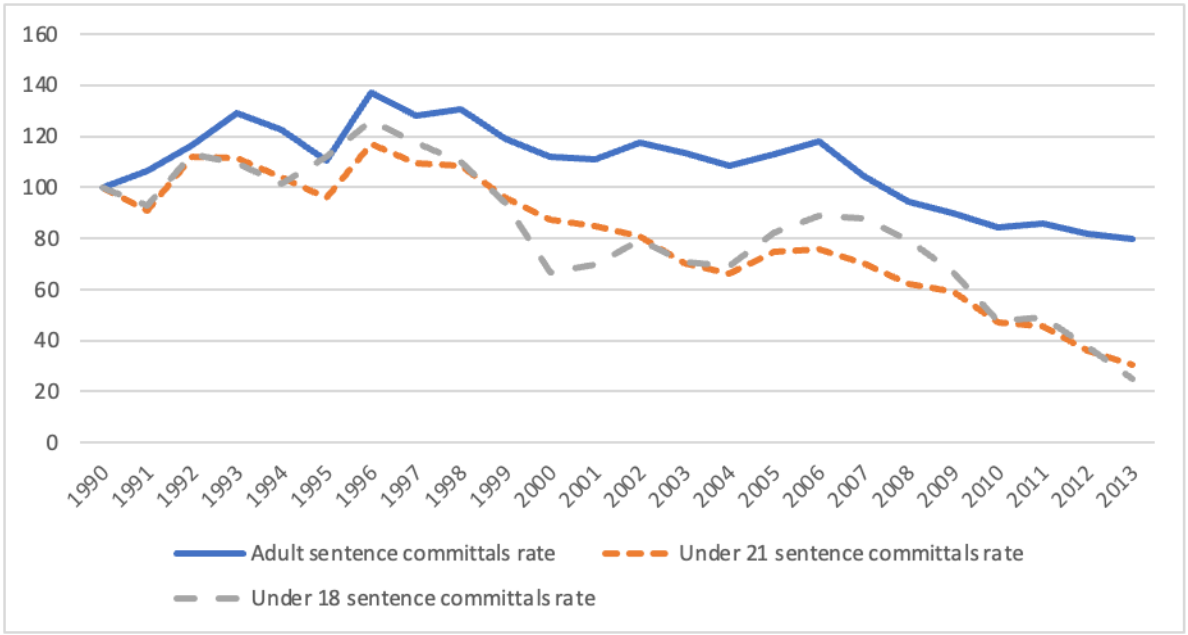

Figure 9.3 **Adult sentence committal, under 21 year old sentence committal, and under 18 sentence committal rates in Scotland 1990-2015 using 1990 as an index year[88]**

Sources: Scottish Prison Service Annual Reports 1990-1996, 2012-2013, 2015-2016, Scottish Executive: Statistical Bulletin: Prison Statistics Scotland 1997-2012, Scottish Government Prison statistics and population projections 2013-2014.

[88] It is important to note that these figures for those under 21 and under 18 represent the young people who are in YOIs under the care of the Scottish Prison Service, as distinct from young people under the age of 16 under the care of the Children's Hearing System and local authorities.

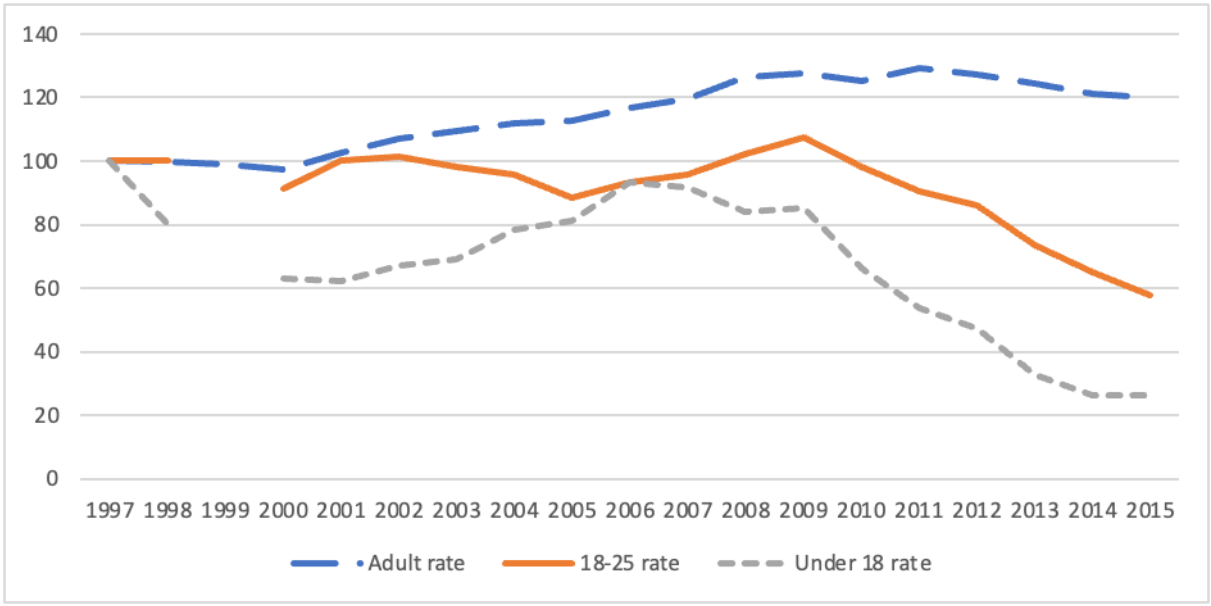

Figure 9.4 **Adult prison population, 18 to 25 year old prison population, and under 18 prison population rates in Scotland 1990-2015 using 1997 as an index year.**

Sources: Scottish Prison Service Annual Reports 1990-1996, 2012-2013, 2015-2016, Scottish Executive: Statistical Bulletin: Prison Statistics Scotland 1997-2012, Scottish Government Prison statistics and population projections 2013-2014.

In respect of the transitions between the adult and youth sector in Scotland, it is acknowledged that Scotland has YOIs for 16 to 21 year olds, therefore eliminating the harsh transition into the adult system at 18 years old. Many interviewees emphasised the significant differences between YOIs in Scotland and adult prisons:

> 'I am always hesitant to say Polmont is great, it's not great, it's a prison, but in comparison with the adult estate it's brilliant' (Scottish interviewee #8).

> 'From a young person's perspective this [YOI] is very more therapeutic regime, very much more therapeutic and far greater interventions and activities and looking at the individual's needs… Adults, I still think there is an element of containment, they don't have the same interventions that we have, everybody that comes in here [YOI Polmont] is like wow, you have got so much, adults I think it's still you are going to jail, that kind of mentality… [W]e have services

> in here which deal with trauma which deal with bereavement which deal with domestic abuse, consent, we have got all that in place here, there is nothing like that in the adults' (Scottish interviewee #7).

These additional supports were recognised by interviewees who stated that when younger people (under 21) want to leave the YOI to go to an adult institution 'you are trying to tell them, you have got all this here and you engage with it all, you go to adults you have got nothing' (Scottish interviewee #7).

On the other hand, the mixing of adults and children raises difficult issues of under 18 year olds being housed with adults in an adult prison, contrary to the UNCRC, Havana Rules (1990) and Beijing Rules (1985). Prison officers commenting on the differences between the YOI and adult prison stated that the 16 and 17 year olds are housed in a separate hall in the YOI with a separate hall for 18 to 21 year olds. They thought: 'the hall for under 18s was very, very good, because I think that system, you really try to protect these kind of guys for no mixing with the older guys' (Scottish interviewee #6). Another issue was the harsh transition when 21 year olds move from a YOI into an adult prison:

> 'I could have guys, right you are 21 year old, you are getting moved to Barlinnie, Barlinnie was a different kind of jail, it was a harder kind of jail, it was harder criminals' (Scottish interviewee #6).

> 'I do think we need to be far better at transitions... Going from the care system to here [YOI] is far better than going from here to the adults. So when they come to here from the care system the boys come in and see the jail and the staff go out to the care system and are involved in the case conference, case management so we know who they are coming in, we know their behaviours, we know their traits, we know their risks, whereas there is nothing like that at all with young people going to adults. Nothing. They just, you hit a certain age, you are on another estate, you are gone' (Scottish interviewee #7).

The stark contrast between the two establishments was also commented on:

> 'if you think of somebody that has been in this type of environment from say 14, and if they have got a life sentence and we are moving them on at 21, 23 they

> have been in this encompassing care environment… and then they are jumping into an adult area, it is very… Different relationships, different boundaries, different environment, different atmosphere' (Scottish interviewee #7).

The decision as to when offenders were moved also appeared quite discretionary and based on prison numbers i.e. 'if the numbers were low they could move to an adult prison' (Scottish interviewee #6). On the other hand, 'if [it] were not a problem you could keep them up to 22… but as soon as they hit 22 or whatever you had to move them on, I think it was like a shock to their system' (Scottish interviewee #6).

In respect of why there has been no other focus on transitional arrangements in the Scottish criminal justice system, several interviewees echoed views expressed by respondents in Ireland around the inertia that often exists in this area, combined with the difficulty in 'selling' the idea politically. One interviewee referred to their initial comment that the system was 'traditional' and also 'fairly rigid I think when it comes to that, and I think it's probably [lack of] understanding' (Scottish interviewee #9). Another interviewee agreed: 'there has never been a political priority… too hard to do, just one of these things, we will get around to it, but the thing is a mess…' (Scottish interviewee #4). This is in contrast to the Dutch approach, explored below, where the overrepresentation relating to young adult offenders signalled a need to take action and build on what had been done already (the approach to 18 to 21 year olds since 1965).

Linked with this is the political appeal of the idea, particularly when this cohort are a high offending group. It is interesting to contrast the views of interviewees, who felt that the public would struggle to identify a young adult as a child, with the observations of Pruin and Dünkel, (2015) who note that in the past fifty years the average age of several social factors such as gaining employment, starting a family and marriage, have all increased. Indeed, in many Western European jurisdictions, a large proportion of young adults still live with their parents, differing from the past and the expectation to leave home at the age of 18:

> 'I think people will struggle to identify someone at being 23 and not being an adult and it is that whole cultural aspect as to how you sell it, and you say "well they are still learning"' (Scottish Interviewee #9).

> ‘Lack of sufficient thought, engagement and courage to do it, I mean I suppose the most offending is going to be by those who are under 25 or certainly a significant percentage of it so say we are going to deal differently with them is, you are really talking about a radical transformation of your whole approach… it has probably just been easier because it is too hard to just let it go and say well we have now got a system where in fact up to the age of 21 there is certain safeguards [already]’ (Scottish interviewee #4).

This last point raises the issue of the particular institutional arrangements in place in Scotland, which arguably already make concessions to age in the form of YOIs. In addition, the particular way in which the Scottish youth justice and adult systems are configured meant that the more immediate concern in Scotland has been to raise the age of criminal responsibility and remove the under 18 year olds from YOIs after which, there can be focus on the younger adult cohort. As one interviewee commented: ‘these young people [adults] are the missing bit, like really they get so little attention because there has been attention on children and attention on adults but there is a real need to think about this group’ (Scottish interviewee #5). As stated by one interviewee:

> ‘it’s a real culture change it’s not something we can just switch overnight and there is a big enough change coming now as we move towards the age of criminal responsibility changing to 12 or potentially older than that in time so that is a big step already…’ (Scottish interviewee #9).

In respect of how this should be done, some interviews discussed putting in place possible transitional arrangements by extending YOIs up to 24 and that whilst: ‘it’s still a prison in Scotland … comparatively it’s just so much better than adult prison, so I would really love to see that approach extended until like 24 or something or 25 even’ (Scottish interviewee #8). Many interviewees discussed the care system (or looked after children) extending its support until young adults turn 26 years old, and argued that this should be the same for the justice system: ‘so I suppose it makes sense as well that we would follow that in supporting involving young adults as well’ (Scottish interviewee #10). Indeed, as stated by a YOI prison officer:

> ‘We could absolutely keep them until they are 26, because obviously there is a lot of talk surrounding a young person, they don’t mature until 26, so we could

> absolutely keep them until they are 26 but I wouldn't like to house them with a 19 year old' (Scottish interviewee #7).

This issue of mixing under 18s and over 18s is also raised in the Netherlands and indeed was an issue in St Patrick's Institution in Ireland before it closed in 2017. It does raise interesting questions about the best place for young adults within the criminal justice sector and perhaps emphasises the need for their own 'carved out' justice system, rather than an extension of the youth justice systems. All interviewees agreed that transitional arrangements *should* be in place in Scotland with many referring to recent developments of the Scottish Sentencing Council Guidelines on sentencing young people under the age of 25 (Scottish Sentencing Council, 2021).

9.4 Netherlands

In contrast to Ireland and Scotland, the Netherlands have discussed the treatment of young adults since the 1950s and legal provisions have been in place for youth sanctions to be applied to those aged between 18 and 21 since 1965 (Uit Beijerse, 2016). This was further strengthened by the introduction of the Adolescent Criminal Law Act ('*adolescentenstrafrecht'* and 'ACL') ('the 2014 Act') which entered into force in April 2014 and which extended the current provisions that apply for 18 to 21 year olds to those up to the age of 23 (Schmidt et al., 2020). As explored in Chapters Six and Seven, whilst there continue to be strong welfarist aspects to the youth justice system in the Netherlands, the youth and adult justice sectors appear to have taken similar approaches over the study period, in terms of the sharp upward, and then downward trajectory of imprisonment/detention rates. Figure 9.4 shows that the under 25 prison population rate closely tracks the adult trend lines and generally shows the convergence between all of the three justice sectors.

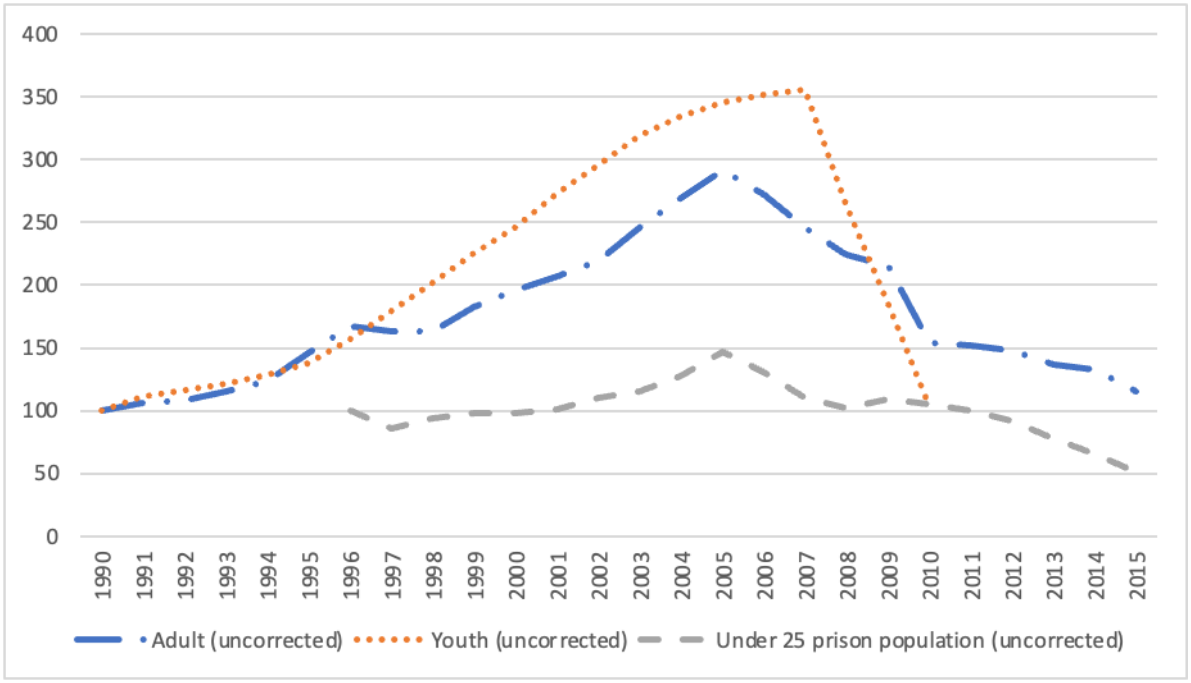

Figure 9.5 Adult imprisonment rate (uncorrected) 1990[89]-2015, under 25 imprisonment rate (uncorrected) 1996-2015 and youth JJI detention rate (uncorrected) 1990-2010 in the Netherlands using 1990 as an index year

Sources: Criminaliteit en rechtshandhaving 1999, 2004, 2006, 2007 and 2015.

As noted, legal provisions were introduced in 1965 providing for youth sanctions to be applied to offenders aged between 18 and 21 (Uit Beijerse, 2016). With the emergence of scientific research in the late 1990s and 2000s on reduced culpability and responsibility in young adults due to their immaturity there was revived interest in juvenile delinquency and effective responses to it (Scott and Steinberg, 2008; Steinberg and Scott, 2003). This scientific research was relied on by academics and professionals in their argument that young adults should be given a special position in the youth justice system (Schmidt et al., 2020):

> 'when it was being debated a few years ago now, they were really going on about how scientific they were going to be and they were going to look at the psychology and the neuroscience and follow the signs in creating a criminal

[89] See note 81. There are two different sources of the prison population from 1990 to 2015 which resulted in a corrected and uncorrected rate. The corrected rate was only collated from 1999 onwards, therefore the only data available before then is the uncorrected rate.

> justice system where age was only a number so to say and it would really be to do with the developmental levels etc.' (Dutch Interviewee #2).

Whilst proposals were initially criticised for lack of clarity, a renewed focus since 2009 on young adult offenders aged 18 to 24 led to legislative proposals in 2012, which ultimately resulted in the 2014 Act (Uit Beijerse, 2016; Schmidt et al., 2020). The 2014 Act entered into force in 2014 (van der Laan et al., 2019) and extended the current provisions that apply for 18 to 21 year olds to those up to the age of 23 (Schmidt et al., 2020).

Many of the interviewees thought that there were better transitions between the adult and youth justice sector in the Netherlands, particularly in light of the 2014 Act and the potential extension of youth law up to age 23. For example, in the Netherlands, when a young person up to the age of 23 is sentenced under youth law, they would serve the entirety of their sentence in the institution and not be transitioned to an adult institution if they reach a certain age. As one interviewee stated: 'there [is] a strict distinction between youth law so [if] you [get sentenced] to the adult law you have to commit a crime again' (Dutch Interviewee #9). As another interviewee explained, '[the way] you are sentenced determine[s] which institution you go to, so if you are 22 and you are tried as a child and you have youth detention imposed then you will go to a youth detention centre and that stays that way.' (Dutch Interviewee #5. This transition process was described as positive:

> 'it's good that you don't have that transfer, that you have the possibility to stay in one institution if they are there and going to school and to finish your school and so on, you should never have that abrupt transitions so in that way I think it's better in the Netherlands' (Dutch Interviewee #1).

The historical approach to young adults and the introduction of the 2014 Act in the Netherlands raises interesting questions as to how the Dutch were able to do this, particularly in comparison to other jurisdictions like Ireland and Scotland discussed above. The Netherlands became a European pioneer adopting this approach and is the only European country to provide the legal basis for extending the use of youth justice provisions to such a high age (Pruin and Dünkel, 2015; van der Laan et al., 2019). In terms of why this change occurred, the interview data seems to point to the significance of the neuroscience research and the focus of policy makers on the effectiveness of a new approach to young adults up to age 23:

> ‘they were using the new research on brain, brain research that showed until 23 their brains are developing… especially because … the policy makers thought it would be more *effective*, so they said we should look more to the possibility to impose a youth sanction to a young adult and we brought them up to 23, not only to 21 but to 23’ (Dutch Interviewee #1).

> ‘the brain development of younger adults can last well within their 20s and there was more awareness that young adults have the same troubles and problems as juveniles and we should approach them differently and that the effect of doing [the] *what works* system that was developed in juvenile penal law would also apply to them and that was the one factor that set in motion that change with the law’ (Dutch Interviewee #3).

Indeed, one interviewee discusses the shift from the 2000s when policy makers in youth justice ‘started to look [at] what is effective, that was the new policy… so everything that was youth minded in 1965 it now returned but not because it is youth minded but because it is effective’ (Dutch Interviewee #1). This new approach can be seen to have been taken with young adults also.

Another factor concerned the more flexible approach taken historically in the Netherlands. The change in the system from 1965 to allow youth sanctions to be applied to offenders aged between 18 and 21 (Uit Beijerse, 2016) seems to have ensured that the increase in 2014 to the age of 23 wasn’t met with significant political or institutional obstacles. Since the approach to young adults was already flexible in the Netherlands historically, this meant that the system was more open for further change. Indeed, one interviewee commented on the introduction of the 2014 Act: ‘it wasn’t even controversial at the time’ (Dutch Interviewee #2). This is in contrast to the other two jurisdictions (particularly Scotland) where the historical and cultural embeddedness of their youth justice systems, and the desire to preserve it, has rendered it very difficult to legislate for young adults. As discussed in Chapter Eight, stagnation within the Irish youth justice has exerted a protective effect and benefited the system from punitiveness. In Scotland, the Kilbrandon ethos linked to Scottish identity has resulted in a reluctance to change the system. Both of these factors, while positive on the one hand in protecting the youth justice system from excessive punitive change, has restricted the systems’ abilities to reform in a more progressive direction. Whereas the Netherlands, as we

have seen in previous chapters, is more agile and responsive to pressure for reform which can be a disadvantage on the one hand but on the other has resulted in progressive reforms in the area of young adults and a willingness to change their system.

Issues with implementation

As discussed earlier, while the possible extension of youth law to 18 to 23 year olds has been regarded as a progressive move, there has been criticism concerning 16 and 17 year olds and the possibility of adult law applying to them. One stated: 'we don't want from a juvenile point of view to transfer youngsters into the adult system… but the other way there could be some possibilities for some in adult populations to attend interventions, attend therapy, attend school maybe in the juvenile institutions' (Dutch Interviewee #9). In addition, with the increase in the numbers of younger adults in the youth system: 'the problem is because we have so many adults in the youth prison, and so only a few 14 or 15 year olds, there is also the danger that these very young prisoners and influenced by the older ones' (Dutch Interviewee #1). Another Dutch Interviewee who worked in Juvenile Detention Centres stated: 'so the institutions we have now the population grew older but also more complex, really, really complex. Sometimes we were talking about regular units, I said but we don't have regular units because we don't have regular kids anymore' (Dutch Interviewee #9). This echoes the concerns raised by Irish and Scottish interviewees and the practical challenges of housing young adults with those under 18. As seen in Chapter Six, there has been a complete reversal over a twenty-three year period of the population in JJIs from predominantly under 18s to now predominantly over 18s.

Another issue which has emerged in research and was commented on by Dutch interviewees was the practice and implementation of the ACL which has been difficult with only 5 per cent of young adults being sentenced under this Act in 2016 (from 1 per cent in 2014). There is also an issue with variation among courts, as one interviewee noted: 'Well it's used very differently because it is the decision of the judge and different judges, different prosecutors, so I can point out the courts where it is more happening than in other courts. Difference in application' (Dutch Interviewee #9). Several of the interviewees proffered reasons as to why this is. The below discussions illustrate the difficulty in changing legal culture, even where

the law surrounding young adults has changed. One interviewee commented on the courts and judge's role:

> 'whatever guidance given is so broad and so generic and so relying on the wisdom of judges that it isn't a game changer and that it's actually quite hard to get things ahead of judges and do things differently' (Dutch Interviewee #2).

A public prosecutor stated: 'it's a bit disappointing… at the same time, we didn't expect a very great change' (Dutch Interviewee #3). The public prosecutor went on to say that there were several reasons why it is not being used, particularly that 'the system is too complicated' (Dutch Interviewee #3). In particular this interviewee commented that, while the juvenile public prosecutors 'know these rules very well and they know how to apply the law', this is not the case for public prosecutors in the adult system for whom the rules and law are 'too complicated' (Dutch Interviewee #3). The public prosecutor also stated that 'the juvenile punishments are shorter, so when the crime is too severe we won't go [to] apply juvenile law' (Dutch Interviewee #3). Another interviewee agreed with this; 'the culture within the courts, we are asking the adult criminal court to apply this new law but they haven't been really educated [in the 2014 Act]' (Dutch Interviewee #5). Agreeing with this, another interviewee commented on the 2014 Act: 'it could be used more… sometimes they [practitioners] don't really think outside of the box and they just go on routine and they have to make it into a routine to think about' (Dutch Interviewee #8).

Going forward, one interviewee recommended what could be done for this 2014 Act to be utilised more: 'if prosecutors were, we are going to suggest changing [sentencing] along the lines of the legislation that is probably the best way through because on their own as a collective judges… to get them motivated in the same way is not easy' (Dutch Interviewee #2). Therefore, even where a European country has specifically built in transitional arrangements, there appear significant challenges in straddling the divide between two different legal systems and cultures.

9.5 Conclusion

There has been increased international attention and research on young adults within criminal justice systems in recent years, with interdisciplinary research suggesting young adulthood is

a crucial and sensitive period in the life course characterised by wide-ranging transitions and changes, the (non) accomplishment of which significantly impacts on criminal careers and life trajectories (Pruin and Dünkel, 2015). In this context, adapting the justice system to make accommodations for young adults appears logical. Yet in Ireland and Scotland, extension of transitional arrangements or distinct treatment of young adults is lacking compared to the Netherlands where a fully flexible system is in place for young adults. This begs the question as to how the Netherlands has achieved this reform, when the other jurisdictions have not.

From the above analysis, the main reasons Ireland and Scotland could not achieve reform when the Netherlands could were: the lack of a tradition of special accommodation for young adults, lack of willingness to innovate and the siloed approach taken historically to youth justice. Even where initiatives are introduced to improve transitions between the two justice sectors, as the interviews have shown, there are a number of challenges to adopting a distinct approach to the young adult cohort, as can be gleaned from both past failed attempts such as the young adult wing in Wheatfield prison in Ireland and the disappointing judicial uptake of the flexible system in the Netherlands. Several insights can be drawn from these findings. Firstly, it was found that it is not enough to merely have separate young adult institutions or units as this results in warehousing young adults, similar to the adult population, but they would 'have to be equipped to promote individual outlooks and positive trajectories and provide opportunities for personal development' (Pruin and Dünkel, 2015: 72). Sufficient resourcing of these initiatives is critical. Secondly, the difficulties of mixing of adults and young people under 18 has arisen in all the jurisdictions. Currently in both Scotland and the Netherlands, under 18 year olds are mixed with over 18 year olds in YOIs/JJIs. Historically in Ireland this was done in St Patrick's Institution which closed down in 2017. This raises issues under human rights compliance as well as difficulties concerning the differing needs of those under 18 and those over 18. This raises questions about where to best place young adults within a criminal justice system and highlights the challenges in practice of attempting to provide a distinct approach.

Ultimately, whilst jurisdictions can implement legislation and enact changes to policy or practice regarding young adult offenders, the importance of people championing the issue, practitioners 'buying-in' to it and the political will to use this in practice is paramount. This can be clearly seen in the Netherlands, with the flexible system in place for young adult offenders but only five per cent of young adults being sentenced under this Act in 2016 (from

one per cent in 2014). This speaks to the distinct legal cultures operating in most jurisdictions for adults and juveniles and the difficulties for transitional initiatives in straddling this culture. Therefore, whilst all the legal conditions may be place in a jurisdiction to effect change for young adult offenders, practitioners on the ground must be prepared to adapt and champion the change.

Chapter 10 – Conclusion

10.1 Introduction

While much academic ink has been spilled on developments in youth justice from the 1980s to the present time (see, most recently, Goldson et al. (2021) and Lynch et al. (2022)), few studies have examined 'contrasts in tolerance' (Downes, 1988) *within* the justice system itself. This PhD addressed this lacuna through comparative research into the youth, young adult and adult justice systems in Ireland, Scotland and the Netherlands. It addressed three research questions, some tentative answers to which are put forward in Chapters Seven to Nine. Firstly, it sought to explore further the differences and/or similarities between the adult and youth justice systems in each of the respective jurisdictions. Secondly, it sought to identify the drivers of these differences/similarities between the justice sectors. Thirdly, it probed the existence of transitional arrangements for young adults in the three justice systems and the reasons underlying these arrangements.

This thesis was divided into three parts in order to address the three research questions. The first part examined the key literature in this area and outlined the methodological approach. The second part comprised three country review chapters for each of the selected case study countries. Thirdly, this thesis provided three findings chapters addressing each of the research questions. This final conclusion chapter will focus on the key themes to emerge from the findings in relation to these research questions, noting that there is overlap in the key themes which emerged across these findings. Further, this chapter will discuss the overall relevance, significance and implications of this thesis. This chapter will argue that a *cross-sectoral* approach to penality, examined through the lens of the path dependency literature, can provide fresh perspectives on apparent differences of approach *within* and *between* justice systems, as well as key determinants ('risk' and 'protective' factors) of penal policies (Tonry, 2007).

10.2 Summary of Findings

The following section will briefly outline the findings of this research. It will also consider recent developments, outside of the 1990-2015 study period, briefly and how (if at all) they impact these findings.

10.2.1 Youth Justice contingencies and constitutive leniency

As discussed throughout, punitiveness and tolerance have been comprehensively researched in the last couple of decades (Feeley and Simon 1992, 1994; Garland 2002, 2013; Pratt et al., 2005, Simon 2007). With the increase in punitiveness in criminal justice systems being far from universal, scholars such as Tonry (2007) and Lappi-Seppälä (2011) have developed useful frameworks to understand this diverse reaction amongst countries. Such frameworks, however, fail to take into account of contrasts in tolerance *within* jurisdictions. Research conducted by Kutateladze (2009) and Hamilton (2014) demonstrated that punitiveness is a multidimensional concept and highlighted the variation that can occur *within* state justice systems. This is also true of the youth and adult justice systems, with stability characterising some youth justice systems and change characterising others. Indeed, this formed the primary motivation for selecting the countries in question: while politicisation occurred across both the adult and youth justice systems in the Netherlands in the 1990s, in contrast, the youth justice systems in Ireland and Scotland appear to have been protected from a more punitive approach. This invites important questions about the historical, cultural, economic and social factors preserving (or not) a distinct approach to youth justice in certain jurisdictions which this thesis sought to answer.

In the three jurisdictions examined the research shows that there were differences between their respective adult and youth justice systems, which is perhaps not surprising. In addition, the finding that that each of the youth justice systems retain strong tolerant welfarist elements, distinct from their adult counterparts, is also to be expected, particularly given their international reputations for a progressive approach to youth justice. Yet, a key finding was the contingency which attached to this welfarism in all three jurisdictions. As stated by Goldson et al. (2021: 46) ‘youth “justice” is contingent and ever-changing and its logics and drivers defy tidy explanation’. ‘Leniency’ in the three case study countries varied significantly according to a child’s age, address, background, class, guilt, and mental state. The children who fall into these categories therefore become, in Doob and Tonry’s (2004)

terms, ‘instant adults’ and are excluded from the relative leniency of the youth justice system. This finding highlights the need for a more nuanced analysis in order to focus on the children that fall into these categories as they are ‘the one[s] that the system[s] do… the least for at the moment.’ (Irish interviewee #12).

Related to this finding concerning the highly contingent nature of ‘leniency’ in the three jurisdictions is the issue of the boundaries between the adult and youth justice systems and the degree to which they mutually constitute or legitimatise one another. As discussed in Chapter Seven, this issue has received relatively little attention within criminology to date, outside of the discussions in the US on juvenile waivers from the youth justice system to the adult system. Fagan (2008: 12) has observed on his discussion on ‘border disputes’ between the two systems, that transfers to the adult system ‘helped maintain the legitimacy of the juvenile court by removing hard cases that challenged the court’s comparative advantage in dealing with young offenders’. He goes on to say, however, that these ‘hard cases’ before the juvenile court have changed over time, from children charged with murder or other violence to children ‘thought to be “incorrigible”— repetitive delinquents whose failure to respond to the court’s therapeutic regime signalled the intractability of their developmental and social deficits’. This process of adulterisation is, as Case and Bateman (2020) have argued, ‘socio-historically contingent’, as well as demographic and dispositional. This finding was strongly echoed throughout the thesis, with contingencies relating to the young person’s (perceived) level of risk and/or social undesirability coming into sharper focus at key historical moments (e.g. the 1995 Act in the Netherlands). Moreover, the formal and informal exceptions to the protections afforded by each of the jurisdictions’ youth justice systems, result in certain (socially constructed) cohorts of young people experiencing the system in a more punitive manner than others.

As suggested by the interview data, a key finding of this thesis is that these exceptions are key to maintaining the legitimacy of the youth justice systems, by removing from the youth justice system ‘hard cases’ in its reach. Exceptions or boundaries may be formal or informal in nature. Formal boundaries are clear in each of the countries in respect of the upper and lower limits of the courts’ jurisdiction and the exceptions that result in young people becoming ‘instant adults’ (Doob and Tonry, 2004; see Chapter Seven, Table 7.1). It is notable that Lynch et al. (2022) have highlighted there are arguments to be made for reform of existing responses to young people who commit serious offences (who experience these

formal boundaries) in several jurisdictions with a more principled and evidence-based response. The authors astutely note the importance of political will, which is largely shaped by public opinion and the media, in reforming such existing responses (Forde et al., 2022). In Ireland, if a young person from the age of ten is charged with a specific serious crime, including murder, manslaughter or rape, they must appear in the adult court (with some child protections in place), experiencing a much more punitive trial process and potentially a harsher sentence. As we have seen, the judge in the Children's Court also retains discretion to refuse jurisdiction in cases deemed too serious, and on occasion this prerogative is exercised. In the Netherlands, a judge has the option to sentence 16 and 17 year olds under adult law, and juvenile custodial treatment orders ('PIJ') (treatment order for those who committed a serious offence and suffer from a mental illness and the safety of others/in general is an issue) allow the statutory limits on sentencing to be exceeded quite considerably. Of the three case study countries, however, this has the strongest application in Scotland where, as discussed in previous chapters, children who are 16 and over directly enter the adult system. In addition to formal boundaries, informal rules also exist which govern inclusion or exclusion in the youth justice systems, which was evident in each of the case study countries. Professionals in both the police and prosecutorial bodies retain considerable discretion within each of the countries in terms of decisions around entry into diversion programs, and decisions relating to remand. For example, in Ireland, children who, for whatever reason, are deemed unsuitable for diversion may have a much harsher experience of the youth justice system given the absence of alternatives.

A key finding of this thesis is that these formal and informal exceptions in many ways shore up the legitimacy of the youth justice systems in the three countries, including the 'rhetorical cover' provided by the youth justice systems (McBarnet, 1981; Hamilton, 2007). This is particularly the case in countries such as Scotland with the world-renowned Children's Hearing System in some ways bolstering the legitimacy of what is, in effect, a youth justice system with very limited reach, as well as a relatively punitive adult system (at least as measured by imprisonment rates). In a sense, therefore, the adult system (through statutory exceptions, etc.) and the youth justice system mutually constitute one another. This is clear from the formal and informal exceptions in place in the three jurisdictions and from the justifications advanced for these. For example, as we have seen in Chapter Seven, the 'angry assault' (Zimring, 2000) on Ireland's youth justice system came via the Criminal Justice Act 2006, introduced as part of a wider suite of measures aimed at rebalancing the criminal

justice system. This Act introduced ASBOs for children and exceptions to the age of criminal responsibility (10), raising it to 12 for certain serious offences (murder, rape, aggravated sexual assault). The justification advanced by the Minister of Justice at the time was that victims of ten and 11 year olds would not find it satisfactory that the only recourse would be via 'social services' and that 'public opinion in Ireland demanded that criminal prosecutions should be pursued against young people accused of homicide or sexual offences'[90]. At a punitive period in Irish penal policy these exceptions were deemed necessary to maintain the legitimacy of the youth justice system in the eyes of the public; there was a sense in which the progressive reforms introduced by the Children Act had gone too far. Yet, as discussed in Chapter Eight, much older young people charged with rape offences in Ireland are often dealt with via diversionary means and this appears to meet with public approval.

Similarly, in Scotland all young people aged 16 and over are processed in the adult system with, as interviewees noted, few concessions made to the child's age or relative lack of maturity. In the same way that McBarnet (1981) argued that due process is *for* crime control through its legitimation of the crime control nature of the system, here we see the international reputation enjoyed by the CHS masking and thus legitimising the highly contingent aspects of treatment within youth justice such as 16 and 17 year olds. In perhaps shedding some light on why 16 and 17 year olds are excluded from the CHS, a Scottish Parliament member stated that in Scotland: 'there have been multiple instances of 16 and 17 year old murderers. Their place should absolutely be in jail… '[91]. Despite a recent welcoming development of the Scottish Government's pledge to remove 16 and 17 year olds from YOIs, the extension of the CHS to this cohort was not addressed. As emphasised by one interviewee the reason why the Hearing System has and continues to exist 'is because there were always ways around it, so exceptional acts would have been prosecuted and still will be prosecuted in the courts and will be tried like adults' (Scottish interviewee #13). In Ireland and Scotland, these exceptions were able to exist even when protective factors were operating to shield the youth justice system from punitive interference, as discussed in Chapter Eight. This indicates the intricacies of the youth justice systems relationship with its adult counterpart, and the need for exceptions to be in place in order for its to operate effectively and without (undue) political interference.

[90] Dáil Eireann Debate Vol. 624 No. 3 Responses to Q141 and Q194, 3 October 2006.
[91] Scottish Parliament Debate, S6O-01055, 11 May 2022.

In the Netherlands, as has been discussed, the lack of culturally and historically embedded protective factors led to both the adult and youth justice systems experiencing more punitive tendencies. In youth justice this was most clearly seen in the 1995 Act and through recent discussions about raising the maximum custodial sentences for young people sentenced by youth law. In particular, the 1995 Act carved out exceptions for certain 'risky' young people, namely, 16 and 17 year olds and custodial treatment orders. The provisions for judges to use when deciding whether to apply adult law to 16 and 17 year olds were expanded (a third criteria added on the circumstances of the cases) and changed from cumulative criteria to each criterion being independently sufficient (Uit Beijerse, 2016). In changing the criminal procedures, the 1995 Act was 'emphasizing the increased maturity of young people' (Junger-Tas, 2004: 325). Furthermore, the juvenile custodial treatment order ('PIJ'), as discussed in Chapter Seven, allows for the statutory sentence limits to be exceeded for up to a maximum of seven years. From 1999 to 2015, approximately half of juveniles in JJIs have been there on a PIJ which is quite an alarming statistic (see Figure 6.8). It is perhaps *because* of these exceptions to the system that the welfarist and 'pedagogical' characteristics of the system have, according to several commentators, been preserved in the face of the 'punitive turn' (van den Brink, 2021). Indeed, as some have suggested, it may be that the power to punish has been dispersed into the community under the banner of crime prevention (Van Swaaningen, 2013). Thus, even in a historically flexible system such as the Netherlands, exceptions are key to the legitimacy of the youth justice system.

Based on the above, the argument is advanced that the boundaries between the adult and youth justice systems arguably merit greater attention and should not simply be regarded as mere frames around which the business of justice systems go on. As this thesis has shown, by examining who is included or excluded from the youth justice system and why certain boundaries have been drawn, both formally and informally, there is an opportunity to learn about the values and assumptions behind those systems. In addition, the intertwining of the adult and youth justice sectors raises questions about the merits of analysing each respective system in isolation. One scholar who raised this issue some years ago was Franklin Zimring (2000: 2491) who argued that in fact there 'is no excuse for the nearly non-existent research base on this important issue'. Indeed, in Zimring's (2000: 2494) view, the reason why there were 'angry assaults' on juvenile courts in the US in the 1990s was 'not because they had failed in their youth serving mission, but because they had succeeded in protecting their clientele' and therefore were at odds with 'the new orthodoxy in crime control' in the adult

system. By analysing the adult and youth justice systems together, we not only shed new light on the youth justice system and its differences or similarities with the adult system, we also highlight the *impact* of the adult justice system on the youth system and vice versa. It is acknowledged that this is complex, with different cultures and modes of practice in both the adult and youth justice sectors, as we have seen with the young adult cohort discussed further below. Yet, if we examine the links and (hidden) connections between the two systems we can gain a better and deeper insight into how these systems work.

10.2.2 Drivers of differences in youth justice systems

Building on the first research question and the findings, this thesis then sought to identify the factors that were driving a different or similar approach to the adult and youth justice sectors in the case study countries. As discussed in Chapter Two, Tonry (2007), in seeking to understand determinants of penal policies in different jurisdictions, developed a risk and protective factor framework to understand changes in punitiveness. This model was adopted to understand risk or protective factors driving the different or similar approaches to the adult and youth justice sectors *within* a jurisdiction in this thesis, drawing also on the path dependency framework from the field of historical institutionalism. The advantage of this framework is that it examines change, but also *stasis* and mechanisms of inertia and change such as feedback effects, and exogenous shocks (sudden external events) (Thelen and Mahoney, 2009). As Rubin (2021) has written of the path dependency literature: 'path dependence research recenters the analysis to the periods before and after change', by asking questions such as 'When do we not see change?' and 'how is a period of non-change (stability) sustained?'. These questions hold great utility in a cross-sectoral context where non-change and change can co-exist in the same period, or where, conversely, strong exogenous shocks can reverberate across both the youth and adult sectors.

Examining the Irish case through this lens, several historical factors have operated to protect the youth justice system from any divergence from the path of diversion, even at a time when an exogenous shock − the double murder of Veronica Guerin and Gerry McCabe − was moving the adult system in a much more punitive direction. As discussed in Chapter Eight, these factors include historical factors such as: the role played by the gardaí in the diversion programme (and their cultural significance); the history of institutional abuse in the state; the

(small nation's) desire to comply with international human rights standards, and general stagnation within the system. It was also found, however, that discretion can be double-edged sword resulting in informalism and lack of oversight in the youth justice system. A similar degree of stability can be seen in the Scottish case where several historical factors have operated to protect the welfare-based Children's Hearing System from the more punitive approach adopted in the adult sector. Protective factors, as discussed in Chapter Eight, exerted on youth justice include the Kilbrandon ethos linked to Scottish identity, in turn linked with a receptiveness to evidence in this area that is not mirrored in the adult arena. On the other hand, as already observed, the system is highly contingent on the age of the offender and it would be remiss to dismiss the 'abrupt propulsion of 16-year olds… into the adult criminal system' (Munro et al., 2010: 264). In this regard, risk factors present include the independence of judiciary in relation to sentencing, and strong cultural and political links with the England and Wales. Despite these risk factors, however, very similar 'force of history' and status quo biases can be seen to exist in Scotland as in Ireland. The very strong protective factors present in Scotland's Hearing System have created a path dependency similar to Ireland's, shielding it from change.

In contrast in the Netherlands, the youth and adult justice sectors appear to have taken similar approaches over the study period, in terms of the sharp upward, and then downward trajectory of imprisonment/detention rates. In seeking to explain why this occurred in the Netherlands and not in Ireland and Scotland, it was found that it was due to lack of 'culturally embedded' (Melossi, 2001) factors in Dutch youth justice. The lack of these factors meant that 'exogenous shocks', such as the murders of Pim Fortuyn and Theo Van Gogh in the early 2000s, were able to alter both juvenile justice and adult justice policy in a punitive direction. While the welfarist Dutch judicial culture did exert some protective effect, namely, by preserving the essential characteristics of the system, the rates of both custodial remand and detention increased in line with the adult population. This is not the whole story, however. Punitiveness in the Netherlands did not suddenly erupt in the early 2000s and can be traced back to the 1980s and 1990s when traditional Dutch 'tolerance' or *gedogen* began experiencing 'negative feedback effects' (increased public scrutiny) rendering this traditional approach increasingly untenable (Weaver, 2010). The Dutch 'culture of tolerance' became a source of delegitimization for both sectors and historical and cultural embedded factors were not strong enough to shield the juvenile justice system completely. This is in contrast to Ireland and Scotland where historical and cultural factors served as positive feedback effects

to ‘lock’ diversion and the Children’s Hearing System in. This is not to say that Dutch tolerance has completely disappeared. As seen in the lack of moral panic after the dramatic reduction of the prison population which followed the ‘punitive turn’ it persists in many ways. In both Dutch justice sectors, however, there is a suggestion the power to punish has disappeared into the community under the heading of crime prevention (Van Swaaningen, 2013). Therefore, it can be argued that there has been an evolution of penality over time resulting in public sentiment against tolerance being ‘layered’ (Thelen and Mahoney, 2009) on top of traditional aims of rehabilitation and commitment to welfare values (in the youth justice system).

This thesis has demonstrated the utility of examining youth justice cross-sectorally, and in particular drawing on path dependency frameworks as a helpful toolkit for making sense of the past. One of the benefits of path dependency, as recently argued by Rubin (2021: 6), is the shift in focus ‘from the beginning and end of the story to the underexplored middle’ and therefore from change to stasis. This is particularly evident in a cross-sectoral context, where non-change and change can co-exist in the same period. By using a comparative path dependency framework as shown in this thesis, concepts such as ‘positive and negative feedback effects’, and ‘layering’, help explain why some jurisdictions adopt the pattern towards heterogeneity across the two sectors and homogeneity in others. In addition, combining path dependency with Tonry’s (2007) risk and protective factor framework may prove useful in elaborating on the risk/protective factors that give rise to the ‘initial conditions’ and ‘feedback effects’ of established justice policies.

10.2.3 Transitions and young adults in the justice systems

This thesis has demonstrated the benefits of examining *both* the adult and youth justice systems within a jurisdiction. A key part of this examination is the transitional arrangements in place between the youth and adult justice sectors and the treatment of young adults in the justice system. It will be recalled that there has been increased international research on transitional arrangements and the needs of young adults given increasing evidence that brain development and maturing continue well into early adulthood (Farrington et al, 2012; Transition to Adulthood Alliance, 2009; Irish Penal Reform Trust, 2015; Pruin and Dünkel, 2015; UNCRC, 2019). In this context, it appears to be a logical step for criminal justice

systems to adapt the way they respond to young adults. Yet, here Ireland and Scotland compare unfavourably to the Netherlands who in 2014 introduced a distinct approach to young adults.

In seeking to explain why the Netherlands has made important progress in this area compared to Ireland and Scotland, several factors come to light. There has been a lack of collaboration between the adult and youth justice sectors historically in Ireland and Scotland. This lack of collaboration between different departments and systems means ‘‘if an issue falls between two stools it usually falls’ (Irish interviewee #7). In addition, in Ireland and Scotland interviewees suggested that despite, or perhaps because of, the overrepresentation of young adults within crime statistics, there is also an unwillingness to innovate, a ‘fear’ or lack of understanding of young adults resulting in a feeling that a distinct approach to this cohort is ‘hard to sell’ politically. Interestingly, in the Netherlands, the fact that this cohort was disproportionately represented in the crime statistics was seen as a reason for addressing the problem and prompted a political response to create a distinct approach to this cohort, rather than militating against it (Schmidt et. al., 2020). Thus, the more siloed approach historically in Ireland and Scotland and fear of the public reception to such initiatives has rendered innovation more difficult in these countries.

Additional factors concern a system’s willingness to change, again harking back to the path dependency arguments advanced above. In both Ireland and Scotland strong protective factors were present in their respective youth justice systems, which created a path dependency in each system, shielding it from a more punitive path or from following its adult counterpart. In particular, Ireland experienced stagnation within the justice system, particularly the youth justice system, for many years, while the inherent conservativeness of the Irish civil service has made radical change difficult in any direction (Hamilton, 2022a). Similarly, Scotland has also experienced a reluctance to change due to the Kilbrandon ethos that remains tightly bound up with Scottish identity (Hamilton, 2014). Indeed, there is a strong pride in the Scottish legal system leading to this reluctance to change it; described by O’Neill (2004) as the ‘institutional conservatism’ of Scottish legal culture (Hamilton, 2014). These historical and cultural embedded factors arguably cut both ways. On the one hand, they shielded their youth justice systems from punitive reforms, but, on the other, the pressure towards continuity means that they can struggle to alter or adapt, even when compelling evidence for progressive reform or change is presented. In recent years there has been some

innovation and receptiveness to change in the Scottish youth justice system as seen with the Whole System Approach and GIRFEC (Getting it right for every child) being introduced. Yet, this openness to change or innovate has not been seen in respect of young adults or even 16 or 17 year olds.

As discussed above the Netherlands has been more agile and responsive to pressure for reform, with growing frustration with '*gedogen'* and 'tolerance' and 'exogenous shocks' altering both the adult and youth systems in a punitive direction. However, on the other hand, this may have resulted in the Netherlands being more open to change, including openness to progressive approaches to young adults and transitional arrangements in their system. Indeed, the Netherlands has historically adopted a flexible criminal justice system as seen in provisions allowing adult law to be applied to 16 and 17 year olds since 1905, which law was further clarified in 1965 and further extended in 1995 (Uit Beijerse and Van Swaaningen, 2006; Weijers, et al., 2009). In addition, since 1965 provisions have existed for youth sanctions to be applied to offenders aged between 18 and 21 (Uit Beijerse, 2016). This historically flexible approach in the Dutch criminal justice system is in stark contrast to the Irish and Scottish criminal justice systems where the systems have traditionally remained siloed.

In addition to bringing a fresh perspective to the issue of transitional arrangements, the research points to several key challenges in adopting a distinct approach to the young adult cohort, based on past failed attempts (such as the young adult wing in Wheatfield prison in Ireland) and current practice (such as the disappointing judicial uptake of the flexible system in the Netherlands). It was found that there needs to be sufficient resourcing and distinct approaches to any separate young adult institutions or units, and that their mere existence is not enough. The research also highlighted the difficulties with the mixing of adults and young people under 18, particularly in light of human rights compliance. Ultimately however, the importance of people championing the issue, the political will to use this practice and practitioners 'buying in' to it is paramount. Understanding these challenges therefore will be pertinent for any jurisdiction that is seeking to adopt or extend a distinct approach to this young adult offender cohort, particularly as more European countries move towards this approach in acknowledging General Comment No. 24. In this regard it is notable that the latest Irish Youth Justice Strategy (2021-2027) has included proposals for a more flexible approach to dealing with young adults aged between 18 and 24 years old, including

expansion of the Diversion Programme (Department of Justice, 2021). As stated by Kilkelly and Bergin (2022: 162) however whilst the Strategy prioritising this area is welcome, closing the gap in relation having a formalised regime for emerging adults in the prison system 'will require legislative reform'. Scotland has also recently developed the Scottish Sentencing Council Guidelines on sentencing young people under the age of 25 (Scottish Sentencing Council, 2021). Both of these developments (among others as discussed in Chapter Nine) signal some movement towards a distinct approach to young adults in these jurisdictions, and therefore this is a vital time to explore past failed attempts and current practices in other jurisdictions when moving forward. In addition, this research also contributes to the current state of practice of the ACL in the Netherlands, and gains valuable insights from justice stakeholders in this regard.

10.2.4 Recent developments

It is acknowledged that a limitation of this thesis is that the parameters of the data analysis ended in 2015, and since then there have been more recent developments and literature that need to be taken into consideration. These developments have been addressed briefly in the Postscripts at the end of each country review chapter namely Chapters Four, Five and Six. The adoption of General Comment No. 24 in 2019 was significant in the international acknowledgement of adolescent brain development and encourages states to allow the application of youth law to young adults. In addition, General Comment No. 24 recognised that '[c]hildren differ from adults in their physical and psychological development' which constitutes 'the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach' (para. 2). It further encourages all states to ensure that the youth justice system is extended to the age of 18 for all cases, including cases of serious offences. The findings of this thesis in relation to young adults, as discussed above, tie in with this development internationally. While General Comments are not binding on states, they are regularly used by the courts and policy and lawmakers (Skelton, 2018). Therefore, the sustained calls for recognition of adolescent brain development and distinct treatment of young adults within criminal justice systems in academic and international developments place pressure on states to review their current practices and adopt more adequate accommodations. Indeed, this can be seen to some degree in recent changes in both Scotland and Ireland as discussed in this thesis.

In respect of the recent controversial and punitive developments in Scotland and the Netherlands in the area of young adults (discussed in Postscripts for Chapter Five and Six), this further points to the politically delicate and sensitive nature of proposals for young adult offenders. Indeed, as found in this thesis and discussed above, trying to introduce a distinct approach to young adults within criminal justice, even where there is a policy shift, is a 'hard sell' with public opinion and the continued social construction of a young person is being drawn at the 18th birthday. These recent developments highlight that even in a jurisdiction like the Netherlands where there is dynamism in this area and a traditional acknowledgement of young adults there is still the potential for public backlash. Fundamentally, the responses in Scotland and the Netherlands to date largely correspond with the findings of this thesis as argued above. There continues to be a path dependency in Scotland with no radical change in their youth justice system with the Sentencing Council acknowledging the non-commitment nature of the new Guidelines: 'Sentencing guidelines are just that – guidelines. Where appropriate a judge can decide not to follow a guideline, but must give their reasons' (Morrison, 2023). Indeed, in the Netherlands there remains a commitment to the flexible nature of the criminal justice system and in response to the introduction of more punitive measures in the youth justice system, evidence-based research was conducted in order to assess the best way forward (Asscher et al., 2020; Huls et al., 2022).

10.3 Advancing the Current Scholarly Literature

As discussed throughout this thesis, punitiveness and tolerance have been comprehensively researched in the last couple of decades (Feeley and Simon 1992, 1994; Garland 2002, 2013; Pratt et al., 2005, Simon 2007). With the increase in punitiveness in criminal justice systems being far from universal, scholars such as Tonry (2007) and Lappi-Seppälä (2011) have developed useful frameworks to understand this diverse reaction amongst countries. Such frameworks, however, fail to take into account of contrasts in tolerance *within* jurisdictions. Research conducted by Kutateladze (2009) and Hamilton (2014) demonstrated that punitiveness is a multidimensional concept and highlighted the variation that can occur *within* state justice systems. This is also true of the youth and adult justice systems, with stability characterising some youth justice systems and change characterising others. Indeed, this formed the primary motivation for selecting the jurisdictions in question: while politicisation occurred across both the adult and youth justice systems in the Netherlands in

the 1990s, in contrast, the youth justice systems in Ireland and Scotland appear to have been protected from a more punitive approach. This invites important questions about the historical, cultural, economic and social factors preserving (or not) a distinct approach to youth justice in certain jurisdictions which this thesis sought to answer.

In addressing these questions, this thesis contributes to the field of punitiveness scholarship in several aspects. It has taken a broad comparative approach to punitiveness by analysing both the adult and youth criminal justice sectors within three jurisdictions. By adopting such an approach it has highlighted, *inter alia*, the significance of the respective justice sectors' relationship with one another. This relationship is often overlooked in punitiveness studies (with few exceptions of Hamilton (2014); Lynch (2013) and Zimring (2000)). This exploration of within-jurisdiction variation across the three jurisdictions therefore contributes to the knowledge and literature in *both* the adult and youth justice sectors and their relationship with one another. This thesis also contributes to the knowledge in the area of retrospective punitiveness in reflecting on the historical trends across and within jurisdictions over a 25 year period.

As discussed above and throughout this thesis, Tonry (2007) developed a useful framework in seeking to understand the variation of punitive between jurisdictions. This thesis developed that framework further by combining it with a path dependency lens in order to understand why some jurisdictions experienced variation between their justice sectors and why other jurisdictions did not. This is important as the path dependency perspective on its own cannot explain the 'initial conditions' which give rise to contingent events, and thus set a policy or path in motion. Mahoney (2000: 7-8) puts this well when he calls for a 'theory-laden process' of path dependency that involves tracing a given outcome back to a particular set of historical events. It is also important to have a theoretical toolkit from which to explain stasis. Without such theorising about the mechanisms by which stasis is possible, as Rubin (2021: 11) argues, we find ourselves in the uncomfortable position of 'applying the laws of physics [Newton's first law of motion: an object in motion stays in motion] to the laws of human behaviour'. In this regard, identification of the factors which drove either convergence or divergence across the justice sectors would not have been possible without a combination of the two perspectives, and it is suggested that this may be an important avenue of research for future researchers interested in historical institutionalism, in criminology and more broadly.

In addition, the findings of this thesis contribute to the ongoing debate within criminology between those advancing the pendulum metaphor and those who advance the agonistic perspective. The pendulum metaphor has been used to describe 'significant shifts in the overall orientation of punishment nationwide' between rehabilitative/non-rehabilitative and lenient/punitive orientations (Rubin, 2019: 791). These pendulum-style accounts emphasise the 'sudden ruptures with the penal past' (ibid: 792; Hamilton, 2022a: 56) such as the work of Garland (2001) and Simon (2007) as discussed in Chapter Two of this thesis. On the other hand, the agonistic perspective, also discussed in Chapter Two, argues the primary mechanism for change is conflict across different actors and groups (Goodman et al., 2017). It is agreed with Rubin (2019) and Hamilton (2022a) that the choice between two perspectives may not be as stark as outlined above. Multiple 'cultures of control' may therefore co-exist as we have seen with considerable tension within the 'penal state' (Garland, 2013, Rubin and Phelps, 2017), not only between *actors*, but within *sectors*. In this regard, the literature extends the important work done by Rubin and Phelps (2017) on the 'fracturing of the penal state' and the explanatory power that may be derived from further examination of the tensions within criminal justice systems and the fracturing of the penal state. Its empirical examination of the *degree* of penal fracturing within the justice system offers a new perspective that ensures a fuller understanding of both penal change and continuity *within* criminal justice systems.

The research design of analysing the youth justice, adult and young adult criminal justice systems of the three jurisdictions also contributes to the punitiveness literature (case within a case comparative case study; see further in Chapter Three). This is a novel approach in the punitiveness literature insofar as this methodology had three sub-cases namely the adult, young adult and youth justice sectors as opposed to just one case or multiple cases representing different jurisdictions which has been the tendency of the literature to date. While the case study methodological approach has been used in social sciences, it has been limited in its use in the criminological sphere. This study has highlighted the benefits of adopting such an approach.

10.4 Implications for policy and practice

Returning to reflections in Chapter One of this thesis on the emergence of punishment and society scholarship and concepts such as penality, scholars such Tony (2007) pointed to the

complex, non-linear relationship between punishment and crime rates with jurisdictions reacting differently to similar crime rates. In line with this perspective, punishment is a social, historical and political construct which is shaped by multiple factors and surrounding conditions (Sparks, 2001). This thesis has further contributed and highlighted these points in finding penal policy, including youth justice policy, is not only driven by crime rates. These findings underscore the importance of penality (subject to stubborn perceptions of who is and is not an adult as illustrated by recent events). It further builds on Tonry's research (2007: 2) that 'the determinants and characteristics of penal policies remain curiously local'. This point has been particularly emphasised by cross-sectoral punitiveness and the findings of this thesis, namely, that *even when everything remains constant within a jurisdiction, including crime rates*, there can still be dramatically different results when analysing two sectors within the same criminal justice system. In respect of policy, this points to the need to decouple crime from punishment, and understand the significance of penality when considering change.

When looking at this field in light of the recent resurgence of penal populism as discussed in Chapter Two, the importance of penality remains from a policy perspective. As stated by Guiney and Farrall (2023: 148) '[p]opulism continues to shape, and reshape, the contemporary penological landscape. It is closely associated with unprecedented prison expansionism, a performative style of penal politics and a 'toughening' of the criminal justice system generally'. If policy and law makers are not sufficiently alive to the socially constructed nature of penality and give in to populist demands for more punishment, including in the youth justice field (as seen in recent developments in the Netherlands), this would alienate the voices in penal policy that truly matter, and distort penal policy that could have disastrous consequences. In this respect, the 'fracturing of the penal state' is important in identifying 'the various actors, agencies and institutional settings that structure, curate and seek to resolve political conflicts in the penal field' (Guiney and Farrall (2023: 149). This is what this thesis has done in 'fracturing the penal state' into the adult, young adult and youth criminal justice sectors.

In light of the above, this study highlights the need for a less siloed approach towards criminal justice systems. As seen in this thesis, despite the often huge divide that exists between the two sectors, they are locked into a mutually constitutive relationship with one another. Yet, most research, and policy flowing therefrom, seeks to analyse each sector in

isolation from its counterpart. In further examining the relationship and transition between the two justice sectors, this thesis has demonstrated the need to take a holistic approach, including greater recognition of the need for a bridge or relationship to be built between these two justice sectors.

10.5 The benefits of a cross-sectoral approach

As outlined above, there are valuable insights to be gained from examining both the adult and youth justice systems *within* a jurisdiction. Conducting a cross-sectoral analysis of both justice sectors provides us with a broader perspective on the determinants of penal policy and this thesis has shown the need to look at the justice system holistically. By examining why change has occurred in one sector compared to stasis in another and drawing on a path dependency framework we can isolate more accurately the factors that are driving this change or stasis. In addition, as has been discussed, we can examine the relationship between the two justice sectors and how they constitute or legitimise one another. Examination of the boundaries between justice systems, as this thesis has done, offers more than just a clearer understanding of the transitional arrangements between the justice systems themselves. Understanding the formal and informal boundaries of criminal justice systems provides a more in-depth view of the youth and adult sectors and who they seek to exclude or include in their system. Adopting such a broad approach can lead to valuable insights into the respective systems and their interactions with one another. We can also see more clearly what needs to be done in terms of young adults and transitional arrangements and the factors underlying change in some countries over others. The factors underlying absence of change in the transitional arrangements are very often linked to stasis or change in the other sectors and how they work with one another as can be seen in the discussion above.

There are several directions this research can develop in the future to further build on this area and this research. As discussed above, the social construction of young people and who is perceived as an adult is still a timely and hotly politicised issue. As Case and Bateman (2020: 478) argue the process of 'adulterisation' is not only 'socio-historically contingent', but also demographic and dispositional. In addition to the factors identified above, structural forces or 'local values and realities on the ground' such as race and ethnicity could be an area of future research in this area (Forde et al., 2022: 220). Even though this specifically did not arise during this research (the emphasis was predominantly on social class), it does raise

further questions about the profiles of such young people experiencing these contingencies in youth justice. The mental illness contingency present in the Netherlands also raises questions on who is constructed as being at 'risk' in the youth justice system and who these contingencies primarily impact. Thus, the 'edges' or exit points of the system and the boundaries in place should be further researched in order to address such important questions.

In respect of the punitiveness literature, it is further argued that a cross-sectoral approach to comparative research provides an important way forward for the (now dominant) agonistic perspective (Goodman et al, 2015, 2017). By exploring more fully the tensions *within* the sectors of a criminal justice system it underscores the 'fracturing' of the 'penal estate' that is often necessary for its full understanding (Rubin, 2021). This enhances the path dependency perspective with its focus on continuity as well as change, and it is hoped can be utilised in future research in the analysis of punitiveness in criminal justice systems. Ultimately, when thinking about penal change, it is argued that there is a need to move away from a dualistic approach (punitiveness in the adult/youth sector) and towards cross-sectoral analysis. Whilst it is agreed that we should shift our gaze from 'the beginning and end of the story to the underexplored middle' (Rubin, 2021: 6) in terms of policy trajectory, it is also argued that we should shift our focus from the middle of criminal justice sectors to the underexplored *edges*.

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Appendix A: Consent Form

Informed Consent Form

I have read the information presented in the information letter about a study being conducted by Siobhán Buckley of the Department of Law at Maynooth University. I have had the opportunity to ask any questions related to this study, to receive satisfactory answers to my questions, and any additional details I wanted.

I am aware that my participation in this interview is entirely voluntary.

I am aware that the duration of the interview will be approximately 45 minutes and confirm it is taking place online via Microsoft Teams.

I am aware that I have the option of allowing my interview to be audio and video recorded to ensure an accurate recording of my responses. Nobody except Siobhán Buckley or her research supervisor Professor Claire Hamilton will hear the recording or read the transcript from the interview.

I am also aware that excerpts from the interview may be included in the dissertation and/or publications to come from this research, with the understanding that the quotations will be anonymous.

I was informed that I may withdraw my consent at any time prior to the completion of this research project without penalty by advising the researcher.

I am aware of the data retention period for this project and that is in line with Maynooth University's Research Integrity Policy. I have also been informed of how all written and audio material will be overwritten or destroyed to further protect my anonymity.

This project had been reviewed by, and received ethics clearance through the Research Ethics Committee at Maynooth University. I was informed that if I have any comments or concerns resulting from my participation in her study, I may contact the researcher's doctoral supervisor Professor Claire Hamilton at Claire.hamilton@nuim.ie or alternatively, by telephone at (01) 474 7566.

If during your participation in this study you feel the information and guidelines that you were given have been neglected or disregarded in any way, or if you are unhappy about the process, please contact the Secretary of the National University of Ireland Maynooth Ethics Committee at research.ethics@nuim.ie *or +353 (0)1 708 6019. Please be assured that your concerns will be dealt with in a sensitive manner.*

It must be recognised that, in some circumstances, confidentiality of research data and records may be overridden by courts in the event of litigation or in the course of investigation by lawful authority. In such circumstances the University will take all reasonable steps within law to ensure that confidentiality is maintained to the greatest possible extent

With full knowledge of all foregoing, I agree, of my own free will, to participate in this study.

☐ YES ☐ NO

I agree to have my interview audio and video recorded.

☐ YES ☐ NO

I agree to the use of anonymous quotations in any thesis or publication that comes of this research.

☐ YES NO ☐

I have fully read and understood the conditions set out in the informed consent sheet provided at the beginning of this interview.

☐ YES ☐ NO

Participant's Name (please print)

_____

Participant's Signature

_____

Date

_____

Researcher's Signature

_____

Date

_____

Researcher's Title Department

_____ _____

If you would like to withdraw from this research at any point, please sign below and return this form via email to me at: siobhan.buckley@mu.ie

Signature

_____

Date

_____

Appendix B: Information Sheet

Information Sheet

What is this research about?

This research seeks to compare policy and practice in the youth and adult criminal justice systems, in Ireland, Scotland and the Netherlands over a twenty-five year period from 1990 to 2015. The main aim of the research is to examine the differences and similarities between the adult, young adult and youth justice systems in these three jurisdictions.

Interviews

Interviews will last for approximately 45-60 minutes and will be held online via Microsoft Teams.

Do you have to take part?

This research is voluntary and it is your choice whether to participate or not. You can stop the interview process at any point and withdraw any information prior to the publication of the research. You may also reschedule the interview if desired. If you do not wish to participate at this time you are invited to fill out the withdrawal sheet at the end of the consent form and return it to the researcher for record purposes. All of your data will promptly be destroyed and the confidentiality of your decision will be ensured.

Will your participation in the study be kept confidential and anonymous?

All information, including audio and video recordings, will be stored on a password protected and encrypted computer and any physical documents will be locked within the office of the primary researcher in a secure cabinet. Aside from the identification of your profession or group of stakeholders to which you belong, no identifying information will be provided in the

thesis or any publications arising. Any extracts quoted from the interview will also be anonymised. Any audio and video recordings made during the interview will be overwritten immediately after the data has been transcribed. Paper data will be immediately and securely destroyed once it has been analysed. All other data will be overwritten ten years after the date of publication in line with Maynooth University policy. If you are nominated by your employer to participate in this interview, please note that all information including audio and video recordings will be strictly confidential and not shared with your employer.

How will the information be used?

The results will be seen by the researcher, her supervisor and the PhD examiners and be presented in the published thesis, in any additional academic publications on the same topic and at relevant conferences. Participants will not be notified or asked for approval in advance of any additional publications following the finalisation of the thesis, as the data will be used in an identical or similar manner to that of the thesis itself.

What are the possible advantages and disadvantages?

Other than the time you will give for this interview and potential inconvenience this may cause, the researcher does not see any disadvantages for participants taking part in this study. Non-participation is also not envisioned to have any repercussions.

Benefits include the opportunity to voice your opinion and share your professional experiences, contribute to a wider understanding of how practices within the adult and youth criminal justice systems have changed and impacted on each other over the years, and contribute to recommendations that would improve the functioning of these systems.

Further queries?

If you need any further information, please feel free to contact me.

Researcher Siobhán Buckley BL, LLB

Department of Law

Maynooth University -Maynooth, Co. Kildare

siobhan.buckley@mu.ie

Mobile: 087 269 8546

Supervisor Professor Claire Hamilton

Department of Law

Maynooth University - Maynooth, Co. Kildare

claire.hamilton@nuim.ie

Tel: (01) 474 7566

If during your participation in this study you feel the information and guidelines that you were given have been neglected or disregarded in any way, or if you are unhappy about the process, please contact the Secretary of the National University of Ireland Maynooth Ethics Committee at research.ethics@mu.ie or +353 (0)1 708 6019. Please be assured that your concerns will be dealt with in a sensitive manner.

It must be recognised that, in some circumstances, confidentiality of research data and records may be overridden by courts in the event of litigation or in the course of investigation by lawful authority. In such circumstances the University will take all reasonable steps within law to ensure that confidentiality is maintained to the greatest possible extent