



NORTH-AMERICAN COUNCIL FOR JUVENILE JUSTICE

NACJJ Paper on Making Deprivation of Liberty a Measure of Last Resort: Promoting Alternatives in North America

Introduction and Conceptual Framework

The principle that deprivation of liberty should only be used as a measure of last resort and for the shortest appropriate period of time stems from various international standards on children's rights, perhaps most famously enshrined in Article 37 of the Convention on the Rights of the Child (CRC).¹ **Deprivation of liberty** must be understood in a broad sense as meaning 'every limitation of a child's fundamental right to liberty of the person'². However, in North America, like in the rest of the world, detention is often used as a first option, even when only a petty crime has been committed. General Comment No. 10 of the CRC provides a more in-depth explanation, stating that states should be encouraged to develop a comprehensive approach on juvenile justice and that possible alternative to court convictions should be explored.

It is estimated that **one million children were in custody** across the globe just one decade ago, a number that is likely to have increased since then. Today, the invitation to the UN Secretary-General to commission an in-depth global study on children deprived of liberty (included in the UN General Assembly Resolution A/RES/69/157), highlights the conditions facing children in custody and the consequences of the use of detention worldwide. Studies³ have shown that children often encounter poor detention conditions with inadequate facilities, denial of health care, education and limited contact with the child's family. This are only a few of the problems that children in custody could be confronted with. Furthermore, not only is detention an expensive youth justice service, possibly hindering the child's development.⁴ The North-American Council on Juvenile Justice (NACJJ) firmly supports the request of a UN Study on Children Deprived of Liberty as an initiative to improve the understanding and raise awareness of the situation on the North-American continent. It also seeks to promote the existence of a **wide range of tailor-made alternative measures** to detention.

¹"the **arrest, detention or imprisonment** of a child must be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

² T. Liefwaard (2008). *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards*, 1.

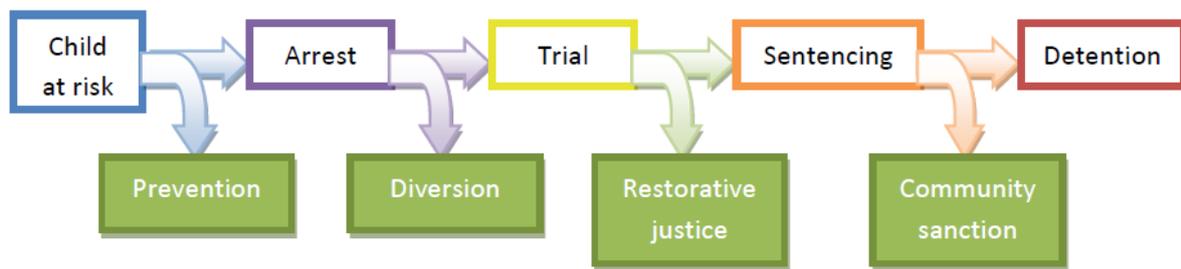
³ Holman, B. & Ziedenbuerg, J. (2006). *The Dangers of detention: The impact of incarcerating youth in detention and other secure facilities*. Justice Policy Institute.

⁴ Moore, M. (2012). *Protect society and realise youth potential: Improving youth justice practice in a time of economic crisis*. International Juvenile Justice Observatory.

The right to liberty is crucial for the future development of the child and the infringement of this right would lead to the child experiencing a particular difficulty in becoming an independent and free adult. As such, countries should be made aware of the problems caused by the detention of children and young people. The **introduction of a child-friendly justice system**, which aims to promote the social inclusion of children and avoid recidivism, can be one solution to reduce the number of children in detention today. Equally, it can contribute to the reduction of development risks that children may face when they are in detention.

Scientific research on brain development indicates that a child or adolescent's brain is not yet fully grown when in comparison to the brain of an adult. The implication of this is that it can be specifically hard for a child or an adolescent to fully comprehend or predict the consequences of his actions. While further research about brain development is required, it is clear that alternatives to detention are essential to help children understand the consequences of their behaviour.

Making deprivation of liberty a measure of last resort includes more than implementing alternatives to detention. **Prevention** is the first and foremost focal point of a child-friendly justice system. However, when a child does commit a crime, **diversion** can give the child a second chance by rebuilding family and community ties. **Community measures** usually vary from country to country and include support from probation officers, community services and compensation or retribution for victims and these measures form an integral part of the restorative justice process. They can help to **reduce** the number of children that are in pre- or post-trial detention. The term 'alternative to detention' is used for a measure that does not entail a full deprivation of liberty in a custodial institution.



Stages of juvenile justice in practice⁵

Legislative Level

In order to make alternatives to detention **accessible for every child**, legislation must not only provide a **wide range of options** but also ensure that these options are available to everyone. **Tailor-made alternatives** for every child should be encouraged in order to effectively address the child's individual needs.

In many countries, a **judicial exception** is made for young people between 16 and 18 years old who have committed a serious or heinous crime and they are legally treated in the same manner as an

⁵ Moore, M. (2012). *Protect society and realise youth potential: Improving youth justice practice in a time of economic crisis*. International Juvenile Justice Observatory.

adult. However, alternatives to detentions should still be made available to every child from the age of criminal responsibility until they reach the age of 18. Therefore, countries that allow exceptions to be made for children aged 16 to 18 years old should be encouraged to change their legislation in order for adolescents between the ages of 16 and 18 years old can benefit from alternatives to detention as well. Sending them to adult courts can have clear disadvantageous effects to their development.

Finally, the **principles of fair trial** should under all circumstances be guaranteed. In order to make justice more child-friendly, it is important that children are able to understand the procedures and the outcomes of the procedure and this could be enabled by rendering the language used in procedures less formal and to ensure that children are adequately informed and represented.

Political Framework

At the political level, **serious policy commitments** must be undertaken to implement a wide range of alternatives into the juvenile justice system. The United States of America are aware of the problems caused by detention of children and young people. In a declaration dedicated to the National Youth Justice Awareness Month last September, President Obama expressed his deep concern about the increasing amount of children in custody today. He made clear that efforts should be undertaken to implement alternatives to custodial measure and that *'these efforts include emphasizing prevention, promoting cost-effective and community-based alternatives to confinement, and sustaining programs that provide job training and substance use disorder treatment and counseling to youth in juvenile facilities'*⁶. Policy commitments such as the one from President Obama are crucial to achieve a child-friendly juvenile justice where deprivation of liberty is only used as a measure of last resort.

Furthermore, **multi-disciplinary approaches** to implementing alternatives to custodial measures should be encouraged. Cooperation between professionals, governmental agencies and voluntary groups is essential to ensure that alternatives to detention can be carried out.

Alternatives to Detention in Practice

Deprivation of liberty within the juvenile justice system entails many different forms of custody both at pre- and post-trial stage, including house arrest, police custody, placement in reform schools, detention centres or even imprisonment in adult prisons. These measures are clearly not suited for children or young people as they cannot guarantee the **continuity of a child's upbringing**.

Different measures can be considered as an alternative to detention. First, the **imposition of a fine** would aim to compensate the victim by paying out a specific sum of money. This measure is usually taken at the sentencing stage and should take into account the child's ability to pay. A second commonly used alternative is **probation**, whereby the child is placed under the supervision of a probation officer in its community. Often the child is also required to meet certain behavioral requirement or curfews. Probation will be imposed by a court and is carried out for a fixed time period.

⁶ Presidential Proclamation – National Youth Awareness Month, 2015. <https://www.whitehouse.gov/the-press-office/2015/09/30/presidential-proclamation-national-youth-justice-awareness-month-2015>

Educational measures and mentoring are also used as alternatives to detention. **Educational measures** ensure that the principles of social integration, education and prevention of re-offending are taken into account. Such orders can require the child to attend e.g. educational or vocational training programs. These measures would allow the child to stay at home most of the time. A successful example of an educational measure is cohabitation in an educational group so as to guide the child in the socialization process. **Mentoring orders** on the other hand will pair the child with an adult volunteer, the mentor. The main tasks of the mentor include providing support, and giving guidance and advice.

Finally, there are alternatives to detention that are based on providing care or that have a therapeutic aim. **Care-based measures** aim to provide care for the child outside of the family environment, at least for a period of time. These measures can be imposed in combination with other alternative measure such as educational measures. Care-based measures are specifically effective when it is proven that the family contributes to the offending behaviour of the child. Measures with a **therapeutic aim** are usually imposed in combination with another alternative measure. Access to counseling services or participation in, for example, anger management training can be useful to ensure the rehabilitation of the child.

Restorative justice can also be a useful tool to make deprivation of liberty a measure of last resort. This subject is addressed to a greater extent in the NACJJ's paper on restorative justice.

10 Points for Better Implementing Deprivation of Liberty as a Measure of Last Resort

The following 10 points spell out the NACJJ's aims to lay down the basis for a shared position on the objectives, standards and practices related to alternatives to detention, with the intention to encourage its effective implementation in North America:

1. Strong **advocacy** for increased use of alternative measures, including encouraging the judiciary to make use of these measure to the greatest extent possible in order to make deprivation of liberty a measure of last resort;
2. Continuing the research on **brain development**;
3. Establishing systems of **data collection** to ensure meaningful evaluation;
4. Ensuring that alternative measures are **available for all children**, even those living outside major urban centres;
5. Increased use of **multi-disciplinary approaches** by ensuring effective cooperation between professionals, governmental agencies and voluntary groups involved in alternatives to detention;
6. Ensuring **specialisation** of youth justice professionals by ongoing adequate **training**;
7. Highlight the **cost-effectiveness** of alternative measures compared to traditional detention;
8. Improving **evaluation mechanisms** and **complaint systems**;
9. Set **concrete goals** to reduce number of children in prison and make sure the goals are being reached;
10. Developing a **wide range of alternatives** so that individual assessment becomes possible and there is a suitable alternative for every child, ideally having at least one alternative measure of each type.