

Time for a new hearing

A comparative study of alternative criminal proceedings for children and young people



Time for a new hearing

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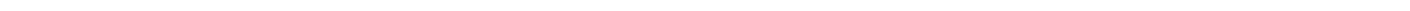
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Annexes A and B can be found at:

www.youthcrimecommission.org.uk/index.php?option=com_content&view=article&id=95&Itemid=90



Summary

This report, commissioned jointly by JUSTICE and The Police Foundation, is a companion document to the July 2010 report of the Independent Commission on Youth Crime and Antisocial Behaviour, *Time for a fresh start*.¹ Based on principle and the available international evidence, it proposes that a form of restorative justice known as restorative youth conferencing should be introduced in England and Wales to deal with most cases of offending and antisocial behaviour committed by children and young people under 18.² Under the proposed new system, restorative youth conferences would replace court appearances in most cases of admitted offending or antisocial behaviour. Youth courts would be retained to deal with trials in contested criminal cases and sentencing in cases where restorative youth conferencing was unsuccessful or inappropriate. Children and young people would no longer appear in the Crown Court: very serious cases would instead be heard by a modified youth court.

Chapter 1 sets out the principles and objectives which we believe that any hearing responding to children and young people in trouble with the law should observe. These include the basic social outcomes that it should seek to achieve, which include:

- reducing the seriousness and/or frequency of offending and antisocial behaviour
- meeting the needs of children and young people that directly contribute to this behaviour
- engaging and commanding the confidence of the local community
- meeting (or initiating the meeting of) wider relevant child and family needs
- giving victims of offending by children and young people confidence in the process
- commanding support and confidence from the wider public.

The chapter also sets out more specific features that are either necessary or desirable for the appropriate treatment of children, and points to accompanying principles, including the need to comply with the UK's human rights obligations and for the process and its outcomes to be proportionate to children and young people's behaviour and circumstances.

Chapter 2 outlines the present court-based youth justice and child antisocial behaviour systems in England and Wales and considers how they measure up against the principles and objectives described in Chapter 1. It highlights a range of systemic factors whose combined result is that underlying problems in the lives of children and young people who offend are tackled sporadically and incompletely. Public money is, meanwhile, wasted through unnecessary escalation, delays and duplication. The systems often operate at a remove from victims of crime and the local community in general; and they are insulated from the mainstream services that are, or should be, helping the children and young people who appear before the courts.

Unsurprisingly in these circumstances, the youth justice system is characterised by high rates of reoffending and low public confidence. Further, the formality and rigidity of the current system has counter-productive effects and grants insufficient discretion to offer the best chance of preventing reoffending in the individual case. It escalates children and young people through a series of penalties which may establish their status as an offender rather than diverting them from offending, and both through criminal records and disruptions such as periods in custody it places barriers between young offenders and educational, employment and training opportunities.

In addition, the capacity of a hearing, in itself, to reduce reoffending and improve life chances through development of empathy for victims and understanding of the consequences of offending behaviour, and through exploration of causes of offending and what

¹ Independent Commission on Youth Crime and Antisocial Behaviour (2010) *Time for a fresh start*. London: Police Foundation. www.youthcrimecommission.org.uk

² Throughout this report, the phrase 'children and young people' will be used to denote children and teenagers under 18 years of age.

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could be done to address them, cannot fully be developed in the current formal court-based system.

Chapter 3 (which should be read in conjunction with the more detailed information compiled in website Annex A (www.youthcrimecommission.org.uk/index.php?option=com_content&view=article&id=95&Itemid=90)) therefore examines 16 alternative forms of hearing in the UK and around the world from which relevant lessons can be learned for reform. These include lay panels (Scotland and Guernsey); restorative justice and restorative youth conferencing (New Zealand, Northern Ireland and Referral Orders in England and Wales); inquisitorial courts (France); welfare courts (family courts in England and Wales); multi-level gate-keeping (South Africa); criminal justice centres (New York and North Liverpool); drug courts (USA and England); civil tribunals (mental health tribunals and asylum and immigration tribunals in the UK), reduced use of custody (Canada) and the flexible treatment of young adults (Germany). Annex A provides a detailed, structured summary of how each works and what the available research shows, while the report highlights the most attractive and problematic features of each when planning a reformed hearing system for England and Wales.

Chapter 4 identifies four basic structural models which draw on this international experience:

- restorative youth conferencing
- lay youth justice panels
- welfare panels
- inquisitorial courts.

It finds that both restorative youth conferencing and lay youth justice panels could be built into our existing court-based systems without requiring them to change fundamentally. Both would be appropriate ways to handle all but the most serious cases involving children and young people and more effective in dealing with

their offending and antisocial behaviour than the alternative models. While welfare panels and inquisitorial courts would do more than the existing system to address children and young people's needs, neither is particularly suitable for England and Wales. This is principally because of the extensive and costly changes they would require to the existing courts system.

While restorative youth conferencing emerges as the most promising of the four models in principle, Chapter 4 examines both restorative youth conferencing and lay youth justice panels against the objectives identified in Chapter 1. It goes on to consider relevant design issues. (These are set out in more detail in website Annex B (www.youthcrimecommission.org.uk/index.php?option=com_content&view=article&id=95&Itemid=90)). The chapter then discusses how the new hearings would relate to the existing youth courts and the Crown Court and how the allocation of cases and procedures in both would need to be reformed.

Chapter 5 reaches a final recommendation that, although a lay panel solution has merit, restorative youth conferencing offers the most acceptable and effective response to children and young people who offend. This is because it responds more sensitively and appropriately to the needs of victims and communities. It does this in ways that enhance its suitability for working with young offenders, helping them to understand the consequences of their offending and to make amends. Restorative youth conferencing is supported by positive evidence from international research and by the practical experience of its growing effectiveness in Northern Ireland since 2003.

The report concludes by emphasising the importance of effective implementation of the changes and looking at a number of relevant issues. These include piloting and preparation for introduction, recruitment and training, and monitoring and evaluation.

1. Introduction

This report considers the case for reforming the existing youth court system in England and Wales by making greater use of community hearings and other alternative approaches, including the form of restorative justice known as youth conferencing. It was commissioned jointly by JUSTICE³ and The Police Foundation⁴ as a contribution to the work of the Independent Commission on Youth Crime and Antisocial Behaviour ('the Commission') whose report *Time for a fresh start* has been published separately.⁵ Based on an examination of international evidence, it assesses alternative forms of hearing in England and Wales, Northern Ireland and Scotland as well as other jurisdictions in Europe and elsewhere.

Background

The Commission conducted its inquiry with a wide remit to reform the response to criminal and antisocial behaviour by young people in England and Wales, including prevention and early intervention, alternatives to prosecution, court processes and sanctions. Its final report identifies the guiding principles on which the response to youth crime should be based and calls for a major reduction in the expensive and ineffective use of custody for young people under 18, as well as greater investment in cost-effective preventive services for children with chronic behaviour problems.

The Commission's guiding principles drew it to the view that the purposes of administering justice, securing children's welfare and preventing reoffending could also be better served by taking a different approach in cases where children and young people are currently prosecuted in the youth court. It was recognised that the Commission's thinking would benefit from a detailed, specialised assessment of existing court arrangements for children and young people accused of offending or antisocial behaviour, and of the options for reform.

Objectives for a reformed system

Our review of the courts and alternative mechanisms began by considering the defining purposes and principal social objectives that these mechanisms should seek to achieve. We also identified features that would be 'essential' or 'desirable' in order to deliver those outcomes. The results of this initial exercise were then used to assess the existing court-based systems and to inform and test the design of possible solutions.

Our formulation of objectives took account of the Commission's wider-ranging conclusions about guiding principles across the whole field of its review, thinking among penologists both nationally and internationally, and considerations raised by both our own experience and expertise and that of a number of experts and practitioners with whom we met in the course of our work.

Strategic objectives

Strategically, we concluded that the defining purpose of any alternative hearings system should be:

to decide upon and monitor the implementation of appropriate and effective actions, by or with the authority of the State, where a child's behaviour (criminal or otherwise) gives rise to legitimate cause for concern.

Essential social outcomes to be achieved would be to:

- reduce the seriousness and frequency of a child or young person's criminal and antisocial behaviour
- meet any needs of the child that were directly contributing to their offending
- engage, and command the confidence of, the local community.

³ The all-party law reform and human rights organisation. London. <http://www.justice.org.uk>

⁴ An independent, non-governmental, not-for-profit criminal justice research organisation, London. <http://www.police-foundation.org.uk>

⁵ See n1 above.

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Desirable social outcomes would be to:

- meet, or initiate the meeting of, children's wider family and welfare needs
- give the victims of children's offending and antisocial behaviour confidence in the process for dealing with it
- command wider public support and confidence in the process.

In addition, we acknowledged as *matters of principle* that the hearing system should:

- comply with the UK's national and international human rights obligations, notably those set out in the Human Rights Act 1998, the European Convention on Human Rights⁶ and the United Nations Convention on the Rights of the Child (UNCRC)⁷
- be proportionate in its process and outcomes and to the child's offending behaviour and their circumstances. (The precise meaning of 'proportionality' will depend on the type of solution under consideration. For example criminal justice sanctions must be proportionate to offending behaviour while non-compulsory welfare-based interventions should be proportionate to need.)

Scope and supporting aims

In terms of scope, we concluded that any viable alternative hearing to the existing youth court should:

- deal with offending of a medium to high level of seriousness (*necessary*)⁸
- link effectively with statutory children's services, the family court system and other relevant services such as housing (*necessary*)
- be capable of dealing with problems relating to families as well as individual children (*desirable*).

Supporting aims would be to:

- treat children non-discriminatorily, on the basis of gender, race, age and disability (except where differential treatment is justified, for example, adaptations to procedure to ensure effective participation in hearings), religion, sexuality and socio-economic background (*necessary*)
- ensure children understand and can participate effectively in the process (*necessary*)
- ensure parents and carers can engage with, understand and participate effectively in the processes in which their child is involved (unless inappropriate in the particular case) (*necessary*)
- ensure any resulting commitments and requirements can realistically be met by the child – if necessary through provision of appropriate support (*necessary*)
- ensure suitable, trained professionals are accountable for the child's completion of commitments and requirements, and for their progress (*necessary*)
- remove any barriers to children's present and future education and employment opportunities, and promote re-engagement with services such as mainstream education where the child is disengaged (*necessary*)
- deal with cases as speedily as possible, without sacrificing the need for scrupulous assessment, fairness and arrival at an appropriate outcome (*necessary*).

Methods

The alternative hearing would need to work in ways that:

- involve other statutory and voluntary services in responses to youth crime and antisocial behaviour, directly or indirectly (*necessary*)

⁶ European Convention on Human Rights
<http://conventions.coe.int/treaty/en/treaties/html/005.htm>

⁷ United Nations Convention on the Rights of the Child
<http://www2.ohchr.org/english/law/crc.htm>

⁸ Low-level offending could be dealt with by the alternative hearing or by other mechanisms eg pre-court diversion, as appropriate.

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- engage children and their families in deciding and implementing those responses (*necessary*)
- use evidence of effectiveness to agree on responses, whenever available (*necessary*)
- monitor the delivery and effectiveness of responses (*necessary*)
- comply as far as possible with non-binding international guidelines and principles concerning best practice⁹ (*desirable*).

Resources

Particularly in the light of Ministry of Justice budget cuts in the 2010-2015 spending review period,¹⁰ the alternative hearing system should:

- ensure that the decision-making process is cost-effective and, at least in the medium term, cost-neutral or cost-saving (*highly desirable*).

⁹ UN instruments which commend best practice include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') <http://www.un.org/documents/ga/res/40/a40r033.htm>; United Nations Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'); UN Guidelines for Action on Children in the Criminal Justice System <http://www2.ohchr.org/english/law/system.htm>;

and the European Rules for juvenile offenders subject to sanctions or measures. [http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/Rec\(2008\)11E.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/Rec(2008)11E.pdf); [Draft Guidelines on Child-Friendly Justice](http://www.coe.int/t/dghl/standardsetting/childjustice/draft_per cent20guidelines_per cent2018_per cent20nov_en.pdf) http://www.coe.int/t/dghl/standardsetting/childjustice/draft_per cent20guidelines_per cent2018_per cent20nov_en.pdf;

¹⁰ HM Treasury, *Spending Review 2010*, Cm 7942, October 2010.

2. The existing system

This chapter summarises formal pre-court and court processes in England and Wales that are currently used with children and young people under 18 accused of committing criminal offences or various types of antisocial behaviour. It looks at the two main routes by which children and young people can currently be taken to the youth court or magistrates' court:

- the youth justice system¹¹
- the application of – largely civil – antisocial behaviour measures.

We go on to compare the current system against the principles and objectives identified in the previous chapter.

Youth justice

Pre-court measures

If the police consider they have enough evidence for a successful prosecution and a child admits responsibility, a first offence attracts a formal 'reprimand' by a police officer in the presence of a parent or other appropriate adult. A second results in a 'final warning', which comprises a police formal warning about the consequences if offending continues. This is likely to be delivered on Youth Offending Team (YOT) premises and is usually followed up by YOT rehabilitative work and/or a restorative meeting with the victim. A third offence has to be referred to the Crown Prosecution Service (CPS) with a view to prosecution.

There are limited exceptions to this progression: children and young people who receive an absolute or conditional discharge in court, or receive a fixed penalty notice from the police, are not disqualified from subsequent use of pre-court measures. Moreover, if more than two years elapse after a final warning without further offending, it can be followed by another for a non-serious offence.

However, if the police (who have a gravity scoring scheme) consider any offence too serious for a reprimand or final warning the child may be referred immediately to the CPS.

Reprimands and final warnings are kept on police records until a young person's 18th birthday, or for five years if longer. They may be cited in any subsequent criminal proceedings. They are not convictions but have to be disclosed, if required, in job applications. Some sexual offences require special registration.

Pre-court procedures depend on a child or young person admitting the offence of which they are accused. In case of a denial, the options are to take no further action or to prosecute. In 2007-08, 43% of the youth justice system's 211,000 cases were dealt with by pre-court disposals (the remainder comprised 35% first-tier court sentences, 20% community sentences and 3% custody).¹²

At the time of writing two schemes have been piloting modifications to the existing alternatives to prosecution:

- From late 2008 12 police areas piloted a youth restorative disposal (YRD) for minor offences. Provided a child or young person admits their offence and the parties agree, a trained police officer or Police Community Support Officer (PCSO) can bring them together with the victim and parents to discuss the offence, negotiate an apology and agree a plan to make good the wrong. The matter is recorded only on local police files. The local YOT is notified and may follow up with voluntary work to tackle known offending risk factors.
- From January 2010 the police and CPS in five police areas piloted a Youth Conditional Caution (YCC) for 16-17 year olds who would otherwise be prosecuted. They must have no previous court convictions, admit responsibility and also consent to the caution. Conditions attached to the caution can include rehabilitative steps, minor punishment,

¹¹ For further information see M Ashford, A Chard and N Redhouse (2006) *Defending young people in the criminal justice system*. London: Legal Action Group

¹² Ministry of Justice (2010) *Adult and juvenile reoffending statistics 2008*.

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reparation, fines and/or attendance at activities. Criminal proceedings are suspended, but can be resumed if the conditions are not met. The YCC applies to offences at a level of seriousness up to theft, criminal damage and personal use drug possession, and can either follow a reprimand and final warning or be used earlier for offences considered too serious for those disposals. A YCC can be used twice if the earlier caution was for a first offence. The caution carries a criminal record for three months. It then becomes spent (except for job applicants seeking work with children or vulnerable adults, where enhanced disclosure requirements apply¹³).

Assessments, reports and casework

Casework with children in trouble with the law is the responsibility of Youth Offending Teams (YOTs). They are sponsored and established by local authorities, and supported by grants, monitoring, training, standard-setting and strategic development from the Youth Justice Board for England and Wales.¹⁴

YOT casework focuses on matters closely related to offending such as assessments and reports, compliance supervision and support, offending behaviour programmes and restorative and reparative work. Responsibility for mainstream work on the wider underlying factors related to offending remains with the relevant mainstream services. YOTs have to negotiate for the involvement of these services where offending reveals greater needs, urgency or requirements for co-ordination than previously recognised.

A number of different assessment instruments, procedures and mechanisms are used by YOTs and other services when children and young people are facing pre-court or court proceedings:

ASSET is the standard youth justice assessment tool for England and Wales which YOTs complete for all children coming into contact with the youth justice

system. Compiled from interviews and existing relevant reports, it gives a core profile of offending history; neighbourhood, lifestyle, relationships and living arrangements; physical health; emotional and social development and self perception; attitudes, motivations and vulnerabilities; and any social care history. ASSET is used to assess children receiving pre-court interventions, for recommendations to courts on bail and sentences and to inform supervision and intervention programmes.

- The **Common Assessment Framework** (CAF) is used in England (Wales has been developing its own equivalent) to provide a standardised pool of information on children dealt with by one or more local services across the range of their needs and issues. It was developed to improve awareness and collaboration where children face or may need multi-service work. It covers similar issues to ASSET, but with less focus on offending and fuller information on personal and social development, family circumstances, housing and community situation, educational and interpersonal aptitudes and safety and protection issues. YOTs are expected to consult CAF information when available, to help them to understand better the issues affecting their clients.
- **Triage** has been introduced as a way of taking quicker and better informed decisions about children and young people who have been arrested by the police. Following two earlier pilots, funding has been provided since June 2009 in 69 YOT areas – about half the total – to place a YOT worker in or in direct telephone contact with police station custody suites. The YOT workers make immediate checks on the children's known backgrounds, carry out assessments – usually using ASSET – and advise the police and CPS on appropriate action. This can include low-key restorative interventions or family support work, formal pre-court interventions, prosecution and bail. The scheme is intended to

¹³ Enhanced disclosure also applies to certain licences and judicial appointments.

¹⁴ On 14 October 2010 it was announced that the Youth Justice Board for England and Wales would cease to operate as a non departmental public body and its functions would be brought within the Ministry of Justice. See Ministry of Justice news release of 14 October 2010, 'Ministry of Justice announces reform of public bodies', www.justice.gov.uk

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ensure that police and CPS decision-makers have good information before they take key decisions about how children should be dealt with. It is also intended to maximise the appropriate use of alternatives to prosecution and the use of bail when children and young people are held on remand.

- **Reports to court.** If a case goes to court the YOT has to submit a report to court which takes account of the ASSET assessment. The possible exceptions are where the offending is expected to warrant a less serious, 'first-tier' sentence – absolute or conditional discharge, fine or a Referral Order. For recommendations involving the most serious sentences – community or custodial – the report must be a Pre-Sentence Report (PSR) with an offence and impact analysis, assessment of the child and of risk to the community and sentence recommendation. The latter is based on ASSET and other relevant information, including interviews with the child and their parent/carer and any available personal statement from the victim. Courts can also order education and medical reports before passing sentence for an imprisonable offence.

Prosecutions, remands and trials

The Crown Prosecution Service (CPS) is responsible for criminal prosecutions of children and young people (although, since November 2009, pilot schemes have been established that enable the police to take charges forward in some less serious cases). The CPS must decide whether to prosecute based on whether there is sufficient admissible evidence to give a realistic prospect of conviction and whether prosecution would be in the public interest (applying a wide range of tests related to the child, crime, circumstances and/or impact). If a child or young person meets the relevant criteria, the CPS can direct the police to administer a reprimand or final warning. In areas piloting the Youth Conditional Caution (see above) the CPS has to agree to the caution's use.

If the police charge a child or young person they can release them unconditionally or on police bail pending a court appearance, or, in serious cases, detain them overnight. In the absence of suitable local authority holding accommodation the latter is almost always in police cells. The first court appearance must be within seven days; or the next working day if the child or young person is detained in custody (such remand hearings may take place in adult magistrates' courts).

When children and young people plead guilty, youth courts usually deal with less serious cases at the first hearing. However, if the case is serious, or guilt is denied, they normally set a later date for the hearing or trial. The remand options for children and young people are complex and vary with age, gender and vulnerability. Overall they comprise unconditional bail, conditional bail with behavioural, monitoring, supervisory and/or supportive conditions/interventions, remand to local authority accommodation or remand to secure custody. Six per cent of under-18s are detained pending trial or sentence, two-thirds of whom are later acquitted or receive a non-custodial sentence.¹⁵

Children and young people have the right to legal advice and representation if held in custody at a police station and more generally to prepare and present their case in court. Free advice from duty solicitors is available at police stations. Children facing trial have the right to publicly-funded legal advice and representation, subject to a general interests of justice test.

Children and young people can be prosecuted in 'first-tier' courts – youth courts and (in limited circumstances) magistrates' courts – or in the Crown Court:

- **Youth courts** deal with most cases against under-18s. They are presided over by a District Judge or a bench of three lay magistrates who have been trained for youth cases. Youth courts sit in magistrates' court buildings between weekly and daily depending on the local volume of business.

¹⁵ Gibbs, P and Hickson, S (2009) *Children: Innocent until proven guilty*. London: Prison Reform Trust.

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They are normally attended by the child, a parent, carer or appropriate adult, a YOT case worker and prosecution and defence lawyers. Victims (and their parents, if the victim is a child or young person) are normally allowed to observe the hearing. Cases may not be reported publicly in any way that would identify the defendant, but the court can decide in exceptional cases to lift the reporting restrictions.

- The structure of the court process is designed to meet criminal justice trial and sentencing needs. Proceedings fall into two parts:
 - determining guilt or innocence – by the child pleading guilty or a trial with prosecution and defence lawyers contesting the evidence with the aid of questions to the defendant and witnesses
 - deciding a sentence – with the court considering reports, YOT recommendations, prosecution and defence (mitigation) arguments, questioning the child and conferring (where necessary) before announcing its decision.
- Although Government guidance on youth court venues encourages informal seating (round a table and on the same floor level) many courts still share adult courtrooms with raised benches and docks, some enclosed behind reinforced glass. Young defendants are normally addressed by their first name. District Judges and magistrates are encouraged to use plain language to help children and young people to understand proceedings and participate freely in response to questions. Some courts manage this well, particularly where the venue is suitable. Others remain formal, with benches and lawyers – who do not have to be specialists in working with children and young people – finding it difficult to adjust from the language and conventions of adult trials.
- **Magistrates' courts.** In addition to dealing with overnight remand hearings (see above) adult magistrates' courts may deal with trials of children who are charged jointly with adults. Cases are separated if possible (for example, where the adult pleads guilty and only the child wants to contest the case). Guidance suggests that procedures in these cases should be adapted to children's needs if possible, but adult venues, customary practices and the presence of adult co-defendants and their lawyers generally limit the scope for this. Child defendants can be publicly identified unless the court decides to apply reporting restrictions.
- **Crown Court.** More serious cases against children and young people are heard in the Crown Court. They include homicide, firearms, sexual offences, offences for which 'dangerous offenders' sentencing provisions are applicable,¹⁶ and a range of 'grave crimes' for which adults can be sentenced to 14 years or more in prison. This can include cases of robbery, residential burglary and handling stolen goods. Following critical judgements from the European Court of Human Rights,¹⁷ a practice direction from the Lord Chief Justice sought to make Crown Court proceedings against children and young people less intimidating – including the removal of wigs, gowns or uniforms, longer and more frequent breaks and explanations of the proceedings to the child.¹⁸ However, the surroundings, procedures and language of the Crown Court are designed for adults. Proceedings are usually public and, in addition to the jury of twelve present for trials, this makes for a courtroom crowded with adults. Further, child defendants in the Crown Court can be publicly identified unless the court decides to apply reporting restrictions.

¹⁶ As listed in Schedule 15 to the Criminal Justice Act 2003.

¹⁷ See *T v UK*; *V v UK* (1999) 30 EHRR 121 and *SC v UK* (2004) 40 EHRR 10.

¹⁸ 'Trial of Children and Young Persons in the Crown Court', 16 February 2000.

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Referral Orders and the Youth Offender Panel (YOP)

The range of sentences available for children and young people is mostly beyond the scope of this report. The options include 'binding-over' young people to 'keep the peace'; absolute or conditional discharges; fines; Compensation Orders; Reparation Orders; Referral Orders; Youth Rehabilitation Orders (a community sentence with a wide range of activity, restriction, rehabilitation, treatment/ testing and residential options); or custody (up to two years in the youth court; and up to the adult maximum for the offence in the Crown Court).

Referral Orders are of direct interest, however, because they involve courts referring young people to a process overseen by a hearing known as the Youth Offender Panel (YOP). Referral Orders are used as the standard disposal for children who plead guilty on their first court appearance to an offence that is punishable with imprisonment – unless the circumstances are thought to justify an immediate custodial sentence. They currently account for about a third of children's sentences.

The child or young person is referred to a YOP made up of two lay members of the community and a member of the local Youth Offending Team. The panel seek agreement with the child or young person on reparative and rehabilitative actions. If the resulting contract is agreed and successfully completed the child or young person's conviction becomes 'spent' and need not be disclosed to employers, although it may be cited in subsequent court proceedings. Victims are invited to make their views and feelings known by attending the panel or providing written statements. In practice, victim attendance is low – measured at 13% by Home Office research in 2002.

Reoffending

Official statistics on reoffending are based on the proportion of children and young people who receive a further pre-court disposal or are reconvicted within 12 months of the previous one. Among the young offenders dealt with in 2008, 37% reoffended within a year: 25% of those who had been dealt with out of court and 56% of those dealt with by courts. The reoffending rate for those sentenced to first-tier penalties was 46% (ranging from 38% for Referral Orders to 66% for Reparation Orders). The reconviction rate was 68% for community-based penalties across all courts and 74% for custody.¹⁹ Previous history is clearly relevant: 22% of those with no previous convictions were reconvicted within a year, rising to 81% of those with ten or more previous convictions.

Antisocial behaviour

'Antisocial' behaviour is a recognisable but much more elastic concept than 'crime'. In England and Wales it has been defined as "acting in a manner likely to cause harassment, alarm or distress to one or more persons not in the same household" (Crime and Disorder Act, 1998). The focus of enforcement is on neighbourhood problems – local street disturbances, nuisance neighbours and spoiling the local physical environment. The Home Office's illustrative examples include both criminal offences and non-criminal nuisance: rowdy and noisy behaviour, yobbish behaviour, nuisance neighbours, vandalism graffiti and fly-posting, street drug dealing, fly-tipping rubbish, aggressive begging, street drinking and setting off late night fireworks.²⁰ Proceedings against children can start at age 10 and are civil, usually dealt with by adult magistrates' courts in their civil jurisdiction. However, breach of an anti-social behaviour order (ASBO) or related order is a criminal offence that can result in imprisonment.

¹⁹ Ministry of Justice (2010) *Reoffending of juveniles: results from the 2008 cohort England and Wales*. London: Ministry of Justice Statistics

²⁰ See Home Office website: www.homeoffice.gov.uk

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Agencies and assessments

Formal action against antisocial behaviour is normally taken by local authority staff or the police working within the framework of community safety partnerships. Although focused on prohibition, the process includes some initial assessment of children and young people's circumstances and needs through consultation with YOTs or children's services. This is so that consideration can be given to any needs for special support or services in parallel with specified prohibitions on antisocial behaviour.

Pre-court measures

The main pre-court measures responding to antisocial behaviour are warning letters sent to young people and their parents and Acceptable Behaviour Contracts (ABCs). The latter are written agreements, usually between the local authority and children and young people who are at risk of being taken to court on an ASBO application. A parent or carer should be present when the contract is agreed and the child or young person should be involved in drawing it up. ABCs can run for a renewable six months and specify the antisocial behaviour to be stopped. Actions are also specified to help the child or young person to deal with any underlying causes. The ABC has no legal force, but failure to agree a contract or comply with it will lead to further warnings and/or an ASBO application.

Court orders and processes

The antisocial behaviour measures available in court are:

- **Anti-Social Behaviour Orders (ASBOs)**. About half of all ASBOs are against children.²¹ They last up to two years and comprise prohibitions, similar to injunctions, against specified antisocial behaviour. Free-standing ASBOs are made by the adult magistrates' court in its civil jurisdiction, although ASBOs can also be made by the youth courts and Crown Court after a child or young person has been convicted of an offence (so-called

'CRASBOs'). ASBOs are applied for through a summons to the child with a copy to the parent. Courts can make an interim ASBO while a full order is under consideration. Although the orders are civil, the court has to satisfy itself on two issues:

- on the criminal test of 'beyond reasonable doubt', that the person has caused harassment, alarm or distress to someone in another household
- on an 'exercise of judgement or evaluation', that the order is necessary to prevent further similar conduct.

Under case-law, the best interests of the young defendant should also be a primary consideration. Courts can take account of ABC breaches, witness statements and diaries, CCTV evidence, hearsay evidence provided through council officials and other 'professional' witnesses (usually information they have gathered from complainants who wish to remain anonymous for fear of reprisals) and previous civil or criminal proceedings. Unlike criminal prosecutions, there is a presumption in ASBO cases that children and young people will be publicly identified.

- **Individual Support Orders (ISOs)**. When it makes an ASBO, a court has to consider whether positive requirements are needed alongside prohibitions, after seeking relevant information from the social services or YOT. The test for an ISO is whether it would help prevent further antisocial behaviour. The order creates obligations lasting up to six months for the child or young person to take part in specified activities, see a specified person as directed and to comply with education arrangements or any directions made by a responsible person.
- **Parenting Orders** have to be considered where courts make ASBOs against under 16s; District Judges and magistrates must give reasons in open court if they decide against making an order.

²¹ Solanki, A., Bateman, T., Boswell, G. and Hill, E. (2006) *Anti-Social Behaviour Orders*. London: Youth Justice Board.

The existing system

Breach of an ASBO, an ISO or a Parenting Order is a criminal offence, dealt with by prosecution in the criminal courts. One analysis of cases involving 137 child ASBO recipients showed that nearly half were returned to court for breach.²² For an ASBO breach a child aged 15 to 17 or a persistent offender aged 12 to 14 can receive up to two years in custody. The penalty for breach of an ISO is a fine.

Discussion

When compared against the defining purpose and strategic objectives that any alternative system should seek to fulfil, as identified in Chapter 1, it is evident that there are serious weaknesses in the approach of the existing court-based systems in England and Wales. As a consequence, they are unable to deal satisfactorily with children and young people's antisocial and criminal behaviour, let alone the underlying problems that beset those aged to 10 to 17 who offend.²³

Systemic problems

Many of the problems we have identified are systemic. Adversarial court proceedings – whether in a criminal court or a civil antisocial behaviour application, are designed to establish facts and legal tests through evidence and advocacy and are reliant upon the ability of the defendant to instruct his or her lawyers to challenge or correct the state's case. For this reason, the principle of 'equality of arms' is of particular importance.²⁴ A child or young person is at a disadvantage in seeking to comprehend and effectively to challenge prosecution evidence and advocacy by reason of his or her age.

Youth court procedures have been modified to assist participation of children but difficulties remain. Children tried jointly with adults, facing antisocial behaviour proceedings in magistrates' courts, or tried in the Crown Court, experience an overwhelmingly adult environment.

Further, the criminal court process focuses on determining guilt or innocence of the particular offences alleged and upon passing an appropriate sentence for those offences within the framework of statute and guidelines. Antisocial behaviour proceedings are structured by the nature of the order applied for. The wider circumstances of the child or young person and his or her family are only examined if raised by one of the parties: in criminal proceedings they are channelled into arguments for mitigation of the sentence rather than being explored in their own right as drivers of the child's behavioural problems. Defendants have an interest in not bringing to the courts' attention offending or antisocial behaviour of which the court is not already apprised. Both pre-court and court actions focus on specific offences and civil wrongs. The duration of interventions is governed by concern to achieve proportionality of punishment rather than social need, and they rarely provide ongoing support for children and young people, even on a voluntary basis, to tackle underlying problems.

In addition, the courts cannot reliably activate mainstream services such as education, child protection and mental health, which are needed for the most challenged of the children they deal with. Neither they nor Youth Offending Teams (YOTs) can require contributions from other services towards the resolution of cases. YOTs were created as multi-service partnerships, but their staff are overwhelmingly engaged in serving the youth justice process. Children and young people on supervision orders in 2004 typically received just over one hour a week of contact with a YOT member;²⁵ yet mainstream services often mistakenly assume YOTs are capable of carrying out specialist and continuing casework.

Ironically, while a child or young person's first formal reprimand may come years after they first exhibit behavioural and other welfare problems, the thresholds for youth justice intervention, once triggered, are remarkably low and inflexible. Research shows an

²² Solanki et al (2006) as above.

²³ For an instructive account of the vulnerabilities of children appearing before the courts for serious offences, see (2006) *Child Defendants*, Occasional Paper OP 56, Royal College of Psychiatrists, London.

²⁴ I.e. that each party has a 'reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial

disadvantage vis-à-vis his opponent'. See *De Haes and Gijssels v Belgium* (1997) 25 EHRR 1, para 53; *Delcourt v Belgium* (1970) 1 EHRR 355, para 28.

²⁵ Audit Commission (2004) *Youth Justice 2004: a review of the reformed youth justice system*. London: Audit Commission.

The existing system

important association between serious behavioural problems in children's early years and persistent and serious teenage crime.²⁶ Yet youth justice action is triggered by offences not causes, with the result that repeat offences, irrespective of cause, can rapidly lead to court proceedings.

Restorative justice procedures have been introduced to the youth justice system in England and Wales, but their use appears somewhat arbitrary. Referral Orders that send children and young people to a Youth Offending Panel are generally confined to those pleading guilty on their first court appearance (changes came into effect in 2009 to broaden this but only slightly).²⁷ This means that subsequent cases, even though they might be particularly amenable to referral orders, can only proceed through the courts.

There is, likewise, no scope for making use of restorative processes within the parallel enforcement machinery introduced since 1998 for tackling antisocial behaviour. As previously noted, a child accused of a criminal offence is normally subject to rigidly structured pre-court interventions and may progress to a youth court, adult magistrates' court or the Crown Court. But identical behaviour, when tackled by local authority antisocial behaviour teams, is subject to a different range of interventions. Applications for Anti-Social Behaviour Orders (ASBOs) are taken to magistrates' courts in their civil jurisdiction, but if the ASBO is breached the case switches to the criminal courts.

²⁶ Farrington, Rutter, Mrazek, Haggerty and others find strong links between youth crime and multiple factors such as ADHD, ill health, poor parenting and housing, low educational achievement and child access to drugs and alcohol

²⁷ See Powers of Criminal Courts (Sentencing) Act 2000, ss16 and 17, s17 as amended by Criminal Justice and Immigration Act 2008, s35.

3. International review

This chapter looks at alternative systems in the UK and around the world that may assist in designing improvements to the present court processes for children and young people in England and Wales. It compares and contrasts different approaches, seeking to understand what each of the systems can and cannot do and testing them against the principles and objectives set out in Chapter 1. This sets the scene for Chapter 4, which goes on to consider which models appear best suited to the English and Welsh context and how they might be applied in practice.

Scope

We studied 16 systems, existing or recently legislated for, including:

- lay panels (Scotland and Guernsey)
- restorative justice conferences (New Zealand, Northern Ireland and England and Wales Youth Offender Panels)
- inquisitorial courts (France)
- welfare courts (England and Wales family courts)
- multi-level gate-keeping (South Africa)
- community criminal justice centres (United States and England)
- drug courts with deferred sentencing (United States and England)
- civil tribunals (English mental health tribunals and UK asylum and immigration tribunals)
- reduced use of youth custody (Canada)
- young adult flexibility (Germany).

Structured templates analysing each system in detail – how they work, what the available research shows and the information sources can be found in website Annex A (www.youthcrimecommission.org.uk/index.php

?option=com_content&view=article&id=95&Itemid=90). The description below is an overview of each model studied, highlighting what seem to be its more attractive and/or problematic features. Our standpoint is strictly what the model might contribute to reform in England and Wales, so the listing of 'problematic' features should not be read as wider criticism of the particular jurisdictions or legal systems, which each have their own purposes, social contexts and priorities. The information about each model is based on a study of available research literature, published guidance and statistics, supplemented in some cases by visits or direct enquiries to relevant experts. Generally, it has been possible to build up a good operational picture, including some statistics about caseloads. Information about costs and outcomes has proved harder to obtain. Some jurisdictions do not attempt to measure outcomes, but it is, in any case, difficult to distinguish between the effect of court or tribunal processes and any resulting interventions. One notable exception is restorative justice, which has been comparatively thoroughly researched around the world.

Lay welfare panels

Scotland

Scotland's Children's Hearing system works with children and young people under 16 (and under 18 in some cases) who commit offences or are considered to be in need of care and protection. A 'gate-keeper' (the Children's Reporter) decides which cases should be referred to a lay tribunal – the Children's Hearing. The Children's Hearing is required to consider and make decisions on the welfare of the child or young person before them, taking into account all the circumstances, including any offending behaviour. Cases only go to the sheriff court if an offence is denied: they are then referred to the Children's Hearing once the facts have been determined in a trial. When dealing with serious offences and 16 and 17-year-old offenders, the courts can also refer cases to the Children's Hearing for decision on what action should be taken.

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- **Attractions** of the system include its strong emphasis on children's welfare and the extensive use of diversion to prevent the need for formal hearings, confining the use of formal machinery to circumstances where compulsory interventions may be necessary. The gate-keeping role of the Reporter encourages a thorough investigation of each child's circumstances. The use of trained lay tribunals, open decision-taking and an informal, participative process assist children and young people's understanding and engagement in proceedings.
- **Problems** include evidence from research that the system is ineffective in reducing reoffending and that referral to the Children's Hearing leads to children being identified as 'the usual suspects' in ways that can serve to accelerate their criminal careers.²⁸ The system also requires 16 and 17 year olds to go to the adult-oriented sheriff court (albeit with some cases then referred to the Children's Hearing for disposal). There is a lack of programmes for children and young people that specifically address offending, and considerable social services discretion over the level of supervision that those who have offended receive. The Children's Hearing, although conducted by lay members of the community, does not include any effective role for victims.

Guernsey

Guernsey's recently-introduced system is modelled on the Scottish approach but applies to young people aged 16 and 17 as well as younger children. It includes a gate-keeper (the Child Convenor) and a welfare-oriented panel (the Child Youth and Community Tribunal). It deals with offending alongside other problems, guided by an assessment of the child or young person's long-term best interests. Courts deal with disputes of fact and take some cases direct but can refer disposals to the tribunal. Guernsey's system

can be seen as improving on its Scottish model in two respects: stronger 'gate-keeping' based on case conferences, and the extension of hearings to 16 and 17-year-olds.

- **Attractions** include the use before any referral to the hearing of convenor conferencing, bringing together the child, his or her family and legal representatives. This should contribute to well-informed and legally sound voluntary referrals. As in Scotland, the lay tribunal conducts informal proceedings focused on welfare needs. There is a presumption in favour of voluntary measures; and any requirement for an invasive welfare disposal has to carry court as well as tribunal agreement.
- **Problems** include the newness of the system, which means there is as yet no track record to assess. In addition: the focus is entirely on long-term solutions; there is no victim role; a range of cases (including assault, traffic and persistent offending) still go directly to court; and the tribunal does not allow legal representatives to attend.

Restorative justice

Restorative justice, which features in several of the models described below, describes an approach, not a single method, which has been widely practised in various jurisdictions both within and outside the context of offending behaviour. Given its potential importance to our work this section gives a brief overview of the subject. While Referral Order Panels in England and Wales are often not truly restorative (see above) they are discussed here as they offer the greatest opportunity for restorative justice in the current mainstream youth justice system.

What is restorative justice?

In the criminal justice context, restorative justice has been defined as "a process whereby parties with a stake in a specific offence resolve collectively how to

²⁸ McAra, L. and McVie, S. (2007) 'Youth Justice? The Impact of Agency Contact on Desistance from Offending', *European Journal of Criminology*, 4: 3, pp. 315-345.

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deal with the aftermath of the offence and its implications for the future".²⁹ It is normally voluntary for the parties involved, including offenders, who must have accepted responsibility for causing harm, as well as victims, who need to be ready to engage directly with offenders. Offenders agree to try to come to terms with what they have done and to discuss remedies. Victims agree to make clear how they have suffered harm and discuss how the offender could make amends. The key discussions (sometimes preceded by preparatory meetings) can take the form of a conference between all parties, and the conference itself negotiates and agrees on the outcomes. Consistent with the focus on repairing a specific harm, the victim role in the conference can be taken by a nominated representative who is close to the victim (if they feel unable to meet the offender), by an employee of a business which suffered loss or damage, or by a neighbourhood representative. Aside from reparation to the victim or the community, a conference can lead to personal rehabilitative actions by the offender.

In addition, there are restorative practices – typically used to deal with minor offending – that lack the collective resolution inherent in restorative conferencing. Examples are: processes where victims outline their problems to a meeting and then leave; conferences with reparative outcomes that are pre-packaged by the police or YOT workers; and reparation measures agreed after third parties have worked to raise an offender's awareness of the impact of their offence on the victim.

Evidence concerning restorative justice

There is a substantial body of research evidence concerning the operation and outcomes of restorative justice, including the models used in New Zealand and

Northern Ireland, as well as the community-based Youth Offender Panels that sit when children and young people in England and Wales are sentenced to Referral Orders.³⁰

Family Group Conferencing in New Zealand

Family Group Conferences (FGCs) are a means of delivering restorative justice that has become well established in New Zealand, where they are used as an alternative to prosecution but also are near-mandatory as a pre-sentence procedure when a child is prosecuted. They emphasise both responsibilities and needs and are preceded by a system of police warnings and other diversionary procedures, which commonly include an element of reparation.

- **Attractions** of the New Zealand system include the way that FGCs are reserved for more prosecutable cases and how the system combines extended family support work with victim involvement. Other positive aspects include its relative speed (conferences typically take place a month after arrest), the skilled, professional facilitation by trained social workers and a child-centred approach, with consensual discussion of tailored solutions. The number of prosecutions and young people in custody both fell substantially after FGCs were introduced by 1989 legislation as part of a reformed system.
- **Problems** include the near automatic use of FGCs, even if a child denies the offence of which they are accused (though conferences in these circumstances can still be productive). Victim attendance at FGCs and satisfaction with them is about 50%. This suggests that a considerable number of conferences are, in practice, more oriented towards 'sentencing' than restorative

²⁹ Marshall, T. E. (1999) *Restorative Justice: an overview*. London: Home Office Research Development and Statistics Directorate.

³⁰ See Evaluation of the Northern Ireland Youth Conference Service. NIO Research and Statistical Series: Report No. 12 by Catriona Campbell, Roisin Devlin, David O'Mahony, Jonathan Doak, John Jackson, Tanya Corrigan and Kieran McEvoy. Institute of Criminology and Criminal Justice, School of Law, Queen's University, Belfast, October 2005, available at http://www.restorativejustice.org.uk/Resources/pdf/evaluation_of_the_northern_ireland_youth_conference_service.pdf; Shapland, J et al (2004) *Implementing restorative justice schemes (Crime Reduction Programme)* A report on the first year, www.homeoffice.gov.uk/rds/pdfs04/rdsolr3204.pdf; Shapland, J et al (2006) *Restorative justice in practice – findings from the second phase of the*

evaluation of three schemes www.homeoffice.gov.uk/rds/pdfs06/r274.pdf; Shapland, J et al (2007) *Restorative Justice: the views of victims. The third report from the evaluation of three schemes. Ministry of Justice Research Series 3/07*. London: Ministry of Justice. www.justice.gov.uk/papers/pdfs/Restorative_Justice_Report.pdf; Shapland, J et al (2008) *Restorative Justice: Does Restorative Justice affect reconviction? The fourth report from the evaluation of three schemes. Ministry of Justice Research Series 10/08*. London: Ministry of Justice, www.justice.gov.uk/publications/restorative-justice.htm; and *Restorative justice: the evidence*. Lawrence W Sherman (Wolfson Professor of Criminology at the University of Cambridge) and Dr Heather Strang (Director of the Centre for Restorative Justice at the Australian National University). The Smith Institute, 2007.

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justice. It also appears that the concerns of professionals, lawyers and 'interested individuals' can sometimes overwhelm the supposedly family-led dynamics of conference (and there does not appear to be much systematic monitoring of conference delivery).

Restorative youth conferencing in Northern Ireland

Restorative youth conferencing is central to the youth justice system in Northern Ireland, having grown out of the 1998 'Good Friday' agreement. It was piloted in 2003 and extended across Northern Ireland from the end of 2006. It is used both as a diversionary alternative to prosecution and as a sentence of the youth court. Young offenders must admit their culpability (or have been found guilty in court) and agree to take part in the conference. The required participants are the child or young person, their parents (or 'appropriate adult') and the police. Victims choose whether to take part and can bring a friend or relative, or nominate a representative to attend in their place. Children and young people can have a legal representative with them but speak for themselves in the conference. The restorative plans agreed in conferences can include a written apology to the victim, reparation, unpaid community work, supervision and a young offender's agreement to take part in activities to address offending behaviour or treatment for any mental health, alcohol or drug problems.

- **Attractions** include the use of professional, trained facilitators – considered instrumental in the smooth running of conferences and in securing a high rate of participation by victims (67%). This has been linked, in turn, to lower reconviction rates.³¹ Conferences provide a genuine, interactive and restorative experience for the young offender and victim, and victim satisfaction rates are high (89%). Conferences typically respond to middling serious and repeat offending. Reconviction rates are lower

than those for sentences imposed by the youth court (28% reconvicted within a year of completing a diversionary order, and 47% for court-ordered conferences compared with 52% for community sentences and 71% for custody).³²

- **Problems** include the potential need for victims of group offending to attend more than one conference and for repeated conferencing for prolific offenders (although special arrangements are in place for working with them intensively). Youth conferencing appears too elaborate for dealing with minor offences; there is also some concern (as with other diversionary procedures) that young people may admit an offence that they have not committed (for example, where they have a valid defence or lacked the relevant intention) in order to avoid being sent to court. The average length of time that it takes from offence to referral to youth conferencing (120 days) is another problem in Northern Ireland, although not caused by the conferencing process itself.

Northern Ireland has built on New Zealand's Family Group Conferencing, developing a well managed, restorative model that uses victims' and communities' experiences to engage with offenders and develop rehabilitative responses. It deals with all but the most serious offences and secures encouraging results, including with repeat offenders.³³ Like restorative justice generally, Northern Ireland's system hinges on young offenders coming to terms with and repairing harm to victims and is not primarily geared to tackling offenders' underlying problems and needs.

Since it was applied across the whole of Northern Ireland four years ago, restorative youth conferencing has become the main mechanism for dealing with moderate to more serious offences committed by young people. It accounts for 11% of measures decided by prosecutors (the police have to refer all cases to them) and 52% of youth court disposals. The

³¹ Data provided by the Northern Ireland Youth Conferencing Service reported in Independent Commission on Youth Crime and Antisocial Behaviour (2010) *Time for a fresh start*. London: Police Foundation.

³² Campbell, P & Wilson, M (2008) *Court Prosecutions and Sentencing for 10 to 17 year olds 2006*. Belfast: Northern Ireland Office.

³³ For example: Sherman, LW & Strang, H (2007) *Restorative Justice: The Evidence*. London: The Smith Institute.

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most serious offences, including murder, manslaughter, rape, riotous assembly, hijacking and terrorism still go to court, but all of these except murder (which carries a mandatory sentence) can be referred to a youth conference at the court's discretion. No exception is made for repeat offenders, although a specialist team has been created within the Youth Conferencing Service to work intensively with them.

There have been nearly 8,000 youth conferences since the system was introduced. Three out of four (74%) have been attended by victims in person and 79% by victims or their named representative. The satisfaction rate among victims is 89%. Monitoring data also suggests that 81% of children show shame during victim-attended conferences and that 93% of conferences lead to a negotiated plan that is successfully completed. Among young offenders diverted from court or sentenced in 2006, one-year reconviction rates were 38% for those who attended youth conferences (28% for 'diversionary' and 47% for 'court-ordered') compared to 52% for conventional, community-based sentences and 71% for custody. One in nine young offenders (11%) who go through youth conference attend five or more conferences, and one per cent go through ten or more. For those with no previous convictions who take part in youth conferencing, the one-year reconviction rate is 16%. This increases to 41% for those with up to four convictions, and 72% among the very small number who have more than nine previous convictions. The proportion of young offenders sentenced to custody declined from 10% in 2004 to 7% in 2006.³⁴

It is evident from experience in Northern Ireland, New Zealand and elsewhere that the successful use of restorative conferencing requires expert management, including professional-level facilitation, and time devoted to conference preparation, including pre-meetings with victims and others to secure their active involvement. This, and the training needed to achieve

it, has to be properly resourced. It follows that this type of conferencing is probably over-elaborate for use as a routine response to minor offending. However, this is not to say that simpler, cheaper restorative processes cannot be effective with less serious offences when used by the police and others as a diversionary response.

Referral Orders / Youth Offender Panels (England and Wales)

The Referral Order is a sentence in England and Wales for young offenders appearing in court for the first time who plead guilty to offences that are not deemed to warrant immediate custody. The referral is to a Youth Offender Panel made up of two lay volunteers and an adviser from the local YOT. The panel meet with the child or young person and their parent(s). Victims can also attend or arrange to have their views represented. The aim is to agree a contract for the child or young person lasting between three and 12 months. This can include reparation and activities to tackle the causes of antisocial behaviour. The conviction becomes 'spent' once the contract has been satisfactorily completed.

- **Attractions** include the wide range of offences covered by the Referral Order, its combination of professional preparation by the YOT with trained lay panel leadership and the use of community venues for panels to convene. It makes the child and family central to taking responsibility and takes a problem-solving approach. Panels can be arranged quickly after sentencing and the one-year reconviction rate for Referral Orders (38%) compares favourably with those for some other youth court disposals, notably discharges (52%), fines (57%) and Reparation Orders (66%).³⁵
- **Problems** are that the system only applies to 'first-timers' in court and that the level of victim attendance is low (below 10% in one assessment) linked to patchy arrangements for encouraging and supporting their involvement.³⁶ The use by YOTs of

³⁴ See Campbell, P & Wilson, M (2008), n32 above.

³⁵ Ministry of Justice (2010) *Reoffending of juveniles: results from the 2008 cohort England and Wales*. London: Ministry of Justice Statistics.

³⁶ Crawford, A & Newburn, T (2003) *Youth Offending and Restorative Justice. Implementing reform in youth justice*. Cullompton, Devon: Willan.

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pre-drafted agreements can also be seen as weakening victim-offender interaction in the meetings, which appears to be an important element in other forms of restorative conferencing. Some might also criticise the lack of legal representation for young people at the panel, and a degree of discretion that arguably frustrates due process.

Youth Offender Panels are more limited in scope and less consistent in their operation than youth conferencing in Northern Ireland. They vary according to local policy and practice between restorative engagement between offenders and victims and what are effectively adjudicatory lay panels with only a limited restorative element.

Welfare courts

Family courts (England and Wales)

The family court is, amongst other things, a child protection court that considers local authority social services applications for compulsory interventions to protect children's welfare, including community supervision and residential care. It does not deal with offending as such. The process for seeking care orders, though painstaking, is slow and could not be expected to respond with sufficient speed and certainty to offending – or to welfare problems as a cause of offending.

- **Attractions** include the very thorough level of pre-court case preparation, as well as the explicit presumption against making a compulsory order unless tests of significant harm have been met. Children's welfare is always the chief consideration and the court sees a local authority implementation plan before it makes an order. Children can have their interests represented by a guardian *ad litem* as well as a lawyer.
- **Problems** are that the prescribed preliminary stages can take nine months before a case reaches

court and that the hearings are very formal and largely paper-based, with a limited opportunity for children to participate or understand the proceedings. The court cannot force the local authority to take particular steps within a care order, and it is only the local authority children's services that monitor the progress being made under orders.

Inquisitorial courts

France

France (like a number of other European countries) operates an inquisitorial court system which deals with child offending as a criminal matter, and child protection as a civil matter. However, the French system has also developed a large-scale system of 'fast-track', diversionary disposals for young offenders that are used at the discretion of the prosecutor.

- **Attractions** include the prosecutor's role as a 'gate-keeper' diverting young people away from court where possible (though this is also a problem – see below). Children's Judges in France are purpose-trained lawyers who are supported by dedicated professional social education teams. Under the inquisitorial approach, justice is sought through a process of careful investigation and negotiation during which young people are legally represented. There is a guiding ethos of promoting children's social education. Children's Judges and their teams supervise sentence implementation and compliance and appear to use considerable discretion when requirements are breached.
- **Problems** include a widening gulf between 'rapid justice' disposals by prosecutors (which have sometimes been driven by political priorities) and the care-centred courts. The role of parents in court hearings involving children and young people is unclear and there is no role for victims. Nominally 'educational' disposals imposed by courts can include confiscations and prohibitions, and the

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availability of training and education places for young people who offend is limited, leading to delays.

Against the clear attraction of having cases involving children and young people overseen by specialist judges supported by dedicated social education teams, it is evident that actual interventions in France can be long delayed and do not always measure up to the guiding educational philosophy. Political impatience with welfare-based approaches has also led to substantial bypassing of the courts by prosecutors applying 'rapid justice' disposals.

Multi-level gate-keeping

South Africa

South Africa is introducing a child-oriented criminal justice process that combines two levels of pre-court 'gate-keeping' with diversionary options, including restorative justice. It provides for pre-trial case conferences, participative pre-trial background enquiries and assessments of children's suitability for prosecution. However, the scheme – which was not fully operational at time of writing – appears complex and potentially quite slow.

- **Attractions** include pre-trial assessments by probation officers that should be triggered with a day or so of a child or young person being arrested. There is a strong emphasis on parental involvement and a participative process, although there is also an entitlement to legal representation. Prosecution can only take place after relevant developmental, social and offence-related issues have been considered, including the child or young person's capacity to understand a court process. Even if a child is considered suitable for prosecution there is an informal magistrate-led, preliminary inquiry that can conditionally divert to restorative justice conferencing or refer the young person to child protection proceedings.

- **Problems** include the newness of the system and the apparent complexity of the various gate-keeping and diversionary steps. There must also be a degree of uncertainty as to how far the pre-trial assessments can combine speed with thoroughness. There is continuing concern over the lack of a specialist juvenile court.

Community criminal justice centres

Red Hook Community Justice Centre, Brooklyn, New York

The Community Justice Centre in Brooklyn's Red Hook district is a multi-jurisdictional, multi-age community court covering low-level offending, such as property damage, shoplifting, drugs and juvenile delinquency as well as domestic violence and landlord-tenant disputes.

- **Attractions** are that a single judge provides case knowledge and continuity. At Red Hook CJC, the prosecution, defence and court staff collaborate to design individual treatment and training programmes. The court's sentencing options include measures that contribute to the local community rehabilitation and safety programme. The judge monitors progress and calls back offenders during sentence. Some statistics suggest the use of custody has reduced and a high rate of sentence compliance has reduced community fear of crime and increased local support for the centre's work.
- **Problems** are that inter-service synergies appear to have been bought at the expense of economies of scale. In terms of replication, it should also be noted that the Community Justice Centre was only established after a long planning and design process including repeated community consultations over several years.

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North Liverpool Community Justice Centre

The North Liverpool centre is modelled on the Red Hook Community Justice Centre in Brooklyn, New York. It is led by a Circuit Judge who can also sit as a District Judge and a court with on-site access to a range of community services. Police, probation, the YOT and the local Drug Action Team are housed there as well as employment, housing and money advice services. Victim support and restorative justice services also operate from the centre. This facilitates a 'problem solving' approach where offenders meet the service providers to plan ways of addressing their offending behaviour and tackling underlying health and social problems. The plans are taken into account by the court when agreeing its sentence. With adult offenders, the judge has powers to bring them back to court to review the progress of their sentence. The focus of the Community Justice Centre, including a youth court, is on burglary, theft, vandalism and other offences that most affect the life of the community, as well as antisocial behaviour.

- **Attractions** include the role of the judge in achieving consistency, accountability and continuity in the treatment of individual offenders. The multi-agency on-site teams hold case conferences each morning and the judge is able to order an adjournment to allow problem-solving to take place before he passes sentence.
- **Problems** include the £1.8m a year running costs of bringing together the court and various support services in one place. It has proved difficult for the Community Justice Centre to demonstrate an impact on community confidence in the criminal justice system given a lack of crime outcome data specific to the catchment area that it serves. Reconviction data in the court's first year of operation was disappointingly similar to that from a conventional court in Manchester.³⁷

Drug courts

Drug courts in the United States (the 'deferred sentence' model)

Drug courts in the United States are criminal courts that specialise in drug-related offences. Offenders are offered deferred sentences as an incentive to co-operate with treatment and rehabilitation programmes, which are closely monitored.

- **Attractions** include the way the prosecutor, court clerk and drugs staff jointly screen referrals for consistency and to identify potential programmes before any court appearance. Offenders are also sent on programmes pre-sentence as incentives to co-operate. The same judge monitors progress and calls offenders back during programmes, while use is also made of small rewards and sanctions to encourage progress. Rehabilitation work takes place post-programme to help offenders cope in normal society. There is a relatively high completion rate (but see below) and recidivism has been significantly reduced.
- **Problems** include the way that, while the court remains criminal, issues of guilt or innocence are submerged by the emphasis on treatment and incentives to collaborate in programmes. The highest levels of programme drop-out and recidivism tend to occur among those most in need, who are in general the younger offenders, the most socially disadvantaged and the most seriously addicted. Extensive use is made of custody for those who fail to complete their treatment programmes.³⁸

Drug courts in England

Drug courts with specialist judges and staff have been piloted in England since 2005 in Leeds and West London. Convicted adults, referred from the magistrates' court, are given community sentences or

³⁷ McKenna, C (2007) *Evaluation of the North Liverpool Community Justice Centre*. Ministry of Justice Research Series 12/07.

³⁸ Similar problems attend the use of the 'scaled approach' to youth justice supervision in England and Wales: providing welfare-oriented programmes with custody as a sanction for breach can accelerate

progress to custody for the most disadvantaged offenders, especially if more intensive requirements are placed upon them because of their higher levels of need. See Standing Committee for Youth Justice, *Response to Sentencing Advisory Panel Consultation Paper on Principles of Sentencing for Youths*, March 2009, available at www.scyj.org.uk

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suspended custody with attached drug rehabilitation requirements that cover treatment, testing and regular court reviews.

- **Attractions** include the specialist expertise of judges and their staff and the degree of case continuity. Criminal justice and drugs professionals jointly manage cases and informal, discussion-based progress reviews are held at the court. The continuity of judicial oversight in Leeds has been linked to reductions in the likelihood of offenders failing a heroin drug test or failing to complete their sentence.
- **Problems** include the courts' exclusive focus on drug offences committed by adults and a lack of robust, comparative data on reconviction and reoffending.

Civil tribunals

Civil tribunals in the UK, which are being remodelled into a unified tribunal system, include features that are potentially relevant to the design of a community hearing for young people accused of criminal and antisocial behaviour. For example, they combine a legally qualified chair with varying types of professional or lay panel membership. Independent specialist advocacy is available for some types of tribunal (a 'litigation friend') and the location for some hearings is flexible.

Mental health tribunal (England)

Mental health tribunals, comprising a presiding lawyer with medical and lay support, assess whether people of any age detained under mental health legislation can be discharged under guardianship, hospital or restriction orders. Since November 2008 mental health cases have been heard in the health, education and social care chamber of a unified tribunal system.

- **Attractions** include a statutory code on how to deal with children and the ability to hold hearings in external settings such as hospitals. An independent

mental health advocate takes part to inform applicants of their rights and ensure effective participation in care and treatment decisions.

- **Problems** the unified tribunal system is still bedding in and it is too early for proper evaluation. There are no cost figures and the tribunal does not always meet its own deadlines.

Asylum and immigration tribunal

The asylum and immigration tribunal hears appeals against UK Borders Agency immigration decisions and is part of the unified first tier tribunal. One or more immigration judges preside, sometimes supported by legal or lay tribunal members.

- **Attractions** include the way that the substantive hearings are preceded by case management hearings which can dispose of some cases with parties' consent (though others are dealt with without consent, which is more problematic). Family appeals can be heard together and cases involving children can be heard in chambers or round a table, with sensitive questioning and simple language.
- **Problems** are that the tribunal is not obliged to hear children in private and it can proceed in the absence of a party (absence abroad or in the UK is a common feature of immigration appeals). Only a day's notice is given of upper tribunal hearings and there is no power to appoint a litigation friend for the appellants. No cost information is available.

Legislating for reduced custody

Canada

We explored the Canadian system because of evidence pointing to the success of legislation in reducing youth custody without increasing crime. Canada retains a 'justice model', court-based system for child offenders, albeit with over half of cases

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diverted pre-court by police and prosecutors. Use of custody was reduced after 2003 legislation by promoting diversion, reforming the principles and purposes of youth justice sentencing, setting specific restrictions on custody, and by introducing new, community-based sentences similar to intensive supervision and surveillance in England and Wales.

The Canadian scheme offers lessons for youth justice overall, but the features of particular relevance to designing an alternative hearing system are the emphasis that was placed on training and preparation for professionals before the reforms were introduced and the concept of pre-custody conferencing to inform the final sentencing decision.

- **Attractions** are that although its lessons relate chiefly to wider youth justice operations, Canada's approach served to reduce the number of custodial sentences passed by the youth court by more than half between 2003 and 2007. There was no adverse effect on the youth crime rates recorded by police. The menu of diversionary alternatives to prosecution, available to both police and prosecutors, included Family Group Conferencing, reparation, community service, counselling and police warnings. Other interesting aspects were the thorough preparation of relevant professionals for the new scheme and the introduction of a judicial power to convene or refer a child to a community-based conference before imposing a custodial sentence. This enables family or community members' advice or victim-offender mediation to inform the decision.
- **Problems** are there are no obviously problematic aspects of the Canadian experience. Although pre-custody conferencing could serve to prolong post-conviction remands in custody, this will normally be outweighed by reductions in overall sentence length.

Young adult flexibility

Germany

Our interest in the German youth justice system focused on the power given to courts to deal with a young adult (aged 18 to 20 inclusive) as if he or she were a juvenile, based on an assessment of his or her maturity, motives and circumstances. In theory this allows for the fact that a young person does not attain adult maturity and understanding through the act of reaching his or her 18th birthday. However, the 'default' position for 18 to 20-year-old offenders in Germany remains that they should be tried and sentenced as adults. The discretionary system is also prone to significant regional variations in the use of assessment criteria and their interpretation.

- **Attractions** are that the use of the juvenile courts to try 18 to 20-year-olds has not constrained the discretionary development of juvenile-friendly procedures by some adult courts. Where juvenile sentencing is used, the sentences passed for more serious offences tend to be less severe, although there is little difference for less serious offences.
 - **Problems** are that the assessment of whether a person has juvenile characteristics is subjective, based on how young they look (proper psychological or psychiatric assessments would, presumably, be considered too time-consuming).
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4. Towards reform in England and Wales

Four basic models

The international experience described in Chapter 3 has led us to identify four basic structural models that might be considered as alternatives to the adversarial youth court system in England and Wales. These are:

- restorative youth conferencing
- lay youth justice panels
- welfare panels
- inquisitorial courts.

Restorative youth conferencing

Youth conferencing – which currently deals with most criminal offences committed by children in Northern Ireland – would operate as a restorative process where parties with a stake in a specific offence would come together to decide how to deal with its aftermath and implications for the future. Proceeding through negotiation rather than imposed solutions, conferences would focus on behaviour that harms other people, taking a diagnostic and problem-solving approach to engaging the child or young person and their family. It would aim to meet practical and emotional needs of victims, but it could also tackle wider community needs related to offending and antisocial behaviour. (In cases where there was no individual victim, it would be possible for the manager of a business affected by an offence, or a community representative to attend).

Avoiding the rigidities of a conventional sentencing hearing, restorative youth conferencing has been shown to be capable of handling quite serious offences as well as repeat offenders. But while intended to tackle some of the problems that trigger offending and antisocial behaviour, it would remain essentially a process of engagement between a victim and the offender. A child or young person's welfare needs, especially those linked to their patterns of offending, would need to be considered when

agreeing an action plan but would not be central to the restorative process.

Restorative youth conferencing would not remove the need for youth courts. The courts would continue to be required for cases where children and young people denied the offence with which they were charged, or where they declined to take part in the conferencing process. The courts might also need to be involved if, for whatever reason, a conferencing process failed to produce a viable action plan for the child or young person, or the plan was not properly carried out or completed.

Lay youth justice panels

Lay youth justice panels offer some benefits akin to those provided by restorative youth conferencing. Panel members, who are volunteers from the community, would lead a diagnostic and problem-solving engagement with the child or young person (and in appropriate cases his or her parent(s)/guardian) to negotiate and decide on how best to tackle his or her antisocial and criminal behaviour. It would depend on a child or young person admitting responsibility (or having been found guilty by a court), but unlike restorative youth conferencing it would not require the child/young person's consent to participation. As in the case of restorative youth conferencing, contested cases (and any significant issues of fact of the type that would necessitate a Newton hearing in criminal proceedings) would continue to be determined in the youth court. The court could also have a role in cases where panel solutions proved unsuccessful.

Although lay panels would be capable of taking some account of victims' concerns and wider community needs in relation to offending by children and young people, they would not seek the level of victim engagement that is intrinsic to a restorative process. Panels would make good use of lay expertise and, although requiring an investment in training, would

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probably be less demanding to run than restorative youth conferencing.

Welfare panels

A system of welfare panels – like the Children's Hearing system in Scotland – would respond to children and young people's criminal and antisocial behaviour by tackling the multiple underlying problems in their lives. As in Scotland, a panel that focused on welfare problems might also provide a mechanism for responding to child protection issues as well as criminal behaviour. A professional 'gate-keeper', comparable to the Scottish Children's Reporter, would be needed to decide which cases were referred to the panel.

Whether chaired by a specialist professional or by trained lay people, welfare panels would respond to offending through a diagnostic and problem-solving engagement with the child and their family. The intensity and scope of any agreed measures would be determined by the circumstances of the child and family, not the triggering offence or episode of antisocial behaviour. Being welfare-based measures, they would, in most cases, be delivered by local children's services. An issue might, consequently, arise over resources and the extent to which panels could compel the local authorities or NHS to provide a particular service that the panel considered appropriate.

A welfare panel would not normally be expected to focus strongly on the needs of victims, although these might be seen as relevant in some cases (for example where a child had been both victim and offender). As in Scotland, the criminal courts would still be needed to decide the innocence or guilt of children and young people who denied an accusation made against them, although those found guilty could be referred to the panel to decide what welfare measures should be taken. A more difficult issue to resolve in England and Wales would be the role of the family court if the

responsibilities of a welfare panel system were extended beyond offenders to children and young people with other care needs.

Inquisitorial court

Under this model children and young people who had exhausted other, diversionary options to tackle their offending and antisocial behaviour would go to court, but the court process itself would be radically reformed. Led by a professional judge or trained lay panel, the court would treat the admission or establishment of guilt as merely the prelude to its main business of conducting a diagnostic inquiry into the characteristics, causes and consequences of the child or young person's offending. This would be followed by discussion and negotiation with the child, family and relevant services about the measures best suited to deal with the offending behaviour and its causes.

The style would be informal, participative and consensual; although this would not rule out the imposition of compulsory court measures in addition to those that were reached by agreement. The final package or plan would amount to a sentence that could be enforced by sanctions following an investigative recall to the court. Like a lay criminal justice panel, an inquisitorial court could take some account, though not comprehensively, of victim and community needs relating to the offence. This approach would not be well suited to tackling welfare issues.

More fundamentally it is obvious, but crucial, to note that inquisitorial courts for children and young people are found in countries whose legal traditions and system are different to those of England and Wales. They could not be considered for any part of the English and Welsh youth justice system without changes to its general constitutional and common law foundation.

Suitability in principle

In order to discuss their implications in principle for reform in England and Wales the four options can usefully be placed in two groups:

Welfare panels and inquisitorial courts

The introduction in England and Wales of either welfare panels (adopting the Scottish model) or inquisitorial courts (based on practice in continental Europe) would require far-reaching changes to existing court systems, that would be inherently difficult and expensive to implement. Beyond that, however, our investigation has led us to conclude that the limited welfare benefits that an inquisitorial system could offer children and young people would not justify the fundamental changes required to the constitutional and common law foundation of the English and Welsh system.

Of the two, we consider that only welfare panels could yield the major additional benefit of tackling fundamental child problems and welfare concerns. However, the adoption of a 'welfare panel' model in England and Wales would entail a re-conceptualisation and reconstruction of existing child protection and welfare laws and the mechanisms for enforcing them. It would be essential to ensure that harmful or damaging child behaviours at any stage, whether suspected or known, triggered mainstream welfare action, rather than 'bolt-on' or 'stand alone' provision linked to the panel system. Viewed from a different perspective, welfare panels would not provide a response to offending by the overt administration of 'criminal justice'.

We believe that those seeking to reform the youth justice system in England and Wales have much to learn from studying welfare panels, and their key benefits and risks. However, it is clear to us that their wholesale introduction would require a far-reaching review of the powers and operations of the existing family courts and child welfare and protection services,

as well as reform of the youth justice system. For that reason we have reluctantly concluded that neither welfare panels nor inquisitorial courts pass the test of being 'suitable in principle'. We have not, therefore, chosen to develop them as options in further detail.

Restorative youth conferencing and lay youth justice panels

Either a restorative youth conferencing system or lay youth justice panels could be integrated into the existing youth justice system in England and Wales without the need for other fundamental changes. Introducing either approach would be a matter of transferring the task of agreeing responses to all but the most serious offences involving children and young people from the courts to another setting where their offending and antisocial behaviour could be dealt with more effectively.

Some might argue that they are complementary, rather than alternative options. However, it is clear to us that it would not be practical to seek to *combine* their functions within a single panel because of particular, specialist skills and training required of those who facilitate restorative justice. Attempting to run the two different types of panel in tandem, alongside the remaining youth court operations, would be too complicated and expensive to manage. We also concluded after careful consideration that any attempt to run them in sequence (with a lay youth justice panel able to refer cases on to a youth conference) would be unnecessarily complicated, time-consuming and potentially expensive.

Considering them as alternatives, we have concluded that restorative youth conferencing not only follows a procedure that is particularly suitable for children and young people in terms of their understanding and participation, but also offers a better prospect than lay panels of tackling antisocial and criminal behaviour and preventing reoffending. Further, restorative justice has the intrinsic attraction of recognising the interests of victims of crime and the wider community.

Towards reform in England and Wales

While determining at this 'high level' of principle that restorative youth conferencing is the leading option for reform, we have, nevertheless, gone on to explore in more detail how each of the two leading options might operate in practice.

Design issues

At this point it becomes necessary to return to the principles and objectives for reform that we identified in Chapter 1, to consider how they should inform the detailed design of the two options. We discuss the principles and objectives in the order in which they were first introduced.

Reducing offending and antisocial behaviour

The new hearing must be capable of reducing the seriousness and frequency of a child or young person's antisocial and criminal behaviour. It also needs to be capable of dealing with the offences of the level of seriousness of those that are currently heard in the youth court. Among the key design points are that:

- the hearing should deal with antisocial behaviour that contravenes the criminal law using the same methods, and in the same forum, as other offences. Antisocial behaviour, such as noise nuisance, that is not a criminal offence should be dealt with under the civil justice system (we discuss possible improvements to this in more detail below)
- medium to serious offences where a child admits responsibility should normally be dealt with by the new hearing. The same should apply to children and young people who are found guilty after being tried in court. Less serious offending should normally be dealt with through earlier diversion, rather than a formal hearing.

The most serious offences (for example, homicide, rape) may still need to go to court (whether or not the child admits responsibility) because of the severe penalties attached to them and in the interests of public confidence. However, the offences that go automatically to court should be circumscribed as narrowly as possible and the courts should have an option to refer even those offences to the new type of hearing to cater for different levels of participation and responsibility.

Children's needs related to their offending and antisocial behaviour

The reformed system should be capable of dealing with any welfare needs that are contributing to offending and antisocial behaviour and should, if possible, meet relevant family needs as well. The new hearing will need to link effectively with children's health and care services, with other relevant statutory and voluntary services, and with the family court. Clear case referral mechanisms need to be in place as well as powers to ensure multi-disciplinary working.

The hearing's remit must be consistent with the minimum age of criminal responsibility (currently 10 in England and Wales).

Community confidence

The hearing must be capable of winning the confidence of the local community. This may imply a presumption in favour of involving community members in lay panels or youth conferences. However, we anticipate that such decision taking will require a greater understanding of child development than is currently demanded of the courts. Suitable selection and training of lay panel members or community representatives at panel hearings/conferences would be essential.

Community organisations should be encouraged to help arrange opportunities for young offenders to make reparation to victims and carry out unpaid work for the community.

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Victim confidence

Available evidence suggests that the best means of giving the victims of offending and antisocial behaviour confidence would be to introduce a wider system of restorative justice. However, many victims may be fearful or otherwise reluctant to meet young offenders in a youth conference unless they are reassured and their needs are properly met as a part of a careful preparation procedure. We have seen in Northern Ireland how reassuring victims is an important part of the professional facilitator's role, including skilled management of conferences to ensure that victims cannot be 're-victimised' by the procedure. Some victims will still be unwilling to participate, but it is clear that conferencing can also work with victims' chosen representatives or with community representatives in attendance.

To satisfy the principle of achieving victim confidence, lay youth justice panels would need to include some scope for victims to contribute their perspectives to proceedings.

Public confidence and evidence of effectiveness

We have proposed that the system should, so far as possible, command general public support for and confidence in responses to children's offending and antisocial behaviour and that this will require good evidence of effectiveness. Our review of existing systems (See Chapter 3 and website Annex A) has uncovered limited evidence about the relative effectiveness of different hearing systems or their impact on public opinion. The notable exception is the largely favourable evidence supporting restorative justice (see page 18, above).

Human rights

An alternative hearing system should comply with Britain's domestic and international human rights commitments, including the Human Rights Act and the European Convention on Human Rights (including relevant case law), and the UN Convention on the Rights of the Child. It should also take account of principles set out in instruments such as the UN's 'Beijing Rules' and 'Riyadh Guidelines'. The design requirements that arise from these obligations include:

- avoiding judicial proceedings by using diversionary interventions wherever appropriate
 - maintaining a presumption of innocence until proven guilty (with guilt needing to be proved in contested cases beyond reasonable doubt)
 - ensuring that criminal charges are determined without unreasonable delay (requiring procedures that are as simple and straightforward as is consistent with the other requirements)
 - minimising the use of detention following arrest and remands in custody
 - the ability for children and young people to participate effectively in the process (taking account of age, maturity and intellectual and emotional capacities, and taking active steps to promote their ability to understand and participate in the proceedings)
 - ensuring that the best interests of the child are a primary consideration in all decision-making
 - giving children and young people the right to legal and other appropriate assistance, which is free where the interests of justice require it
 - respecting children and young people's privacy at all stages (which means there can be no public identification of children or parents).
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Proportionality

The reformed system should be proportionate in both its process and outcomes. To achieve this, we anticipate that a community hearing would automatically be used in preference to court. Exceptions would be: if a trial was needed to decide issues of innocence or guilt; the offences charged were extremely serious; or a young offender declined to take part in the alternative hearing or persistently and wilfully failed to comply with its requirements. Moreover, compulsory interventions or sanctions should be proportionate to a child or young person's offending behaviour and any non-compulsory welfare interventions should be proportionate to their needs.

It is also important that the introduction of a community hearing should not lead to very minor offending being inappropriately 'escalated' into the new system. Nationwide adoption of 'triage' procedures by YOT workers in police stations would provide a valuable filter to prevent this from happening. Existing pre-court options for under-18s – restorative cautioning, reprimands, final warnings – should become reusable for minor offending behaviour, without automatic escalation to the next level. Each case should be considered on its own merits, including whether or not it is part of a persistent offending pattern.

Understanding and participation

Children and young people must be able to understand and participate effectively in the new hearing, as must their parents and carers. Children and young people should, so far as possible, be given a central role in explaining and understanding the circumstances of an offence and discussing solutions. Parents and carers should be actively involved.

The hearing procedures and the training given to those conducting it would need to emphasise the importance of language, pace, tone and style, adapting proceedings to suit the child's capacity to understand

rather than vice versa. Advance consideration should always be given to whether legal representation is necessary to ensure effective participation and whether a family friend, youth advocate or intermediary is needed to aid understanding.

Cost

The community hearing should, so far as possible, be cost-effective and either cost neutral or cost saving compared with youth court proceedings, in the medium term at least. This highlights a need to avoid unnecessary use of the new procedures (for example, for minor offences that could be better dealt with through police and YOT-organised diversion) and not using the youth court when the hearing provides a suitable alternative.

Referral arrangements should be kept simple to avoid switching cases back and forth between diversionary interventions, the hearing and court. Significant cost savings could be achieved if the reformed system indirectly led to reductions in the use of custody (and, in a smaller way, if it resulted in greater use of reparative interventions and sanctions).

Groups and families

Offending labelled and processed as 'antisocial behaviour' is frequently a group phenomenon, and other crimes committed by children and young people can often be joint offences. Existing youth justice processes can substantially deal with these – through joint police investigations, charges and court hearings with common evidence. However, neither restorative youth conferencing nor lay criminal justice panels would offer an ideal response to group offending because of their central emphasis on exploring the circumstances, motivations and rehabilitation of individuals. They could make use of common offence information from the police and victims, but would, nevertheless, need to run separately for each child or young person.

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Restorative youth conferencing and lay panels would, however, be well suited to tackling wider family issues linked to offending. Parents, and other family members and friends where appropriate, should be treated as vital to the diagnosis of problems and negotiating the responses (including elements in a plan that they can oversee or implement themselves). Parents and other suitable adults should be encouraged to attend and prepared (through pre-meetings) to play a full part in conferences or panels.

Non-discrimination

A reformed system must deal with children fairly and without discrimination in respect of gender, race, disability, religion, sexuality and socio-economic background (without prejudice to any special arrangements needed on grounds of, for example, individual age, capacity, developmental delay, communication difficulties or mental health). Consequently, the hearing or conference must consider beforehand any specific needs relating to a child or its parents in respect of diversity and ensure that they are met. Examples would include ensuring the accessibility of the meeting for those with physical or learning disabilities, providing a child advocate or intermediary where there are communication difficulties, showing sensitivity to the privacy of information about the child's or parents' sexuality, and considering the need for flexible scheduling of the meetings to allow respect for the religious practices of those attending.

Accountable professionals

Those working with the new system will need to include professionals who are accountable for the child's completion of commitments and requirements, and for the child's progress. We suggest that a named, lead professional should be given responsibility for overseeing every plan that emerges from a youth conference or lay panel and that he or she should systematically monitor its implementation. The lead professional should report back to the hearing on

progress and any steps that have been required to remedy poor progress. He or she should also have a statutorily-backed entitlement to co-operation from professionals in other agencies with a stake in the child or young person's plan.

The local YOT would be the obvious agency to provide lead professionals. More generally, the organisation running conferencing or a lay panel system should be required to monitor the success and failure rates of plans, investigate the reasons and periodically report publicly on the data and surrounding issues.

Removing system barriers and promoting re-engagement

The operations and powers of the community hearing should, so far as possible, be designed to remove barriers to children and young people's continuing education, employment and other opportunities. They should specifically aim to promote the re-engagement of disengaged children with services such as mainstream education. One important design point would be to ensure that – as with existing Referral Orders – successful completion of a plan agreed by the hearing will ensure that any criminal record does not have to be disclosed to a potential employer, trainer or educational institution. But we also suggest that education, training and employment services are actively involved in case assessment and preparation for conferences or lay panels and – where appropriate – in the hearings themselves.

Actions, support and supervision

A youth conference or lay panel will need a range of actions, support and supervision options – which can be considered for inclusion in individual plans, though the latter need always to be voluntary and developed from what is said in the meeting, not pre-determined. This leads to three specific design points. The menu needs to embrace reparative actions, adult supervision, non-residential activities and programmes, restrictions

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on conduct or whereabouts and (subject to explicit parental consent or child consent where over the relevant age), mental health and substance misuse treatment and parental actions. All conference or panel actions would need to be negotiated; imposition of actions or any alteration to agreed ones could only follow a court hearing. Linked to that, intrusive interventions – electronic tagging and custody – would need to be reserved for court use and subject to tight statutory criteria.

Remands

A conference or lay panel meeting would be designed to negotiate, not impose, actions in response to offending. It would not require any powers of its own to remand children or young people in custody. Remands in custody should remain a matter for the courts and should apply only in cases of immediate and severe risk to the public of serious harm that could not be addressed by other measures. As now, the police should be able to release children and young people on bail with negotiated conditions. If, exceptionally, a child was thought to be at risk of harm, existing emergency child protection powers could be used to place him or her in a local authority secure unit for up to 72 hours.

Young adults

We think there is an argument for including less mature young adults, aged 18 to 20, in reformed youth justice arrangements. However this could best be considered after new hearing arrangements were operating smoothly for juveniles. Efforts to assess relative maturity could require time-consuming psychiatric or psychological assessments if they were to avoid the somewhat superficial and inconsistent decision-making that occurs in Germany (see above).

Sponsorship and administration

We suggest that youth conferences or lay panels could best be sponsored by local authorities. The lay members or facilitators should be statutorily independent, but local

authorities would provide the necessary administration and staff in YOTs or children's social services would be responsible for case handling and supervision.

Local responsibility for the operation of conferences or panels would provide appropriate financial incentives and devolution of control. However, given its high profile role in the national response to offending, any restorative youth conferencing or lay panel system would need to operate consistently. Statute law and regulations should specify its basis, structure, main procedural requirements and quality standards.

Implications for existing youth justice services and the courts

Having narrowed the choice of an alternative hearing system to two options – restorative youth conferencing and lay youth justice panels – we carried out a comparative assessment of what the two might look like in practice. The detailed results of this analysis can be found in a tabular format in website Annex B (www.youthcrimecommission.org.uk/index.php?option=com_content&view=article&id=95&Itemid=90). This confirms that either option could structurally be fitted into the existing England and Wales youth justice system, and substantially meet the design requirements set out in the previous section.

Although we have concluded that they are alternative models (and would not easily lend themselves to a merged or twin-track process) their relationship to existing youth justice services and the courts would be similar. Each would operate as an administrative process within the youth justice system; each would occupy a similar position in relation to pre-court and court processes:

- when a child or young person is accused of committing an offence, the police would first need to consider whether a preventative, informal or formal pre-court response would be appropriate. If

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considering referral for prosecution, they would consult a YOT 'triage' officer who would make an assessment and recommend whether the child or young person should be referred to a preventative service, considered for a formal reprimand or warning, or referred to the Crown Prosecution Service (CPS)

- the CPS would decide whether the case was, in principle, prosecutable. If prosecution was considered possible (ie the evidential and public interest tests in the Code for Crown Prosecutors were passed) and the child or young person admitted the offence, the case would be referred to the alternative hearing (whether a restorative youth conference or a lay community panel) for diversionary action. However, in the case of restorative youth conferencing it would also be necessary for the child or young person to agree to take part in the restorative process. If they refused, the CPS would need to decide whether to proceed with prosecution or with some other form of diversion (such as the Youth Conditional Caution). Special arrangements could be made for specified, very serious offences such as homicide and rape, so that charge and prosecution would remain possible even where offences were admitted
- where a case was referred to the alternative hearing, it would run a participative, diagnostic and problem-solving process with all relevant parties and seek to negotiate with the young offender and his or her parent(s)/carer(s) a plan of action relevant to the offence and the needs of the victim and/or the affected community. (In the case of youth conferencing, the victim or their representative would be included in the negotiation). The agreed plan would need to be ratified by the CPS, but if approved and successfully completed, there would be no prosecution. The record of the offence would be disclosable only in subsequent youth justice proceedings
- if a child or young person denied an alleged offence then he or she would go to the youth court for trial. Young offenders who pleaded guilty in court or were convicted after trial would still be sentenced to referral to the new hearing and negotiation on an action plan that would be ratified by the court, provided that in the case of youth conferencing, they accepted the facts of the offence at that point and agreed to participate in the conference. Otherwise they could be sentenced by the court, as now. If an action plan could not be agreed or was wilfully and persistently breached, the case would return to the court.

Youth courts

The introduction of an alternative hearing in the form of restorative youth conferencing or a lay panel would have important implications for both the existing youth court and the prosecution of children and young people in the Crown Court. In particular, the CPS would send cases to the youth court:

- where a child or young person denied the accusation against them
- where a conference or lay panel could not reach agreement with the child or young person on a suitable plan of action
- where an agreed plan had not been satisfactorily completed by the child or young person and this could not be resolved by the conference/panel (ie cases of wilful and persistent breach).

It follows that the youth court would fulfil an important, though somewhat different, role as part of a reformed system. It would conduct trials, oversee cases that it referred to the new hearing and deal with very serious offences and any other categories of case that were excluded from the new hearing (for example, regulatory offences).

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Although youth courts are given guidance about suitable layouts, language and pacing of proceedings for children we know that practice varies. More work is needed to improve children and young people's participation in youth court proceedings. We accordingly recommend that further changes should be made to youth courts:

- members of the community should be specifically selected and trained for the lay youth magistracy. Youth magistrates should not have previously served as adult magistrates although Family Proceedings Court experience may be considered helpful. After appointment there should be opportunities for 'cross-sitting' between youth court and Family Proceedings Court benches
- a similar requirement to specialise should apply to District Judges
- there should be a statutory requirement for simple language and matching the proceedings to the individual, including appropriate prior assessment of children with difficulties
- weekend and evening sittings should be instigated to suit children's and parents'/carers' needs
- there should be a flexible choice of venues for court sittings, subject to the need in some cases for separation of defendants, families, victims and/or witnesses
- referral to restorative conferencing before or even after sentencing for very serious offences should be considered in appropriate cases.

Despite these changes, some children and young people will still be unable to participate effectively in hearings because they lack the personal capacity to understand and engage with the issues and implications. These children should be identified through prior assessment of their individual capacities. Where there are doubts about the child's ability

effectively to participate in a court hearing or a youth conference/lay panel, he or she should be diverted to the family courts. Where children and young people could effectively participate in the court hearing/conference/lay panel hearing if adaptations are made, the court should consider what steps are needed to ensure a fair hearing. These should be based on new guidelines that should be prepared in consultation with experts on mental health, learning disability and communication difficulties.

Antisocial behaviour proceedings in magistrates' courts

In the previous chapter, we suggested that antisocial behaviour within the criminal law should be dealt with through the new community hearing, backed up, as necessary, by the youth court. However, it is possible that some children could still face proceedings over behaviour that is antisocial, but not criminal; for example, noise nuisance and trespass. While we would hope that recourse to a court can usually be avoided in such cases (through the use of informal measures such as mediation and acceptable behaviour contracts), civil proceedings that do take place should model themselves upon the reformed youth court in terms of ensuring participation and understanding through measures appropriate to the child's age and developmental maturity.

Crown Courts

European Court of Human Rights judgements in 1999 and 2004 found the Crown Court process was unfair to younger and learning disabled children because it did not promote or ensure their ability to understand the proceedings, participate effectively or recognise the significance of the penalties which might result. While trials have since been modified – for example through removal of wigs and gowns by lawyers and more breaks in proceedings – we consider that the basic Crown Court process remains unsuitable for

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children. This is due, *inter alia*, to oppressive courtroom venues, a large adult presence (including a full jury of 12 for trials) spectators in the public gallery and a lack of specialist lawyers and other staff, including judges, who are trained to work with children and young people.

We therefore believe that no child should be sent to the Crown Court. For the most serious cases the adult Crown Court should be replaced by a trial in the youth court presided over by a 'ticketed' Crown Court judge with specialist training in youth issues. The court would sit in youth court venues and adopt its recommended layout, language and style of operation. In disputed cases a jury would be used, but the number of jurors could be smaller than that in the Crown Court so as to reduce the adult presence in the courtroom.

Prosecutors and defence lawyers should receive specialist training, and the child should be assessed in order to determine whether their age or any mental health, capacity or communication issues require a further adaptation of proceedings.

In the small minority of cases where a child is co-charged with an adult, the first consideration should be whether grounds exist for charging the adult with child exploitation offences, in respect of involving a minor in crime. Child protection proceedings should also be considered. Children and adults should otherwise be tried separately, unless a specialist Crown Court judge decides after hearing representations from the parties that this would prejudice a fair trial. If a joint trial is unavoidable, it should take place in the 'youth' Crown Court.

5. Final recommendation and implementation issues

We have concluded that a system of restorative justice using youth conferencing would provide the best form of alternative hearing for children and young people in England and Wales who admit or are convicted of offences.

We consider that restorative youth conferencing provides a better fit than a lay youth justice panel with the various principles and objectives we identified for a reformed system at the start of the report. In particular, we favour the role that it accords victims in helping children and young people to understand the human consequences of their offending and to make amends.

We have also found that it is better evidenced. The international research evidence is generally supportive and, in the words of one major review: "...more extensive and positive than it has been for many other policies that have been rolled out nationally".³⁹ Beyond that, we have examined in detail the evidence from research and practice in Northern Ireland, where a system of restorative youth conferencing has been successfully introduced as the key component of a youth justice system that, until seven years ago, resembled the system in England and Wales.

From our observations and investigations in Northern Ireland we consider that restorative youth conferencing offers a better way to work with children and young people who offend, making it less likely they will be reconvicted and exerting downward pressure on the use of custody. We also conclude, from the cost comparisons available, that restorative youth conferencing has the potential to prove cost-effective in England and Wales compared with the existing system.

Piloting and preparation

Primary and secondary legislation would be needed to introduce restorative youth conferencing across England

and Wales as a whole. However, as soon as policy decisions have been taken in principle, we would like to see full advantage being taken of opportunities to pilot relevant changes within existing law. The intention would be to refine and improve the operational design before introducing any legislation. It would also create an early opportunity for greater diversion of cases involving children and young people and the modernisation of trial and sentencing procedures.

The piloting opportunities would include:

- nationwide adoption of YOT 'triage' officers assigned to police stations, to advise on the most suitable options for dealing with young people under 18 who have been charged with offences
- changing the appointment and training procedures for youth court magistrates, introducing a greater range of times and venues for court hearings and making hearings more accessible for children, young people and their parents
- changing the style of antisocial behaviour hearings in magistrates' courts so that they only take place before specialist youth magistrates, and follow other procedures designed to engage children, young people and parents and to make them more accessible.

Recruitment and training

The examination of successful restorative justice models in Northern Ireland and elsewhere suggests that investment in the skills and qualifications of key personnel is crucial to the quality of process and outcome of any restorative youth conferencing system. The personal and emotional state of the victim and the child or young person are major considerations when arranging a conference, and success frequently depends on the quality of the conference facilitator's

³⁹ See Sherman, LW & Strang, H (2007) *Restorative justice: the evidence*. London: The Smith Institute

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preparations and the skills they deploy in the conference itself.

We recommend that the training programmes, professional standards and new qualifications needed to introduce restorative youth conferencing in England and Wales are set firmly within the integrated framework of training and qualifications for the children's and young people's workforce. Training should build on a 'common core' of skills and training for all children's professionals, including an understanding of child development and the duties and practicalities of child safeguarding. In Northern Ireland, completion of an accredited training and qualification framework, developed by the University of Ulster, has been made a requirement for all conference facilitators. It is being rolled out in modules to support wider implementation of restorative justice skills when working with children and young people. We would advocate a similar approach to reforms in England and Wales.

Monitoring

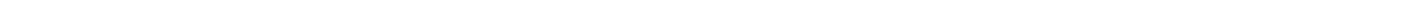
It will be important to ensure sustained learning from experience of restorative youth conferencing – its successes and failures – through regular collection and use of local management information and the organisation of inter-professional and inter-service overviews of case outcomes. That way, improvements can be made to local procedures, training and interventions; although we would also recommend that area-based and nationwide performance statistics are collated and published nationally. Such monitoring needs to be built into the initial design of the new operational arrangements so that the system can produce the necessary information efficiently, as a by-product of its normal operations.

We further suggest that the process of learning from operational experience should include all the services that have an actual or potential part to play in dealing with children in trouble with the law. That way desirable

'whole case' accountability can be achieved for working together to make necessary improvements to the overall response.

Evaluation

We also recommend that the new system is independently evaluated to high, academic standards. This would seek to capture the learning from implementation of the new system as well as reporting on relevant issues like caseloads, stocks and flows of the system. It would investigate the offending, characteristics and background circumstances of young offenders and their families. It would also report on the circumstances of victims. Key issues to be examined would be the outcomes achieved by the reformed system for children and young people, for their victims and for the wider community. The evaluation would also assess the extent to which the objectives defined at the start of this report were being met.





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