18 December 2008

Dear Colleague

CONSULTATION PAPER ON PRINCIPLES OF SENTENCING FOR YOUTHS

The Sentencing Advisory Panel has been asked by the Sentencing Guidelines Council to produce advice on the principles that should guide courts when sentencing those under the age of 18 convicted of a criminal offence. This consultation paper follows the recent Panel consultation *Overarching Principles of Sentencing,* which similarly considered a wide range of issues of general principle relating to the sentencing of adult offenders

Parliament has recently revised the framework within which young people are sentenced. The Criminal Justice and Immigration Act 2008 creates the youth rehabilitation order, a generic community sentence within which a court may impose one or more of a range of requirements. Some of these are primarily punitive and some primarily rehabilitative whilst others are designed primarily to protect the public from further offending. Parliament has also made it clear that a custodial sentence may be imposed only as a measure of last resort by setting out in statute additional criteria that need to be satisfied before such a sentence is available.

After briefly describing the background to sentencing of young people (which has developed over time in England and Wales and has taken account of our obligations under international directives and the experiences of other jurisdictions), the paper examines a range of issues that will need to be addressed as a consequence of the new framework. Key aspects of current sentencing practice are followed by a series of questions seeking consultees' views.

Many of the changes introduced by the 2008 Act are achieved through amendments to the Criminal Justice Act 2003 or the Powers of Criminal Courts (Sentencing) Act 2000. To assist respondents, the Panel has included (at Annex A) the key provisions in the 2000, 2003 and 2008 Acts as they will be once the amendments in the 2008 Act have been brought into force.

The Panel understands that the Council guidelines on this topic will be an important element in the training that needs to be provided for sentencers and practitioners prior to implementation of the youth rehabilitation order and other major changes. Accordingly, we have set ourselves challenging deadlines and invite consultees to respond as soon as possible and, in any case, before Monday 23 March 2009.

The Panel is anxious to receive as many views as possible on all of the questions posed in this paper; however, we are aware that the number of topics covered is very wide and that some of them are more technical than others. Please feel free to respond to those questions which are most relevant to your area of expertise or interest.

Please send your response to Mrs. Lesley Dix, Secretary to the Panel, at the Sentencing Guidelines Secretariat, either by post to 4th floor, 8-10 Great George Street, London, SW1P 3AE, or by email to info@sentencing-guidelines.gsi.gov.uk. **Responses should be received by 23 March 2009.**

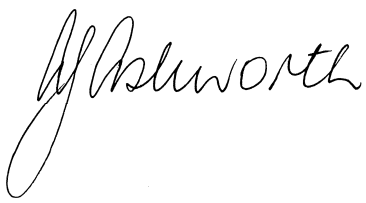
The names of those who respond to Panel consultation papers are listed in the published advice to the Sentencing Guidelines Council. **If you do not want your name to appear on the list, please state this clearly and your response will be recorded only as one of a given number of confidential responses; please note that an automatic confidentiality disclaimer generated by your IT system will not suffice.** Anonymous responses are also welcomed, although these are less helpful in allowing the Panel to understand the background to the views submitted.

Responses to consultation papers are not routinely published but the Freedom of Information Act 2000 (FOIA) places an obligation on the Panel to release all responses upon request, **including those submitted 'in confidence' or anonymously**. Under the Act there is a statutory Code of Practice on confidentiality with which public bodies must comply and, whilst we would take full account of any reasons given for regarding information as confidential, absolute confidentiality cannot be guaranteed.

Where a response from a private individual is to be released, the name, contact details and anything else that would obviously reveal the identity of the sender will be removed in accordance with the requirements of the Data Protection Act 1998.

Where a response submitted on behalf of a group, organization or public body is to be released, the name of the individual submitting the response will be removed but the identity and contact details of the group, organization or public body will remain.

Yours sincerely



Professor Andrew Ashworth
Chairman, Sentencing Advisory Panel

SENTENCING PRINCIPLES – YOUTHS

CONSULTATION PAPER

INTRODUCTION

1. The Sentencing Guidelines Council has sought the advice of the Sentencing Advisory Panel on principles relating to the sentencing of young people (aged 10-17 inclusive) who offend. This important issue was identified as part of the Council and Panel's work programme but has been awaiting the enactment of the revisions to the sentencing framework now contained in the Criminal Justice and Immigration Act 2008. For ease of reference, the relevant provisions can be found at Annex A. Those from the Criminal Justice Act 2003 and Powers of Criminal Courts (Sentencing) Act 2000 incorporate the amendments made by the 2008 Act (although they are not yet in force).

2. This paper briefly explores the development of the youth justice system in England and Wales; it then considers the wider context of sentencing of young people in the light of international conventions and their application in other jurisdictions before setting out in more detail the approach to sentencing under the current sentencing framework. Finally, the paper explores the implications of the impending legislative changes and seeks consultees' views on a range of issues.

DEVELOPMENT OF THE YOUTH JUSTICE SYSTEM IN ENGLAND AND WALES

3. The separation of youths from adults for the purpose of dealing with criminal offences has a long history. This was already well established by the end of the 19th century. The initial Summary Jurisdiction Act 1879 provided for juveniles below 16 years of age to be tried summarily for almost all indictable offences, keeping them away from the more serious of the adult criminals being dealt with at Quarter Sessions and in the Assize Courts.

4. At the initiative of local magistrates, separate courts were set up for juveniles in some cities. At the same time, some basic child protection legislation was introduced, as were alternatives to imprisonment through "reformatories" and "industrial schools".

5. Many of these initiatives were consolidated and expanded in the Children Act 1908, in particular establishing separate courts for juveniles that had to be held in a separate building or at a separate time from courts dealing with adult offenders. The Children and Young Persons Act 1933 established a requirement for magistrates dealing with juveniles to possess special qualifications and established as a statutory principle the obligation to "have regard to the welfare" of the child or young person (see paragraph 36 below).

6. The new courts became the forum for dealing with both criminal and care proceedings involving young people. The Children and Young Persons Act 1969 set out to expand this separation even further, in particular providing for an increase in the age of criminal responsibility from 10 to 14 years and providing for what has been called a "decriminalisation" of the juvenile court.[1] However, this particular provision (and a number of other significant provisions) was never brought into force.[2] Care proceedings moved to the new Family Proceedings Courts following the Children Act 1989; whilst such a court may direct a local authority to conduct an investigation as to whether proceedings (or support or assistance) are necessary,[3] no such power has been given to a youth court.

7. The majority of criminal cases against young people are now sentenced in a youth court where the tribunal will consist of magistrates or a District Judge (Magistrates' Courts) who have undertaken additional training. Cases appear for sentence in the Crown Court primarily where the young person has committed a "grave crime" and a youth court considers that sentence within the powers of the Crown Court may be necessary, where the young person may meet the criteria for a sentence under the dangerous offender provisions, or where the young

[1] See, for example, *On the decriminalisation of the English Juvenile Court* A. Bottoms, in *Crime, Criminology and Public Policy* (ed. R. Hood, 1974)

[2] A key stage was the identification of five critical outcomes for young people in *Every Child Matters*. Two of those outcomes – Making a positive contribution and Staying Safe – are especially pertinent in relation to criminal justice: *Every Child Matters: Change for children in the criminal justice system* DFES-1092-2004: http://publications.everychildmatters.gov.uk

person has been sent to the Crown Court as a result of being associated with an adult offender whose case has been committed to that court (see paragraphs 169-186 below).

8. The response to young people who offend has increasingly been a subject of public debate and political concern. A recent survey commissioned by Barnardo's reported that "49% of people agree that children are increasingly a danger to each other and adults" and that the same proportion "disagree with the statement that children who get into trouble are often misunderstood and in need of professional help".[4] This may not be surprising given the level of publicity that surrounds the small number of serious crimes committed or the gang culture that is prevalent in some areas and the limited reporting of the much higher proportion of young people who play a full and active role in their communities.[5] In 1998, an academic commentator asserted that "the sentencing of young offenders continues to enjoy (or, perhaps better, to endure) a rapidity of change and innovation not found in the rest of the system. It is as if the sentencing of young offenders represents an experimental laboratory where new ideas flourish with little regard to research findings, still less to any theoretical or conceptual framework".[6] Whilst the rate of change has continued apace since then, it may be that the changes introduced by the 2008 Act will start to provide much needed stability.

INTERNATIONAL OBLIGATIONS

9. Alongside developments in domestic law, there are a considerable number of international instruments to which the courts in England and Wales must have regard. The earliest of these was the League of Nations Declaration of the Rights of the Child (the Declaration of Geneva) in 1924. In the second half of the 20th century, various international instruments were ratified, some arising from the United Nations and others from the Council of Europe. Those with the greatest impact on domestic law have been the UN Convention on the Rights of

[3] Children Act 1989, s.37
[4] Barnardo's 17 November 2008
[5] *2005 Citizenship Survey: Active Communities Topic Report* 2006 Department for Communities and Local Government
[6] L. Zedner, *Sentencing Young Offenders* in *Fundamentals of Sentencing Theory* (ed. A Ashworth and M. Wasik, 1998)

the Child[7] and the European Convention on Human Rights,[8] both of which are concerned with issues wider than just criminal conduct by young people.

10. The one international instrument that is solely concerned with children who commit criminal offences is the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) which were adopted by the United Nations in 1985. These rules provide a detailed framework that sets out the standards to be met by a youth justice system at each stage of the process of dealing with a child who commits a criminal offence. Further provisions have been set out in the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh guidelines)[9] and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules).[10]

11. Considerable emphasis has been placed on developing a strategic approach to tackling juvenile delinquency, with the principal aims being the prevention of offending and reoffending, (re)socialising and (re)integrating young offenders and addressing the needs and interests of victims. In 2003, the Council of Europe Committee of Ministers formally set out these aims and recommended both that resources should be targeted towards addressing "serious, violent, persistent and drug related and alcohol related offending" and that "interventions with juvenile offenders should, as much as possible, be based on scientific evidence on what works, with whom and in what circumstances".[11]

12. In relation to addressing serious, violent and persistent juvenile offending, the Committee recommended the development of "a broader spectrum of innovative and more effective (but still proportional) community sanctions and measures, which should address directly both the behaviour and the needs of the offender. They should also involve the offender's parents and, where possible and appropriate, deliver mediation, restoration and reparation to victims".[12]

[7] www2.ohchr.org/english/law/crc.htm, entry into force 2 September 1990
[8] www.hri.org/docs/ECHR50.html#Convention
[9] General Assembly resolution 45/112 of 14 December 1990; www.unhchr.ch/html/menu3/b/h_comp47.htm
[10] General Assembly resolution 45/113 of 14 December 1990; www.unhchr.ch/html/menu3/b/h_comp37.htm
[11] Recommendation (2003)20, adopted on 24 September 2003, www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2008/rapport2008_en.pdf

13. The Convention obligations have been adopted in many European states but different approaches have been developed, some leaning towards a more individualised approach and others towards a more justice-based model. The overarching dilemma has been whether to regard the offender essentially as a criminal to be held responsible (albeit with some concessions for youth) and punished accordingly or whether to give wider consideration to the young person's problems, character and potential in a markedly different way. In England and Wales, the latter approach was most clearly seen in developments up to and including the Children and Young Persons Act 1969; subsequently, the movement was more towards the former, more punitive, approach but now, by virtue of the provisions in the 2008 Act, the approach seems likely to settle somewhere towards the middle ground.

14. In 2006, the Council of Europe Commissioner for Human Rights, Thomas Hammerberg, noted that there was a popular, but inaccurate, perception that a large proportion of crimes are committed by teenagers and that juvenile delinquency on the whole is getting worse.[13] Juvenile crime rates, he stated, remain more or less stable although there was "a worrying trend reported from several countries that some crimes committed by young offenders have become more violent or otherwise more serious".[14] The Commissioner had identified two trends in response to that perception, one to lock up more children at younger ages, the other to avoid criminalisation and to seek family-based or other social alternatives to imprisonment.[15]

15. Attention was also drawn to the consequences of the UN Convention on the Rights of the Child[16] which provides that criminalisation of children should be avoided. The Commissioner asserted that "this did not mean that young offenders should be treated as if they have no *responsibility*. On the contrary, it is important that young offenders are held responsible for their actions and, for instance, take part in repairing the damage that they have caused. … [P]rocedures should recognise the damage to the victims and .. make the young

[12] ibid., para. 8
[13] See also para. 8 above.
[14] It is widely recognised in England and Wales that a substantial proportion of youth offending at any one time is committed by a relatively small number of youths.
[15] Speech to Conference of Prosecutors General of Europe, Moscow, 5-6 July 2006, https://wcd.coe.int/
[16] www2.ohchr.org/english/law/crc.htm, entry into force 2 September 1990; see paragraph 9 above

offender understand that the deed was not acceptable. Such a separate juvenile mechanism should aim at recognition of guilt and sanctions which rehabilitate. .. In juvenile justice, there should be no *retribution*. The intention is to establish responsibility and, at the same time, to promote re-integration. The young offender should learn the lesson and never repeat the wrongdoing. … [W]e know that depriving children of their liberty tends to increase the rate of reoffending. The only reason for locking up children is that there is no other alternative to handle a serious and immediate risk to others."

AGE OF CRIMINAL RESPONSIBILITY

16. The approach in England and Wales is characterised by a relatively low age of criminal responsibility (10 years). A survey of 85 jurisdictions identified three countries with no minimum age of criminal responsibility;[17] amongst the others, the range was from 6 years to 18 years and the most common age was 14. Amongst European countries, most set the age of criminal responsibility between 14 and 16 years[18] and use exclusively civil and/or welfare proceedings before that age.

DETENTION OR IMPRISONMENT AS A MEASURE OF LAST RESORT

17. The approach in England and Wales is also characterised by a relatively high use of custody (both as a sentence and for remand).

a. Obligations

18. As regards young people in detention, the Convention obligations[19] require that:

- detention should be used as a measure of last resort and, where used, it should be for the shortest appropriate time;
- a child should not be subjected to cruel, inhuman or degrading punishment;
- every young person who is in detention has the right to maintain contact with his or her family;
- the detention of young people should be near their home;

[17] Brunei, Panama and Saudi Arabia
[18] *Cross-national scoping review of policy and practice in juvenile justice*, Neal Hazel, YJB 2008 www.yjb.gov.uk
[19] UN Convention on the Rights of the Child: www2.ohchr.org/english/law/crc.htm, entry into force 2 September 1990

- while in custody, juveniles should receive care, protection and all necessary individual assistance that they need in view of their age, sex and personality; and
- all personnel dealing with young people should be specially trained.

b. Interpretation

19. Different interpretations have been placed on the understanding of the concept that custody should be the "last resort" when sentencing a young offender. Whilst care needs to be taken because of different definitions in use in different jurisdictions,[20] there does appear to be a pattern in which the more "welfare influenced countries" have the lowest custody rate.[21] Those countries with the lowest ages of criminal responsibility tend to share the highest juvenile custody rates.[22]

20. Recognising that it is difficult to obtain figures that can be compared accurately given the different nature of responses to crime, the Council of Europe published figures based on the position in September 2002 which showed that England and Wales had 2,869 convicted persons under the age of 18 in a custodial establishment; this was 3.8% of the total prison population and 46.8 per 100,000 of the eligible population.[23] The number was exceeded only by the USA (104,413 – 336 per 100,000 of the eligible population) and by South Africa (4,158 – 69 per 100,000 of the eligible population).

21. More recent figures from the United Nations indicate that England and Wales has the highest incarceration rate in Europe for those aged below 18 years and, of those jurisdictions providing data, it was the fifth highest in the world behind the USA, South Africa, Belize and Swaziland.[24]

c. Nature of interpretation and effect: other jurisdictions

[20] for instance, in the use of places where young people are kept against their will which are not defined as "custody"
[21] *Penal Systems: a comparative approach* Cavadino and Dignan, London 2007 at p.301
[22] *The globalization of crime control – the case of youth and juvenile justice* Muncie, 2005, Theoretical Criminology, 9, 1, pp.35-64
[23] Since 2002, the number of young people in custody in England and Wales has been reducing: see Table B, page 27 below
[24] *The globalization of crime control – the case of youth and juvenile justice* Muncie (2005)

22. There have also been differences in the extent to which the principle of "last resort" has been integrated into both legislation and processes. In Finland, a 1989 law specified that young people should be imprisoned only if there are weighty reasons for imposing custody *other than the seriousness of the offence*. In Austria, the principle is reinforced by a legal rule that a court must consider the impact of a sentence on the offender's integration into society. However, the use of custody has reduced in a number of member states regardless of the extent to which the principle has been integrated; this is often related to reform of youth justice processes or disposals.

23. One of the more significant changes in a comparable jurisdiction occurred in Canada following the implementation of the Youth Criminal Justice Act in 2003. The Act sought to increase the emphasis on responding to crime by means other than criminal charges and to reduce the use of custodial sentences. Judges have to show that they have determined that there is no possible alternative(s) to custody before such a sentence can be imposed; in addition, the number of available community alternatives and the use of diversion have increased as have restrictions on remand.[25]

24. The statistical information for 2006/07 showed that the Act had achieved both aims with the number of cases coming before a court reducing by 26% and the number of custodial sentences reducing both in absolute terms (13,246 cases down to 5,640 cases) and as a proportion of convictions (27% down to 17%).[26] The most commonly occurring offences resulting in court proceedings were theft, common assault and burglary – markedly similar to experience in England and Wales (see paragraph 82 below). However, there has been a noticeable increase in the proportion of violent crime amongst youths which has risen 12% over 10 years whilst the overall violent crime rate for Canada has dropped by 4%.[27]

[25] A similar requirement will apply in England and Wales on the implementation of Criminal Justice and Immigration Act 2008 schedule 4, para.80; this amends the provisions in the Criminal Justice Act 2003 that require the giving of reasons so that a court imposing a custodial sentence will have to state why it is of the opinion that a youth rehabilitation order with intensive supervision and surveillance or fostering cannot be justified.
[26] Statistics Canada, Youth Court Statistics 2006/2007, Catalogue no. 85-002-XIE, Vol. 28, no. 4 www.statcan.ca
[27] Statistics Canada, Youth Crime in Canada, 2006, Catalogue no. 85-002-XIE, Vol. 28, no.3 www.statcan.ca

25. The debate about whether this approach is sustainable is very active and there appear to be wide differences in opinion and in the approach of the main political parties with some proposals for "stiff, automatic sentences for young offenders found guilty of serious, violent crimes".[28]

26. In many ways, the approaches adopted in Canada can be seen in those parts of the general approach in England and Wales that have resulted in the development of referral orders, parenting orders, the intensive supervision and surveillance programme, the youth rehabilitation order and the general approach of Youth Offending Teams. Similarly, the sanctions available to a court in Canada are comparable with those currently available in England and Wales; the two main differences are the power for the court to impose a "Reprimand" (essentially a stern lecture from the Judge) and a "deferred custody and supervision order" (essentially a suspended sentence order).

d. Nature of interpretation and effect: England and Wales

27. During the passage through Parliament of the provisions now enacted in the Criminal Justice and Immigration Act 2008, the Government emphasised the importance of custody being used as a last resort. In the Committee stage in the House of Lords, Lord Hunt stated "I hope I have made clear that the Government believes that custody is the last resort, that the construct of the youth rehabilitation order is to strengthen the whole community sentencing structure and that we see YROs[29] and the general policy direction we wish to see embraced as one where punishment can be constructive".[30]

28. In the Youth Crime Action Plan 2008,[31] the Government states that "When young people are found guilty of crime, they should receive a sentence which protects the public and punishes the offender but which also tackles their offending with the aim of preventing them doing it again".[32] The Plan emphasises the "key principle of sentencing that a young person should not be sent to custody unless the court is able to specify why dealing with him or her

[28] As reported in The Toronto Star, 7 October 2008 – www.thestar.com. The same newspaper had recently concluded an 8 part investigative series on *Crime and Punishment*.
[29] youth rehabilitation orders – see para. 33 below
[30] *Hansard*, 6 February 2008, col.1108
[31] Published July 2008, www.homeoffice.gov.uk/documents/youth-crime-action-plan
[32] ibid., para. 4.1

within the community is not appropriate";[33] when imposing a custodial sentence, a court is required to state the reasons why it is satisfied that the offence(s) was "so serious that neither a fine alone nor a community sentence can be justified".[34]

29. Similarly, the Plan states that "Most young offenders can be punished and dealt with effectively in the community".[35] Attention is drawn to a public perception that the youth justice system is too lenient whilst, having been given the full facts of a case, members of the public tend to choose a sentence less severe than that imposed by a court.[36]

IMPLICATIONS OF INTERNATIONAL OBLIGATIONS

30. Fulfilment of obligations under the various conventions is regularly reviewed and there have been a number of reports criticising the extent to which the law relating to young offenders in England and Wales breaches basic international instruments. In a report published on 3 October 2008,[37] the United Nations Committee on the Rights of the Child noted continuing concerns about the implementation by the United Kingdom of recommendations relating to juvenile justice. In particular, it was concerned:

a) that the age of criminal responsibility is set at 8 years in Scotland and 10 years for the rest of the UK,[38]

b) at the high number of children deprived of liberty which indicated that detention is not always applied as a measure of last resort,[39]

c) that the number of children on remand is high,[40] and

d) at the proposal in the Youth Crime Action Plan to remove reporting restrictions for 16 and 17 year olds facing criminal proceedings.[41]

[33] ibid. para. 4.2
[34] Criminal Justice Act 2003, s.174(2)(b)
[35] Youth Crime Action Plan 2008, para. 4.2 www.homeoffice.gov.uk/documents/youth-crime-action-plan
[36] ibid., para. 4.3
[37] www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf
[38] ibid., para.77(a)
[39] ibid., para.77(c)
[40] ibid., para.77(d)
[41] ibid., para.77(g)

31. The Committee made a number of recommendations through which the United Kingdom would be able to "fully implement international standards of juvenile justice".[42] These included establishing "the principle that detention should be used as a measure of last resort and for the shortest period of time as a statutory principle" and that "children in conflict with the law are always dealt with within the juvenile justice system and never tried as adults in ordinary courts irrespective of the gravity of the crime they are charged with".[43] The implications of these recommendations in relation to the approach to sentencing are considered further below.

32. The Committee also expressed concern[44] at the application of the anti-social behaviour order (ASBO) to children. Specific concerns included the broad range of prohibited behaviour, the fact that breach is a criminal offence with potentially serious consequences and that, instead of being a measure in the best interests of a child, an ASBO may contribute to the child's "entry into contact with the criminal justice system".

APPROACH IN ENGLAND & WALES TO YOUNG PEOPLE WHO COMMIT A CRIMINAL OFFENCE

33. The Criminal Justice and Immigration Act 2008 sets out the principles on which the sentencing of young people who offend should be based, provides for a single community sentence, the youth rehabilitation order, and increases the steps that need to be complied with before a custodial sentence is imposed. Section 9 of the Act inserts a new section 142A into the Criminal Justice Act 2003 setting out the purposes of sentencing in relation to an offender aged under 18; there are similarities and contrasts between these and the equivalent provisions for those aged 18 and above. In relation to those aged under 18, a court must have regard to:

(a) the principal aim of the youth justice system;
(b) the welfare of the offender; and

[42] ibid., para.78
[43] The Committee considered the information on which its report was based in September 2008; at this date, the relevant provisions in the 2008 Act were enacted but not in force. The Committee called for a further report by January 2014.
[44] ibid., para.79

(c) the purposes of sentencing. [45]

The purposes of sentencing listed for those aged under 18 are:

(i) punishment;
(ii) reform and rehabilitation;
iii) protection of the public; and
(iv) reparation to those affected by the offence. [46]

As with offenders aged 18 and over, no order of priority is given to these purposes in statute.

The principal aim of the youth justice system

34. Section 37 of the Crime and Disorder Act 1998 established that "the principal aim of the youth justice system…… is to prevent offending by children and young people".[47] The *Interdepartmental Circular on establishing youth offender teams* that accompanied the implementation of the Act stated[48] that this would be achieved through six objectives:

- the swift administration of justice so that every young person accused of breaking the law has the matter resolved without delay
- confronting young offenders with the consequences of their offending for themselves, their family, their victims and the community and helping them to develop a sense of personal responsibility
- intervention which tackles the particular factors (personal, family, social, educational or health) that put the young person at risk of offending and which strengthens "protective factors"
- punishment proportionate to the seriousness and persistence of offending
- encouraging reparation to victims by young offenders
- agreeing and reinforcing the responsibilities of parents.

[45] section 142A(2)
[46] section 142A(3)
[47] When in force, section 142A(2) of the Criminal Justice and Immigration Act 2008 will require a court dealing with an offender aged under 18 to have regard to this aim complementing the existing requirement in section 37(2) of the 1998 Act.
[48] published December 22 1998.

35. The National Standards for Youth Justice published by the Youth Justice Board and the Home Office in 2004 set out similar objectives stating that the "National Standards will help to ensure that all youth justice agencies fulfil [the principal] aim by:

a. preventing crime and the fear of crime by ensuring that services are targeted at children and young people at high risk of offending, and meet the needs of victims and communities;
b. ensuring that young people who do offend are identified and dealt with without delay, with punishment proportionate to the seriousness and frequency of offending; and
c. promoting interventions with young offenders that reduce the risk factors associated with offending, increase the protective factors and reinforce the responsibilities of parents."

The welfare of the offender

36. From its earliest days, the development of the system of responding to youth crime has mixed welfare and justice elements. The UN Convention on the Rights of the Child (see paragraph 9 above), Article 3, states "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best interests* of the child shall be a primary consideration". The "Beijing Rules" (see paragraph 10 above), Rule 5.1 states that "The juvenile justice system shall emphasize the *well-being* of the juvenile ..". Whilst the Convention makes it clear that a child's best interests are "a" primary consideration as opposed to "the" primary consideration, nonetheless those interests are a "primary" consideration.

37. The classic statement of welfare in domestic law is in section 44 of the Children and Young Persons Act 1933; this states that "Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the *welfare* of the child or young person, and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education

and training".[49] It is probable that no significant differences arise in practice from the use of different terminology – *best interests, well-being* or *welfare*. Since "welfare" is the term used in the legislation applicable to England & Wales, that is the term used in this consultation paper.

38. When determining any question with respect to the upbringing of a child or the administration of the child's property, the welfare of the child has to be "the court's paramount consideration".[50] However, criminal legislation requires a court to have regard to the welfare of the child alongside the principal aim of reducing offending and the other aims of sentencing set out in the 2008 Act (see paragraph 33 above).

39. In addition, in relation to section 44 of the 1933 Act, it is provided that the court must have regard to both the principal aim and the purposes of sentencing in determining whether to take the steps provided under that section (removing the offender from undesirable surroundings and securing proper provision for education and training).[51]

40. During the passage of the Criminal Justice and Immigration Act 2008 through Parliament, the Government was asked by the Joint Committee on Human Rights how it reconciled the various provisions in the Act with its obligations under Article 3 of the UN Convention on the Rights of the Child.[52] Having considered the response of the Government, the Committee concluded that the effect was to subordinate the child's best interests to the status of a secondary consideration below the primary consideration of crime prevention.[53]

41. The Government set out its position during the Committee Stage of the Bill in the House of Lords. Lord Hunt stated: "We have a justice system that exists to tackle crime and, at its heart, needs to address offending or reoffending behaviour. Of course, it is the duty of the court to take into account the needs and interests of victims and the wider community, as well as those of the

[49] When in force, section 142A(2) of the Criminal Justice and Immigration Act 2008 will require a court dealing with an offender aged under 18 to have regard to the welfare of that offender in accordance with s.44.
[50] Children Act 1989, s.1(1)
[51] CYPA 1933, s.44(1B) as inserted by Criminal Justice and Immigration Act 2008, s.9(3) when in force.
[52] See paragraph 36 above for the relevant terms of Article 3.

offender. We remain convinced that work to prevent offending must be in the young person's best interests".[54]

Purposes of sentencing - Deterrence

42. The purposes of sentencing to be contained in section 142A of the Criminal Justice Act 2003 (see paragraph 33 above) are similar to those set out for offenders aged 18 or over but do not include "the reduction of crime (including its reduction by deterrence)", presumably because the principal aim of the youth justice system is to reduce offending (see paragraph 34 above). Fulfilling the identified purposes will have the effect of reducing crime in any case (at least at the hands of the offender being sentenced), and reducing the risk of reoffending would generally be seen as contributing to the welfare of the offender, although any sanction imposed would need to remain proportionate to the seriousness of the offence.

43. As a general principle, deterrence is described both in terms of "individual deterrence", that is, using a sanction to deter the individual offender from further offending, and in terms of "general deterrence", that is, using the sanction imposed on the offender as an example intended to deter others who may be considering similar offending. All sentences are likely to have some deterrent effect and some claim that passing a sentence that is more severe than a proportionate sentence is likely to have a greater deterrent effect (so called "marginal deterrence").[55] However, there are disparate views both on the effectiveness of sentencing as a deterrent and on the justification for punishing an offender in a particular way because of its anticipated effect on other people. In relation to individual deterrence, there may be an overlap with the reduction in crime that results from incarceration since the particular offender is not at liberty to offend during that time.

44. In relation to young people who offend, there is further potential for conflict, between safeguarding the welfare of the offender and the principal aim of

[53] See the reference to this in the comments of Baroness Stern during the Committee Stage of the Bill in the House of Lords, *Hansard*, 6 February 2008, col.1100
[54] *Hansard*, 6 February 2008, col.1110
[55] The evidence for this is not strong: see *Making Punishments Work* Appendix 5, paras 47ff and Appendix 6 paras. 21ff, Halliday et al., Home Office, July 2001 www.homeoffice.gov.uk

preventing offending, since a sentence designed to deter offending by persons other than the offender may be different from the sentence that would result if based primarily on the welfare of the individual offender. Differing views on the relevance of deterrence in the sentencing of youths has been suggested as a source of disparity in sentencing.[56]

45. Whilst there is no consensus in research literature concerning the impact of deterrent sentencing on youths who offend, there appears to be a general assumption that when youths are considering whether or not to commit an offence "they lack the maturity to fully understand the consequences of their harmful acts" and, typically, they are viewed as "impulsive, inexperienced, emotionally volatile or vulnerable, and more easily influenced by negative family members, peers, negative culture values and poverty than older adolescents and young adults".[57]

46. An illustration of the effect of a wide range of factors on the decision to offend can be seen in relation to the offence of possession of a knife. Considerable emphasis has been placed on the deterrent effect of increasing the likelihood both of prosecution and of the imposition of a (longer) custodial sentence. However, the reasons for carrying a knife commonly cited include protection, fear and the anticipation of being attacked as well as experiences of personal victimisation. Where that accurately reflects the situation, the most effective way to reduce the number of young people carrying weapons is likely to be to focus on addressing those social factors; changes in prosecution or sentencing practice are likely to have a lesser impact.

Balancing the purposes of sentencing

47. Following implementation of section 142A of the Criminal Justice Act 2003 (see paragraph 33 above), a court will be obliged to have regard to the principal aim of the youth justice system (see paragraph 34 above), to the welfare of the offender in accordance with section 44 of the 1933 Act (see paragraph 37 above) and to the four further purposes of sentencing (see paragraph 33 above). There

[56] Doob and Beaulieu, *Variation in the Exercise of Judicial Discretion with Young Offenders*, (1992) 34 Can. J. Crim. 35
[57] Corrado et al., *Should deterrence be a sentencing principle under the Youth Criminal Justice Act* (2006) 85 Canadian Bar Review at p.548

will be occasions when all these obligations point in the same direction but there will also be many difficult balances to be drawn. For example, as noted above, under the terms of the 1933 Act having regard to the welfare of a child may include removing a child from undesirable surroundings.

48. The Panel considers it will be helpful to seek to identify those circumstances in which one aspect might have greater importance than others. In developing an approach that balances the purposes identified and enables a court to fulfil its statutory responsibilities, the key elements appear to be the age of the offender (chronological and emotional), the seriousness of the offence, the likelihood of further offences being committed and the extent of harm likely to result.

49. The younger an offender (taking account of maturity and not just chronological age) the more likely it is that considering the welfare of the young person will be of most significance. It is often stated that young people "grow out of" crime; sometimes linked to this is the suggestion that, in many cases, the obligation to have regard to the welfare of the young person who has offended is best manifested by protecting a child from the adverse effects of intervention in their life rather than by providing for some positive action. This becomes significant particularly where it might be suggested that a court should consider greater restrictions on liberty than is proportionate to the serious of the offence (perhaps because of other factors in the young person's life) or where a custodial sentence is under consideration.

50. In relation to custodial sentences, it is recognised that the reconviction rate is high but concerns are also expressed about the effect on vulnerable young people of being in closed conditions. In recent times, attention has been drawn to the risks of self harm and suicide and, in relation to female offenders, the additional impact on both the offender herself and on the child if the offender is the primary carer of a small child or is pregnant.[58]

51. As a general principle, where a young person has committed a relatively less serious offence but there is a high risk of reoffending, the sentence must

remain proportionate to the seriousness of the present offence (unless the criteria for a sentence under the dangerous offender provisions are met) and should not impose greater restrictions on liberty than the seriousness of the offence justifies simply to deal with the risk of reoffending.[59] Conversely, where an offender is identified as having no significant risk of reoffending, punishment and/or reparation are likely still to be relevant and to be the primary purposes of sentencing. For further discussion in the context of whether to impose a youth rehabilitation order, see paragraphs 128-141 below.

52. The proper approach is for the court, within a sentence that is no more restrictive on liberty than is proportionate to the seriousness of the offence(s), to seek to impose a sentence that fulfils the four objectives relevant to sentence that are set out in paragraph 34 above:

- confronting young offenders with the consequences of their offending for themselves, their family, their victims and the community and helping them to develop a sense of personal responsibility
- delivering an intervention which tackles the particular factors (personal, family, social, educational or health) that put the young person at risk of offending and which strengthens "protective factors"
- encouraging reparation to victims by young offenders
- agreeing and reinforcing the responsibilities of parents.

Question 1

Do you consider that the use of the terms best interests or well-being (see paragraph 37 above) signifies any difference in meaning from the use of the term welfare?

Question 2

In relation to balancing the purposes of sentencing, do you agree that the approach described in paragraphs 47-52 should be the general approach? If not, why not?

[58] *The Corston Report – a review of women with particular vulnerabilities in the Criminal Justice System*, March 2007, Home Office, www.homeoffice.gov.uk

[59] The importance of this approach has recently been emphasised by the Court of Appeal in *PGM* [2008] EWCA Crim 2319 where a custodial sentence on an adult offender was imposed for longer than it would otherwise have been in order to allow the offender to complete the Sex Offenders Treatment Programme; in reducing the sentence length the court affirmed the principle "as to not lengthening a sentence for the purpose of treatment".

EFFECT ON SENTENCE OF THE OFFENDER BEING A YOUNG PERSON

53. The concept of preventing offending by young people has many layers. For the offender before the court, it incorporates the need to demonstrate that such conduct is not acceptable in a way that makes an impact on the offender whilst also identifying and seeking to address any other factors that make offending more likely. For any victim of the offence and society as a whole, it incorporates the need to demonstrate that the law is being effectively enforced, to sustain confidence in the rule of law and to reduce the perception that it is necessary for an individual to "to take the law into his / her own hands".

54. In England and Wales, young people who offend are protected from the full severity of adult sentencing, at least to some degree, by the distinctive range of penalties available determined by age. There is also a broader expectation that a young person will be dealt with less severely than an adult offender, with this distinction diminishing as the offender approaches age 18 subject to issues of maturity and criminal sophistication. It is not always clear what the underlying rationale is but there appear to be two main aspects – one relates to the moral culpability of the offender, the other to the impact upon the offender of the penalty imposed.

55. In relation to moral culpability, young people are unlikely to have the same experience and capacity as an adult to realise the effect of their actions on other people or to appreciate the pain and distress caused. A young person is often seen as having less capacity to resist temptation, especially where peer pressure is exerted (see the earlier discussion at paragraph 44).

56. In relation to the impact of a penalty, in most cases a young person is likely to benefit from being given greater opportunity to learn from mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the young person, and, therefore, on the likelihood of effective integration into society.

57. Individual sanctions are also likely to have a greater impact on a youth than on an adult, especially lengths of time spent in a custodial establishment, not

least because of the exposure to influences likely to entrench criminal conduct (to which a young person may be more susceptible than an adult) and the greater risk of self harm than exists in relation to an adult.[60]

58. Research has consistently identified a range of factors that are regularly present in the background of those juveniles who commit offences. These tend to be: low family income, poor housing, poor employment records, low educational attainment, early experience of violence or abuse (often accompanied by harsh and erratic discipline within the home) and the misuse of drugs.[61] There is also some evidence that those young people who are "looked after" have been more at risk of being drawn into the criminal justice system than other young people acting in similar ways[62] not least because of the risks arising from mixing with offending peers, difficulties in management of challenging behaviour (and the possibility that a strict reaction to the "offender" will be seen in part to have a deterrent effect on others) and the lack of stability in care placements. It is estimated that 50% of young people in custody have lived in care or have had previous involvement with Social Services compared with 3% in the general population.[63]

59. Whilst it is clear that these factors do not cause delinquency (since many who have experienced them do not commit crime), nonetheless there is a strong association and any response to criminal activity amongst young people will need to recognise the presence of such factors if it is to be effective. It is estimated that 83% of young people in custody have been excluded from school (compared with 6% of young people in the general population),[64] 86% have engaged in substance misuse (compared with 21%),[65] 38% have been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) (compared with 6%),[66] and 31% have a recognised mental disorder (compared with 10%).[67]

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[60] Self harm by young people in custody is reported as 2,635 incidents in the year to the end of August 2008. This will include incidents where no treatment was required as well as more serious incidents. The number of young people self harming will be smaller than the number of incidents. *Data supplied by the Youth Justice Board from administrative systems through a self reporting system from secure establishments*

[61] See, for example, the range of approaches in the *Youth Crime Action Plan 2008* Chapter 5: www.homeoffice.gov.uk

[62] See, for example, *Care experience and criminalisation* The Adolescent and Childcare Trust, September 2008 www.tactcare.org.uk

[63] *Counting the cost, reducing child imprisonment* Nacro, 2003

[64] *Juveniles in custody* HM Inspectorate of Prisons, 2004

[65] *Substance misuse and the juvenile secure estate* YJB, 2004

[66] *Youth Crime Action Plan* Home Office, 2008

60. The YJB has a performance indicator which seeks to ensure that young people entering a secure facility are assessed for literacy and numeracy and that 80% improve by one level or more in literacy and/or numeracy from the level of need set out in the individual learning plan. This indicator applies only to those sentenced to a detention and training order of 6 months or more accommodated in a secure training centre (STC) or a secure children's home (SCH) or to those sentenced to 12 months or more accommodated in a young offenders' institution (YOI). For 2006/07, the level of assessment exceeded 95%; the level of improvement exceeded 80% in both STC and SCH but was only 36% in YOI. Since literacy and numeracy skills are likely to be highly significant in gaining employment on release, the achievement of further improvements should be a high priority.

61. In summary, the factors that are most commonly regarded as having the potential to influence the penalty imposed include:

- offending by a young person is frequently a phase which passes fairly rapidly and therefore reaction needs to be kept well balanced in order to avoid alienating the young person from society;
- a criminal conviction at this stage of a person's life may have a disproportionate impact on the ability of the young person to gain meaningful employment and play a worthwhile role in society;
- the impact of punishment is felt more heavily by young people in the sense that any sentence will seem to be far longer in comparison with their relative age compared with adult offenders;
- young people may be more receptive to changing the way they conduct themselves and be able to respond more quickly to interventions;
- young people should be given greater opportunity to learn from their mistakes ;
- young people will be no less vulnerable than adults to the contaminating influences that can be expected within a custodial context and probably more so.

[67] *Mental health needs and effectiveness of provision for young offenders in custody and in the community* YJB, 2005; see further discussion at paragraph 218 below

SENTENCING IN ENGLAND & WALES – OFFENCES, OFFENDERS AND SENTENCES

Introduction

62. Approximately 300,000 offences involving offenders aged between 10 and 17 years are dealt with by Youth Offending Teams (Yots) in a year;[68] about one third result in sentence being imposed by a court whilst others will be dealt with by reprimand, by final warning or by some other response. During 2009, it is anticipated that the youth conditional caution will become available for those aged 16 or 17 years.

63. In relation to those aged 16 or 17, it is also possible for a Penalty Notice for Disorder to be issued. In 2007, just over 19,000 such notices were issued, mainly for causing harassment alarm or distress (7,068), retail theft with a value under £200 (4,474), being drunk and disorderly (2,941) and criminal damage under £500 (2,796). 58% of those notices were paid in full and 37% were registered as a fine following non-payment.[69]

64. In relation to those aged 10-15, the Penalty Notice for Disorder scheme was applied for a pilot period in six police force areas between July 2005 and June 2006;[70] a notice could be issued for 24 specified offences. Over 4,000 notices were issued during that period (90% in just two of the pilot areas); the parent or guardian was responsible for payment of the £30 or £40 penalty. As with notices issued to 16 and 17 year olds, most were issued to this age group for retail theft (value under £200), causing harassment, alarm or distress and criminal damage; all these offences attracted a penalty of £40. 67% were paid and 31% were registered as a fine – it was estimated that half of those registered were also paid.[71]

[68] *Statistics on Race and the Criminal Justice System – 2006* at page 69 www.justice.gov.uk/docs
[69] C*riminal Statistics, England and Wales, 2007 (Volume 3)* www.justice.gov.uk/publications/criminalannual.htm
[70] The scheme continues to be available in the pilot areas only pending consideration of the evaluation of the pilot.
[71] *Piloting Penalty Notices for Disorder on 10-15 year olds: results from a one year pilot* Ministry of Justice Research Series 19/08, November 2008 www.justice.gov.uk

65. The total number of youth offenders sentenced for *all offences* has remained broadly stable at around 95,000 each year, although there has been a small change in the age distribution towards offenders aged 15-16. For the years 2002-2007, this is illustrated in Table A below. Whilst there has been an increase in the total sentenced in 2007, the proportions between the age groups have changed little. In the first quarter of 2008, just over 12,000 young people were sentenced for *indictable offences* of whom just over 700 were sentenced in the Crown Court.[72]

66. These figures cover all offences; they will, therefore, include a large number of relatively minor offences and may be influenced by changes in the level of police activity rather than changes in the underlying youth offending rate. The number of "first time entrants"[73] to the youth justice system in England reduced in 2007/08 (compared with the previous year) by 10% from 97,329 to 87,367;[74] this is the first reduction since 2002/03.

Table A: Number of youth offenders sentenced, all offences

Age Band	**2002**		**2003**		**2004**		**2005**		**2006**		**2007**	
	No.	*%*	No.	*%*	No.	*%*	No.	*%*	No.	*%*	No.	*%*
Age 10 to 11	902	*1.0*	882	*1.0*	879	*0.9*	856	*0.9*	720	*0.8*	776	*0.8*
Age 12 to 14	16,658	*17.6*	16,080	*17.4*	17,392	*18.1*	18,289	*19.0*	17,859	*19.0*	18,592	*19.0*
Age 15 to 16	40,601	*42.9*	40,175	*43.4*	42,304	*44.0*	42,950	*44.6*	43,256	*46.1*	45,468	*46.7*
Age 17	36,387	*38.5*	35,394	*38.3*	35,613	*37.0*	34,108	*35.5*	31,970	*34.1*	32,551	*33.4*
Total	**94,548**		**92,531**		**96,188**		**96,203**		**93,805**		**97,387**	

Diversity issues

a) Ethnicity

67. As with adults, black (Afro-Caribbean and other African origin) juveniles appear to be over represented throughout the system. In 2004, the Youth Justice Board published research it had commissioned which examined decision making

[72] *Sentencing Statistics Quarterly Brief: January – March 2008* Ministry of Justice, 30 October 2008 www.justice.gov.uk
[73] Young people who have not previously come into contact with the youth justice system who receive a pre-court or court disposal for the first time
[74] Department for Children, Schools and Families, 10 November 2008 www.dcsf.gov.uk

in relation to young people of different ethnic backgrounds in 8 Yot areas during 2001-02.[75]

[75] *differences or discrimination?* YJB, 2004, www.yjb.gov.uk/Publications

Having identified some differences at stages of the decision making process that could not be associated with factors of the case, the report, whilst noting differential approaches to sentencing between areas, considered that much of the identified difference in outcome could be attributed to the seriousness of the offence committed, the likelihood of the case being dealt with in the Crown Court and the extent of custodial remand prior to sentence.[76]

68. Nonetheless, the report pointed to a higher rate of prosecution and conviction of mixed race young males, a much greater proportion of mixed race females who were prosecuted, the greater proportion of black and Asian males remanded in custody before sentence, the greater use of the more restrictive community penalties for Asian and mixed race males (especially between ages 12-15) and the much higher probability that, if convicted in the Crown Court, a black male would receive a sentence of 12 months or more.

69. In *Statistics on Race and the Criminal Justice System – 2006*,[77] it was noted that young black people are over represented (compared with young white people) for robbery (significantly) and for drug offences.[78]

70. In October 2007, the Government published "Delivering Improved Outcomes for Young Black People in the Criminal Justice System",[79] its response to a Home Affairs Select Committee Report on Young Black People and the Criminal Justice System. In its response to Recommendation 51, the Government set out its proposals to create improved statistics so that action can be based on "robust and comprehensive data". A "Minimum Dataset" had been agreed and was to be piloted in a selection of Local Criminal Justice Board Areas up to Spring 2008;[80] it will include data on remand and sentencing. Such information would be invaluable in identifying the extent to which there is a need for changes in approach and will support a formal target to "identify, explain and put in place actions to address race disproportionality at key points in the CJS".[81] However, it is likely to be some time before sufficient reliable data is available.

[76] ibid., page 16 *"Sentences Imposed"*
[77] www.justice.gov.uk/docs
[78] As always, care needs to be taken to ensure that valid points of comparison are used.
[79] www.justice.gov.uk/docs/ybp-and-cjs.pdf
[80] see also *Statistics on Race and the Criminal Justice System* Ministry of Justice, October 2007 at p.7
[81] *Race Equality Scheme* Ministry of Justice, March 2008 www.justice.gov.uk/docs/race-equality-scheme.pdf

b) Gender

71. Approximately 20% of the resident population of the United Kingdom is aged 16 or under; the number of males and females is roughly equal.[82] The overall number drops noticeably below the age of 18 until age 5; accordingly the number of young people aged 10-17 will be lower for at least the next 5 years than in the recent past. Whilst most young offenders are male, there has been a trend of increasing criminality amongst females. This has been most noticeable in respect of violent offences. In 2002, just under 7,000 youths were sentenced for violence against the person of whom 14.8% (just over 1,000) were female. In 2007, over 7,500 offenders were sentenced for these offences of whom 15.6% (around 1,200) were female. Over this period, the number of females sentenced for violence against the person increased by 18% compared with an increase of 11% in the number of males sentenced.

72. In both 2006 and 2007, the most common offences for which a female youth was sentenced were common assault (2,625/2,876 females – approximately 19% of offences for which a female young offender was sentenced) and theft from a shop (2,074/2,445 – approximately 17%)). Other common offences were assault occasioning actual bodily harm (1,163 offences in 2007), public order offences (1,161), criminal damage (1,109), and "drunkenness with aggravation", in practice, the offence of being drunk and disorderly (1,679). For common assault, over a quarter of all youths sentenced were female, for obtaining by deception or making off without payment approximately one third were female and for theft from a shop about 30% were female (see further at paragraph 88 and Table 4 below).

73. The research referred to in paragraph 67 above also examined the sentences imposed on females from different ethnic backgrounds. In relation to the use of community sentences, the proportion of black females given such a sentence was no higher than expected given the case characteristics and was lower than for a white female offender. In relation to the use of a custodial sentence, the proportion between black and white females was similar and none of the Asian female offenders received a custodial sentence. Whilst more black

[82] Population estimates; mid-2007. National Statistics, www.statistics.gov.uk/

females were sentenced in the Crown Court than white females, the YJB found that nonetheless the proportionate use of custody was less than was expected given the case characteristics and this was in contrast with the sentencing of white females.[83]

Question 3

Are you aware of any further information relevant to consideration of ethnicity and gender issues and sentencing patterns?

Allocation

74. The majority of cases involving young people who offend are sentenced in a youth court. A young person may be sentenced in an (adult) magistrates' court only where the penalty to be imposed is a discharge or a fine or where a referral order is made. As noted in paragraph 7 above, a young person will appear in the Crown Court for sentence only when charged with an offence of homicide or with a grave crime where a youth court has determined that sentence within the powers of the Crown Court is likely to be required, following sending for trial or committal for sentence as a result of the dangerous offender provisions or where the young person has been sent to the Crown Court as a result of being associated with an adult offender whose case has been committed to that court.[84] There is no general power to commit a young person to the Crown Court for sentence at present.[85]

75. Another aspect of seeking to achieve the sentencing aims of the youth justice system is that courts are encouraged to conduct proceedings in such a way that the young person becomes more involved than might be the case with an adult offender (see also paragraph 15 above). This approach may influence seating arrangements and the way that the court seeks to involve the young person in the conduct of the proceedings. It also influences the extent to which cases are dealt with in a youth court rather than before the Crown Court.[86] Nonetheless, it is likely that the complex processes necessary as a result of the

[83] *differences or discrimination?* YJB, 2004, www.yjb.gov.uk/Publications at pp. 19-20
[84] see paragraphs 169-189 below
[85] Changes to the allocation procedure are contained in Criminal Justice Act 2003, sched.3 which, when in force, will provide for a "plea before venue" process for offenders under age 18 and a general power to commit for sentence: sched. 3, paras.10 and 22
[86] See, for example, *SC v. United Kingdom* [2005] Crim.L.R. 130 where criticism was made of the conduct of a case in the Crown Court involving an 11 year old with learning difficulties who was charged with robbery.

adversarial system will, at times, marginalise the young person or make it more likely that the young person will not properly understand what is happening.

Use of custody

76. In recent years, the total custodial population has tended to be around 3,000 young people *at any one time*. Typically, custodial receptions for those aged under 18 are about 6/7% of total receptions.[87] Since there has been an overall increase in the prison population, there has been an increase of over 40% in the 15-17 year old custodial population between 1996 and 2006; this is a greater increase than for those in the 18-29 age range but is lower than the average increase for all ages. Proportionately, that increase is greater in relation to male offenders than female offenders.

77. One of the most remarkable periods in the history of the juvenile courts was the 1980s which saw a substantial decline in the use of custody.[88] In 1981, custodial sentences imposed on males aged 14 to 16 totalled 7,700; in 1991, they totalled 1,400. The latter part of the 20th century saw major reforms with the introduction of the Youth Justice Board and Youth Offending Teams[89] and, whilst the number of youths sentenced to custody dropped after 2002, it has remained broadly stable since then. Figures for 2002-2007 are given in Table B. Whilst the total number reduced in 2007 to 5,830, the proportions between the age groups remained similar.

Table B: Number of youth offenders sentenced to custody, all offences[90]

Age Band	**2002**		**2004**		**2006**		**2007**	
	No.	*%*	No.	*%*	No.	*%*	No.	*%*
Age 12 to 14	730	9.8	596	9.4	572	9.3	513	8.8
Age 15 and 16	3,475	46.9	2,872	45.4	2,905	47.0	2,707	46.4
Age 17	3,210	43.3	2,853	45.1	2,706	43.8	2,610	44.8
Total	**7,416**		**6,325**		**6,183**		**5,830**	

78. In August 2008 there were 2,403 young people *aged 15-17 years* in custody of whom 1,825 were under sentence – a decrease of 6% from the previous

[87] Offender Management Caseload Statistics 2006, Ministry of Justice
[88] Partly in response to the reduction in the use of custody, offenders aged 17 were allocated to a youth court in 1992
[89] For a fuller description of the history and development of ways of dealing with young offenders, see Ball and others *Young Offenders: Law, Policy and Practice* (Sweet and Maxwell, London 2001) and various texts referred to.
[90] Extracted from data supplied by the Office for Criminal Justice Reform, evidence and analysis unit, 2007

year.[91] 48 of those young people were female, a decrease from the 58 in custody in August 2007. In April 2008, there were also 37 young people aged 14 or under in custody. The number in custody following remand increased from 537 to 578, a rise of 8%. This was most marked in relation to robbery (an increase from 123 to 154 (25%)) and burglary (an increase from 54 to 79 (46%)).

79. Around 20% of those in custody are subject to a long term sentence, that is, a sentence other than a detention and training order.[92] All such sentences may be imposed only in the Crown Court. As at February 2008, 640 young people out of a total population of 2,872 were serving such a sentence. Over two thirds of that number had been sentenced for a "grave crime" (435 young people) and the vast majority were aged 16 or older (91%) and were male (96%). When compared with equivalent figures averaged over the preceding two years, the February 2008 figure shows a noticeable increase (from 570 to 640 young people). In July 2008, changes were made to the provisions relating to dangerous offenders giving greater discretion to a court in imposing such a sentence and raising the threshold that needs to be crossed before such a sentence is imposed.[93] It is likely, therefore, that the already small number of young people made subject to such a sentence will decrease further.

80. The most recent figures from the YJB for a complete year describes details of custodial sentences imposed during 2006/07 on young people who offend.[94] 7,097 custodial sentences are recorded as being imposed in the period covered. 35% (2,526) of those sentences consisted of a detention and training order for the minimum period of 4 months; 56% (4,010) consisted of a detention and training order for more than 4 months up to the maximum of 24 months; 6% (419) were imposed under the "grave crime" and related provisions whilst 2% (142) were imposed under the dangerous offender provisions. The Table below shows the number of custodial sentences by age of offender and by type of sentence.

[91] A commitment was made to reduce the number in custody by 10% comparing 31 March 2005 and 31 March 2008 but this has not been achieved.
[92] *The Accommodation of Young People serving a long-term sentence* YJB, February 2008 www.yjb.gov
[93] See paragraphs 173ff below
[94] *Youth Justice: Annual Workload Data 2006/07* www.yjb.gov.uk

Table C: Custodial sentences imposed in 2006/07 by age of offender and type of sentence

Age	DTO(4 months)	DTO(4+-24 months)	s.90/91*	s.226(life)*	s.226(DPP)*	s.228*	Total
17	906	1,409	141	15	15	27	2,513
16	775	1,303	161	15	11	17	2,282
15	517	844	69	6	6	16	1,458
14	245	342	36	3	-	9	635
13	69	95	9	1	-	-	175
12	14	17	2	-	-	-	33
11	-	-	1	-	-	-	1
10	-	-	-	-	-	-	-

***** s.90 – detention for life following conviction for murder
s.91 – long term detention following sentence under "grave crimes" provisions
s.226 – dangerous offender provisions resulting either in detention for life or the indeterminate detention for public protection
s.228 - dangerous offender provision resulting in an extended sentence

Patterns of sentencing

81. Table 1 below shows the most common offences sentenced by a court in 2006 and 2007 by age group; Table 2 shows the offences for which custodial sentences were most commonly imposed and the number of custodial sentences imposed. Typically, youths are divided into four age categories, not least because the restrictions on custodial sentences differ (10 and 11 years, 12-14 years, 15 and 16 years, 17 years)[95] and the Table uses these categories also. There is little difference between the age groups, with the exception of using an uninsured vehicle which becomes significant only in relation to those aged 15 and above.

[95] See paragraph 162 below

Table 1: Most common offences by age group, 2006 & 2007

Offence	Offenders 2006	Offenders 2007
Age 10 to 11		
Common assault	132	129
Criminal damage under £5,000	114	133
Theft from a shop	85	87
Criminal damage (indictable)	49	50
Age 12 to 14		
Common assault	2,897	3.082
Criminal damage under £5,000	2,316	2,439
Theft from a shop	1,826	2,053
Public Order offences	999	1,188
Assault ABH	1,243	1,120
Robbery	853	994
Burglary in a dwelling	754	737
Age 15 and 16		
Common assault	4,717	5,193
Criminal damage under £5,000	4,042	4,307
Theft from a shop	3,563	3,786
Assault ABH	3,496	3,647
Public Order offences	2.973	3,238
Uninsured vehicle	2,624	2.032
Misuse of drugs	2,178	2,623
Age 17		
Uninsured vehicle	4,123	3,034
Assault ABH	2,468	2,478
Common assault	2,189	2,456
Public Order offences	2,016	2,329
Criminal damage under £5,000	2,162	2,277
Theft from a shop	1,925	2,193
Misuse of drugs	1,873	2,230

82. The most commonly sentenced offences are common assault, criminal damage and theft from a shop; there has been a marked increase from 2006 to 2007 in the number of offences classified under “misuse of drugs” in relation to those aged 15 to 17. The Panel has been unable to ascertain details of the characteristics of the common assault offences.

83. With the 15-17 age groups, there are also a significant number of Public Order offences; one of those, causing harassment, alarm or distress is not an imprisonable offence; similarly for using a vehicle without insurance.[96]

[96] Whilst it is not possible to impose a community order on an adult offender for such an offence (see Criminal Justice Act 2003, s.150A), it will be possible to impose a youth rehabilitation order although, in most circumstances, not one with intensive supervision and surveillance or with fostering - see further discussion at paragraphs 142-148 below.

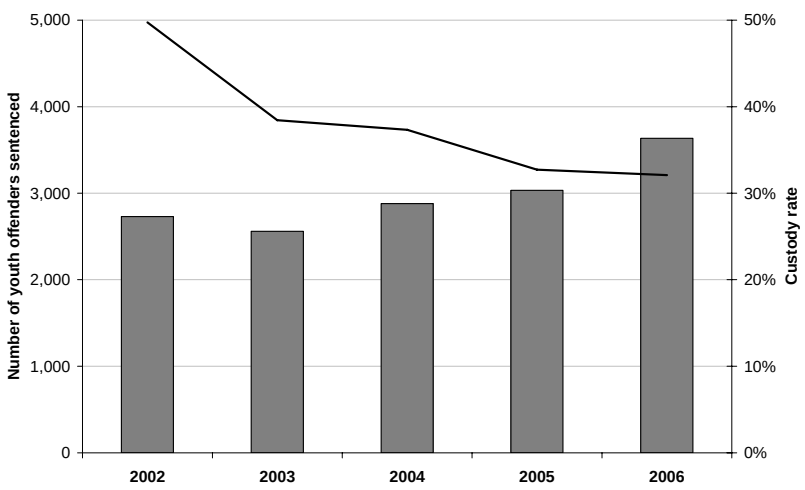
84. Typically, a custodial sentence tends to follow conviction of an offence that involves serious violence (actual or potential) and is most often imposed for an offence of robbery, burglary in a dwelling or assault occasioning actual bodily harm. A significant number of custodial sentences are imposed for common assault in each age group and for driving whilst disqualified for those aged 17; both offences have a maximum sentence of 6 months custody.

Table 2: Most common custodial sentences by age group, 2006 and 2007

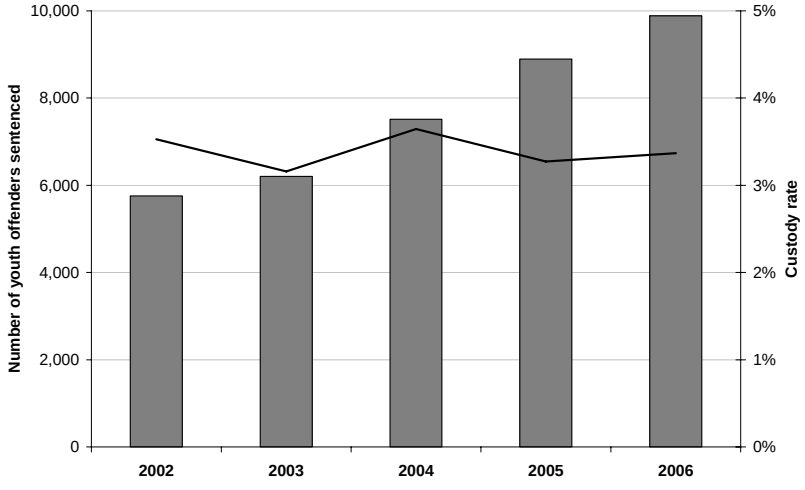
Offence	Offenders - 2006	Offenders - 2007
Age 12 to 14		
Robbery	113	98
Burglary in a dwelling	96	71
Actual bodily harm	63	56
Common assault	53	40
Burglary in a non dwelling	35	24
Age 15 and 16		
Robbery	580	524
Actual bodily harm	387	402
Burglary in a dwelling	359	346
Common assault	171	182
Burglary in a non dwelling	138	106
Public Order offences	83	109
Age 17		
Robbery	501	463
Actual bodily harm	394	385
Burglary in a dwelling	314	296
Misuse of drugs	129	145
Driving whilst disqualified	128	70
Common assault	113	131

85. Trends for specific offences are mixed, with some showing an increase in numbers and some a decrease. Figure 1 illustrates the trends from 2002 to 2006 in overall numbers and custody rates (all ages) for four offences which generate large numbers of custodial sentences. Robbery numbers have increased while the custody rate has fallen; for common assault, the numbers have increased substantially, while the custody rate has remained fairly stable (so the numbers being sentenced to custody will have increased); for actual bodily harm, figures have remained fairly static, while numbers sentenced for driving whilst disqualified have fallen since 2003.

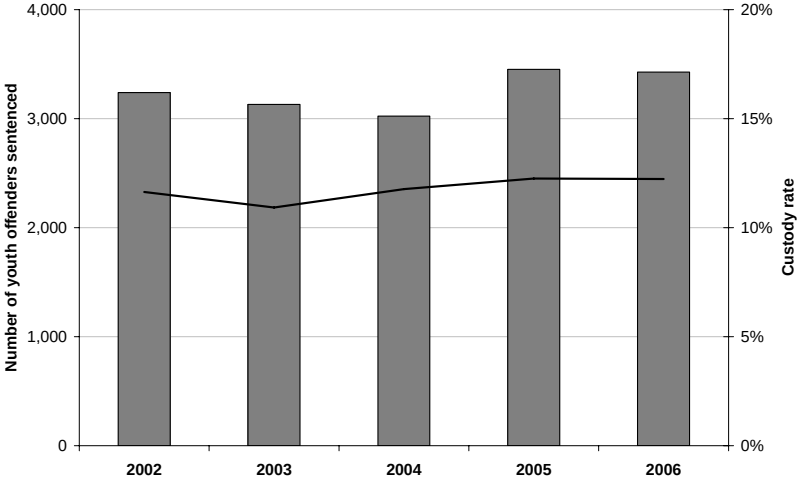
Figure 1: Trend data for selected offences



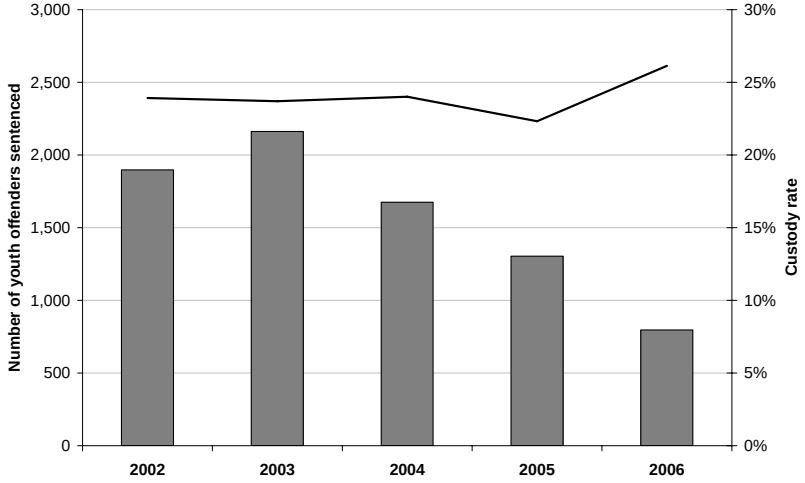
i. Robbery



ii. Common assault



iii. Actual bodily harm



iv. Driving whilst disqualified

In each chart, numbers of offenders sentenced are shown as columns plotted against the left hand axis. Custody rates are shown as a solid line plotted against the right hand axis

86. There are few offences for which a high proportion of those convicted receive a custodial sentence; over 80% of those convicted of causing grievous bodily harm with intent receive such a sentence as do around 60-70% of those convicted of possession of a Class A drug with intent to supply it, of aggravated burglary or of firearms offences. However, these are all offences committed by young people in very low volumes.

87. For offences sentenced more often, the highest proportion of custodial sentences is seen following conviction for robbery, causing grievous bodily harm, burglary in a dwelling or dangerous driving: see Table 3 below. Typically, at least 20% of young people who breach an ASBO will receive a custodial sentence.[97]

Table 3: Highest custody rate offences by age group, 2007 (offences with at least 100 persons sentenced per age group)

Offence	Total Offenders	Proportion receiving custodial sentence	Number
Age 12 to 14			
Aggravated vehicle taking	111	19%	22
Robbery	994	10%	99
Burglary in a dwelling	737	10%	73
Aggravated taking (criminal damage)	133	9%	12
Assault ABH	1120	5%	56
Age 15 and 16			
Grievous bodily harm (Section 20)	133	59%	78
Dangerous driving	177	26%	44
Robbery	2,077	25%	519
Burglary in a dwelling	1,678	21%	352
Age 17			
Grievous bodily harm (Section 20)	126	76%	94
Robbery	1,044	46%	460
Burglary in a dwelling	986	30%	296
Dangerous driving	199	29%	57

Female offenders

88. Approximately 15% of sentenced young people are female. The pattern of offences appearing for sentence are similar to the general pattern, most commonly common assault, theft from a shop, criminal damage, assault ABH and causing harassment alarm and distress. Where a substantial proportion of

[97] Published figures cover the period 1 June 2000 to 31 December 2006 without providing the figures in each year. 75% of such sentences are for 4 months or for 6 months.

those sentenced is female, the offences tend to involve dishonesty or lower levels of violence: see Table 4 below.

Table 4 – Common offences with highest percentage of girls sentenced

Offence	Total Offenders	Female %	Number
Assaulting a constable	2,183	33%	720
Fraud offences	587	33%	193
Theft from a shop	8,119	30%	2,435
Drunk and disorderly	1,679	28%	470
Common assault	10,860	26%	2,823

Use of custodial sentences by area

89. There are noticeable differences across England and Wales in the proportionate use of custodial sentences for young people who offend. Typically, the range is from 17% to 3% of all sentences imposed;[98] the national average is 9%.[99]

90. A comparison between the percentage use of custody for the year to March 2007 and that for the period April 2001 to March 2007 shows a great deal of similarity within areas. The approach to the use of custody appears, therefore, to be well established in most areas and may indicate that local culture and available resources have a greater significance than the type of offender or offence coming before a court. This is also suggested by research indicating that those areas with the highest custody rates tend to have the lowest rate of recommendations for low level interventions in PSRs.[100]

EFFECTIVENESS IN REDUCING REOFFENDING

91. There are indications that the rate of reoffending by young people following sentence is reducing. Research published by the Ministry of Justice[101] describes the frequency, severity, actual and predicted reoffending of those aged 10-17 released from custody, commencing a non-custodial court disposal or given an

[98] In one Youth Offending Team area 23% of sentences were custodial, substantially above the next highest
[99] *The Sentence* Newsletter 08, Sentencing Guidelines Council, January 2008, www.sentencing-guidelines.gov.uk
[100] *Patterns of Sentencing: Differential sentencing across England and Wales* T. Bateman and C. Stanley, 2002: Youth Justice Board
[101] Reoffending of juveniles: results from the 2006 cohort, Ministry of Justice, September 4, 2008 www.justice.gov.uk

out-of-court disposal (reprimand or final warning) in the first quarters of 2000, 2002, 2003, 2004, 2005 and 2006. It indicates that both the frequency and severity of reoffending fell as did the proportion of offenders who re-offended.

92. In the 2006 cohort, the most frequent forms of reoffending were less serious offences of violence, criminal damage and theft. The peak time for reoffending was in the first month with a declining rate until months 7-9 when there was an increase in frequency before reducing again to the end of the 12 month monitoring period. The average time to the first offence lengthened in 2006 compared with the 2000 cohort (131.2 days compared with 122.8 days).

93. The proportion of female offenders in the cohort has increased from 20.9% in 2000 to 25% in 2006 at a time when the size of the cohort has also increased substantially (from 41,176 to 48,938). Although males re-offend at a higher rate than females (140.7 offences per 100 offenders compared with 70.4 per 100), there has been a greater reduction in frequency of reoffending for male offenders as compared with females between 2000 and 2006.

94. The frequency of reoffending increases with the age of the offender but there has been a substantial reduction in the frequency of reoffending for 16 and 17 year olds – for the 2006 cohort, down 23.4% and 28% respectively compared with the 2000 cohort. One of the more marked reductions between 2000 and 2006 has been for offenders who have more than 10 previous offences – a reduction of 21.2%.

95. The research also provides information on reoffending by disposal but emphasises that this should not be used as an assessment of the effectiveness of different sentences since "there is no controlling for known differences in offender characteristics or other factors that may affect reoffending".[102] Further detail is provided in relation to young people who offended in 2005 in the *Youth Justice Annual Workload data 2006/07*.[103] Just over 44,500 young people are included in the cohort. Almost 24,000 received a pre-court disposal and almost

[102] at page 14
[103] www.yjb.gov.uk

25% reoffended, the lowest rate followed a police reprimand (21.5%). Almost 13,000 received a first tier disposal (mainly referral order, fine or conditional discharge) and 45% reoffended; the lowest rate followed a referral order (41.6%). 6,760 received a community disposal and almost 64% reoffended; the lowest rate followed a community punishment order (56.5%). Just over 1,200 received a custodial sentence and just over 64% reoffended.

96. "Restorative Justice" provides an approach through which "parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future".[104] Whilst capable of being used particularly effectively with some young people who offend, no consistent pattern of use appears to have emerged. For 2006/07, a performance indicator for the YJB was to ensure that 75% of victims of all youth crime referred to Yots are offered the opportunity to participate in a restorative process. That target was exceeded and over 86% were offered that opportunity. There was a further performance indicator that 75% of victims participating in a restorative justice are "satisfied". Again, the target was exceeded and 97.4 of victims participating were satisfied. Unfortunately, no information is given as to the numbers involved.[105]

97. Earlier in this paper, it was noted that "looked after children" are at higher risk than others of entering the criminal justice system. One of the reasons for this has been identified as the reaction to incidents within a residential placement. Part of the *Children in trouble* project tests out the use of restorative justice interventions and conferences in such circumstances. In an interim report evaluating the project,[106] the approach was described as involving use of staff trained in restorative justice principles to become involved following an incident of unacceptable behaviour at a residential placement. In discussion with residential staff, the young person and, sometimes, the victim (who may also be a young person) the possibility of a conference is considered as an alternative to prosecution. The evaluation reported on circumstances where custody had been avoided and where a young person previously considered "unmanageable" had successfully completed orders.

[104] *Restorative Justice: an overview* T. Marshall, Home Office Occasional Paper, 1999
[105] *Youth Justice Annual Workload Data 2006/07* www.yjb.gov.uk

98. In relation to adult offenders, research has examined whether restorative justice affects reconviction.[107] It evaluated three restorative justice schemes seeking to compare reconvictions of those who experienced restorative justice with those in a control or comparison group. Noting the difficulties of conducting a valid comparison, the research concluded that those who participated in restorative justice committed statistically fewer offences over two years than those in the control group though there was little difference in the likelihood of reconviction or in terms of the severity of the subsequent offending. The research notes that reducing reoffending is not the only aim of restorative justice and that victim satisfaction is a further important aim.

SUMMARY

99. It is against this background that the Panel will be seeking to explore the general principles that should apply to the sentencing of youths. Far more than with adults, the approach to sentence will be individualistic. The youth of the offender is widely recognised as requiring a different approach from that which would be adopted in relation to an adult.

100. Even within the category of "youth", the response to an offence is likely to be very different depending on whether the offender is at the bottom end of the age bracket, in the middle or towards the top end; in many instances, the maturity of the offender will be at least as important as the physical age.

[106] June 2008, Local Government Association and Howard League for Penal Reform
[107] *Does restorative justice affect reconviction?* Shapland et al., Ministry of Justice Research Series 10/08, June 2008

APPROACH TO SENTENCING

Legal framework

101. In determining sentence, a court must apply the statutory framework, much of which applies to both adult and young offenders. The process (as set out by the Sentencing Guidelines Council in all its guidelines) requires a court first to determine the seriousness of the offence by assessing the harm caused (or foreseeable) and the culpability of the offender taking into account aggravating and mitigating factors relating to the offence. Statutory aggravating factors (including previous convictions) will be relevant at this stage.

102. The assessment of offence seriousness will fix the most severe penalty that can be imposed and will determine whether an offence has crossed the necessary threshold to enable the court to impose a community or custodial sentence. Even where the custody threshold has been crossed, a court is not required to impose a custodial sentence; similarly with the community sentence threshold.[108]

103. The court will then consider any mitigating factors that apply to the offender, any reduction for a guilty plea and any relevant ancillary orders.

104. Having taken account of all these factors, a court must then determine sentence. The types of sentence available for youths differ from those available for adults. Moreover, in respect of a young person who has offended, sentence must be determined in the light of the obligation to treat the prevention of offending as of primary importance. In this next section, the Panel considers how that process and the various other obligations and requirements can be applied consistently.

SENTENCES

REFERRAL ORDERS

105. Where a young person is convicted for the first time following a guilty plea, a youth court may impose only a referral order, an absolute discharge, hospital

[108] Criminal Justice Act 2003, s.148(5)

order or a custodial sentence if the offence is imprisonable. There is a wider discretion if the offence is non-imprisonable.[109] A referral order cannot be made following conviction after a not guilty plea except as described below.

106. A youth court or other magistrates' court sentencing a person under 18 will need to consider whether the **compulsory referral conditions** or the **discretionary referral conditions** exist. Where the **compulsory referral conditions** arise, the court must make a referral order, where the **discretionary referral conditions** arise, the court has the power to make such an order.

107. The **compulsory referral conditions** arise where the offender has pleaded guilty to all offences that are being sentenced together, has no previous convictions in the United Kingdom, has no previous orders to be bound over to keep the peace or be of good behaviour in England, Wales or Northern Ireland, all the offences are imprisonable[110] and the court is not imposing an absolute discharge, a hospital order or a custodial sentence.

108. The **discretionary referral conditions** arise where the offender *either* has been convicted of at least two offences, has pleaded guilty to at least one and not guilty to at least one and no previous convictions or orders to be bound over *or* the **compulsory referral conditions** would arise save for the fact that one of the offences is not imprisonable.[111]

109. The effect of a referral order is to require the offender to attend meetings of a youth offender panel as established by a Youth Offending Team designated by the court. The order will specify a period for a contract to take effect between the offender and the panel; the minimum period is 3 months, the maximum 12 months. If the offender is under 16 years, generally a parent must be *required* to attend the panel meeting, otherwise that requirement is at the discretion of the court.

[109] Powers of Criminal Courts (Sentencing) Act 2000, s.16
[110] ibid., s.17(1)
[111] ibid., s.17(2), s.17(1A)

110. Should the offender fail to comply, the panel may refer the offender back to court where the court may re-sentence. Should the offender commit a further offence (either before or after the referral order is made), in exceptional circumstances the court may sentence by causing the contract period to be extended but that period may never exceed 12 months in total. Alternatively, unless the court imposes an absolute discharge for the new offence it may re-sentence for the offence for which the referral order was made.

111. Where a court imposes a referral order, the contract will be between the offender and a youth offender panel following agreement on a programme of behaviour aimed at preventing reoffending by the offender. This may include financial or other reparation, mediation sessions with the victim, unpaid work or service within the community, a curfew, attendance at school, undertaking specified activities and limiting contact with specified persons or access to specified places.

112. On the implementation of the relevant provisions in the Criminal Justice and Immigration Act 2008,[112] the circumstances in which a referral order can be made will be extended to enable the order to be used more widely and with greater flexibility. The amendments will enable a court to make a referral order where an offender has one previous conviction in relation to which a referral order was not made[113] or, in exceptional circumstances and on the recommendation of the "appropriate officer",[114] where the offender has one or more previous convictions and has had one previous referral order.[115]

113. There will also be an additional power given to the youth offender panel to refer an offender back to the court with a view to revocation of the order on the grounds of good progress or to extending the period of the order; this only

[112] ss.35-37
[113] Powers of Criminal Courts (Sentencing) Act 2000, s. 17(2B) as inserted by Criminal Justice and Immigration Act 2008 s.35; see Annex A to this paper
[114] ibid., s.17(2D); a member of a youth offending team or an officer of a local probation board or provider of probation services
[115] ibid., s.17(2C)

applies where the order is for less than 12 months and the extension cannot exceed 3 months.[116]

114. Towards the end of the period specified by the court, a meeting will be convened at which the youth offender panel will review the extent to which the offender has complied with the terms of the contract and either discharge the order or refer the offender back to the court. When a contract is complete, the conviction is normally spent for the purposes of the Rehabilitation of Offenders Act.

115. On a reference back, the court may revoke the order and re-sentence the offender. If a referral order was made for less than 12 months, one option open to a court dealing with other offences committed by the offender is to extend the period though it may never exceed 12 months in total.

116. The Panel has considered whether it would be helpful to give guidance on the period to be specified within a referral order. Where a youth rehabilitation order is to be imposed, the Panel has proposed that the approach be based on low, medium and high ratings derived from the assessment of the risk of reoffending and of harm (see paragraph 133 below). A similar approach could be adopted to the length of a referral order so that the contract period would normally be 3 months, 6 months or 9 months depending on the seriousness of the offence and the risk of reoffending. This would enable the 12 month order to be reserved for a young person who was very close to the imposition of a custodial sentence or who commits a further offence in circumstances where a court is prepared to extend the referral order.

Question 4

The Panel would welcome your views on whether guidance would be helpful in relation to referral orders. If so, do you agree with the approach set out in paragraph 116?

[116] Powers of Criminal Courts (Sentencing) Act 2000 ss.27A and 27B as inserted by Criminal Justice and Immigration Act 2008 ss.36 and 37

IMPOSING A FINE

117. A fine may be imposed for any offence. Different maxima (below those generally applicable) apply depending on the age of the young person who has offended. Where the young person is under 14, the maximum is £250; where the offender is 14-17, the maximum is £1,000. Where an order for costs is to be made alongside a fine, the amount of the costs must not exceed the amount of the fine. Where a fine is imposed on a young person aged under 16, the court is under a duty to order it to be paid by the young person's parent or guardian (whose means must be taken into account) unless that person cannot be found or such an order would be unreasonable in the circumstances of the case. Where the young person is 16 or 17, the court has a discretion whether to order the parent or guardian to pay.

118. In the period from 1996 to 2007, the number of young people sentenced in a youth court increased from just under 71,000 to just over 97,000. However, in that period the number sentenced by way of a fine decreased from just over 22,000 in 2001 to just over 10,450 in 2007.[117]

119. There has been a similarly dramatic reduction in the use of the conditional discharge reducing from 26,720 in 1999 (30% of all young offenders sentenced) to 9,238 in 2007 (9.5%). The change in the use of both fines and conditional discharges can be compared with the number of referral orders (of which over 30,000 were made in 2006); neither a fine nor a conditional discharge can be imposed following conviction of a first time offender who has pleaded guilty to an imprisonable offence.

120. It would appear that compensation orders are imposed more frequently than fines.[118] The power to require a financial order to be paid by a parent or guardian is also used more often in relationship to a compensation order. On average 36% of compensation orders were ordered to be paid by a parent or guardian and 13% of fines. There is a significant difference depending on the

[117] Extracted from data supplied by the Office for Criminal Justice Reform, evidence and analysis unit, 2007
[118] ibid.,

age of the young person; in 2006, where the young person was aged between 10-14 years, 58% of parents or guardians were required to pay compensation and 46% to pay fines whereas the proportions were 30% and 10% where the young person was aged between 15-17 years.

121. Inevitably, many young people who offend will have little if any financial resources. However, one situation where a young person may have financial resources from which a fine could be paid is through the payment of Education Maintenance Allowance. Where a young person aged 16-18 in the previous academic year has left compulsory education and enrolled on one of a specified set of courses,[119] this allowance will be payable as long as attendance is regular. The amount of the allowance varies from £30 per week to £10 per week depending on the annual household income. No allowance is payable where that income exceeds £30,810 in England and £31,581 in Wales. If the young person is attending an e2e course which started on or after 30 June 2008, the maximum amount is payable regardless of household income.[120]

122. The use of Penalty Notices for Disorder has been noted earlier in this paper (see paragraphs 63 and 64 above). From the information available, it would appear that a significant proportion of those penalties have been paid both when imposed on those aged 16 or 17 (when the offender is liable to payment) and those imposed on the younger age group (where the parent or guardian is liable for payment). On the basis of this information, it may be possible that the scope for financial penalties is greater than reflected in current practice.

Question 5

Is there scope for increasing the use of financial penalties?
If so, what wider circumstances might merit such a sentence?
Should the Education Maintenance Allowance be taken into account?

[119] full time further education course at a college or school, LSC funded Diploma or a course that leads to an apprenticeship or LSC funded "Entry to Employment"(e2e) course
[120] www.direct.gov.uk/en/EducationAndLearning

PARENTING ORDERS

123. Where a person under the age of 18 is convicted of an offence, the court has the power to make a parenting order[121] where it would be desirable in the interest of preventing further offending.[122] Where the offender is aged 16 or less and the court concludes that such an order would be desirable, there is a presumption in favour of the order being made and reasons must be given if it is not made.[123]

COMMUNITY SENTENCE

124. The present provisions creating a number of youth community orders for a person under the age of 18 will change on the implementation of the relevant provisions in the Criminal Justice and Immigration Act 2008. This Consultation Paper considers only the new single community sentence (the youth rehabilitation order) as it is anticipated that the guidelines that will follow will become effective on the implementation of that order.

125. The Act provides for a single youth rehabilitation order within which a court may include one or more requirements variously designed to provide for punishment, for protection of the public, for reducing reoffending and for reparation. The details of the possible requirements are set out in Annex B. A youth rehabilitation order with intensive supervision and surveillance or with fostering is also provided but may be imposed only where a custodial sentence would otherwise have been appropriate.[124]

126. A similar transition took place in relation to adult offenders on the implementation of the Criminal Justice Act 2003. At that time the Sentencing Guidelines Council published a definitive guideline[125] that set out the principles

[121] that is an order requiring the parent or guardian to comply (for a maximum of 12 months) with specified requirements and to attend counselling or guidance sessions as specified for a maximum of 3 months: Crime and Disorder Act 1998, s.8(4)
[122] ibid., s.8(6)
[123] Crime and Disorder Act 1998, s.9(1)
[124] Criminal Justice and Immigration Act 2008, ss.1(3) and 1(4); Criminal Justice Act 2003, s.174(2)(ca) and (cb) as inserted by Criminal Justice and Immigration Act 2008, sched.4, para.80(2)
[125] *New Sentences: Criminal Justice Act 2003* Sentencing Guidelines Council, December 2004 www.sentencing-guidelines.gov.uk

upon which a court should determine the nature and extent of the community sentence. These emphasised that the guiding principles are proportionality and suitability[126] since statute provides that the restrictions on liberty within such an order must be commensurate with the seriousness of the offence[127] and that, taken together, the requirements within the order are the most suitable for the offender.[128]

127. The Council guideline set out the approach to be taken in determining the nature and extent of requirements to be included within an order. It set out

a. three sentencing ranges (low, medium and high);
b. that it is not intended that repeat offending should result in an offender progressing from one range to the next but that the decision as to the appropriate range should be based upon the seriousness of the conviction offence;
c. that there are five factors guiding the decision on the nature and severity of the requirements to be included:
    i. the assessment of offence seriousness (low, medium or high);
    ii. the purpose(s) of sentencing the court wishes to achieve;
    iii. the risk of reoffending;
    iv. the ability of the offender to comply, and
    v. the availability of requirements in the local area.
d. that the resulting restriction on liberty must be a proportionate response to the offence committed.

The Panel considers that this provides a useful framework for the approach to the youth rehabilitation order.

Youth rehabilitation order

128. In order for a court to be able to impose a youth rehabilitation order, it must be satisfied that the offence is "serious enough".[129] Even where an offence

[126] ibid., p.6
[127] Criminal Justice Act 2003, s.148(3)(b)
[128] ibid., s.148(3)(a)
[129] Criminal Justice Act 2003, s.148(1)

crosses this threshold, a court is not obliged to make a youth rehabilitation order.[130] If an order is imposed, the requirements must be those most suitable for the offender[131] and the restrictions on liberty imposed by the order must be commensurate with the seriousness of the offence(s).[132] Presumably, in practice, this means "no more than is commensurate" since a precise match is unlikely to be possible. In contrast to the provisions relating to adult offenders, a court may impose a youth rehabilitation order (other than one with intensive supervision and surveillance or fostering) for an offence that is not imprisonable.

129. A youth rehabilitation order is not an available sentence where the "compulsory referral conditions" are found to exist (see paragraph 107 above); accordingly, the order will not be available to a first time offender who has pleaded guilty to an imprisonable offence.

130. In preparation for the implementation of the provisions in the Criminal Justice and Immigration Act 2008 creating the youth rehabilitation order, and pending the publication of a guideline by the Council (which may necessitate some amendment), the YJB has prepared draft guidance on the approach to be adopted by a Youth Offending Team (Yot) in preparing a pre-sentence report where a youth rehabilitation order is being considered.[133] This guidance seeks to provide a scaled approach that ensures that the response to an offence is based on an appropriate balance between the seriousness of that offence, the risk of harm in the future from any further offences the young person might commit and the needs of the young person.

131. The approach draws heavily on an assessment of the likelihood of reoffending and the risk of serious harm. In most cases, this will be undertaken by use of *Asset*[134] supported by professional judgement. An initial assessment identifies dynamic and static factors and, by assigning a value to these in relation to an individual, calculates the risk of reoffending. An additional assessment will

[130] ibid., s.148(5)
[131] ibid., s.148(2)(a)
[132] ibid., s.148(2)(b)
[133] YOUTH JUSTICE: The Scaled Approach, YJB, September 2008 www.yjb.gov.uk/scaledapproach
[134] See Annex C

follow, if necessary, to assess the risk of serious harm likely to be involved in further offending.

132. Following the model of the Council guideline concerning adult offenders,[135] the YJB proposes three intervention levels – Low, Medium and High. The Low intervention level is for those who show a low likelihood of reoffending **and** a low risk of serious harm, the Medium level is for those who show a medium likelihood of reoffending **or** a medium risk of serious harm and the High level is for those with a high likelihood of reoffending **or** a high or very high risk of serious harm.

133. For the broad generality of offences where a youth rehabilitation order is to be imposed, the Panel considers that the YJB has set out an approach that will enable the writer of a pre-sentence report to make proposals that match the obligations on the court to balance the various statutory obligations that apply. Where the intervention level is Low, the order will primarily seek to repair the harm caused by the offence; where it is Medium the order will, in addition, seek to enable help or change as appropriate in the circumstances; where the level is High, the order will, in addition, seek to ensure control of the young person as necessary to minimise the risk of further offending or of serious harm.[136] This approach is set out in a table which is reproduced at Annex D.

134. The intervention level identified by the assessment must be reviewed by the Yot practitioner in the context of all other available information so that account may be taken of any other factors that suggest that the level of intervention should be different. An example given is where a young person with a low likelihood of reoffending and low risk of serious harm has committed a particularly serious offence.

135. In the light of the threshold that needs to be crossed before a youth rehabilitation order may be imposed, it is inevitable that the offences for which a court will be considering a youth rehabilitation order will fall within a band of

[135] *New Sentences: Criminal Justice Act 2003* Sentencing Guidelines Council, December 2004 www.sentencing-guidelines.gov.uk

seriousness that will enable a court to determine sentence primarily by reference to the likelihood of the young person reoffending and to the risk of the young person causing serious harm. This would be in accordance with the principal aim of the youth justice system, the welfare principle and the sentencing aim of "protection of the public".

136. Where a young person is assessed as presenting a high risk of reoffending or of causing serious harm despite having committed a relatively less serious offence, the emphasis is likely to be on requirements that are primarily rehabilitative or for the protection of the public. Care will need to be taken to ensure both that the requirements are "those most suitable for the offender" and that the restrictions on liberty are commensurate with the seriousness of the offence.

137. Where a young person is assessed as presenting a low risk despite having committed a relatively high seriousness offence, the emphasis is likely to be on requirements that are primarily punitive, again ensuring that restrictions on liberty are commensurate with the seriousness of the offence.

138. When imposing a youth rehabilitation order, the court must fix a period within which the requirements of the order are to be completed; this must not be more than 3 years from the date on which the order comes into effect.[137] Where the order contains two or more requirements, the order may specify an earlier date for any of those requirements.[138] Some requirements have an inherent time limit; for example, unpaid work must be completed within 12 months, a prohibited activity requirement must continue only for a period specified by the court, a curfew period must not apply for more than 6 months and an exclusion requirement must not apply for more than 3 months.

139. The period specified as the overall period for the order will normally commence on the day after the order is made but, where the young person is already subject to a detention and training order, the court may specify that the

[136] YOUTH JUSTICE: The Scaled Approach, p. 10, YJB September 2008 www.yjb.gov.uk/scaledapproach
[137] Criminal Justice and Immigration Act 2008, schedule 1, para. 32(1)

youth rehabilitation order will take effect either on the day that supervision begins in relation to the detention and training order or on the expiry of the term of that order.[139] It is not possible to make a youth rehabilitation order when the young person is already subject to another youth rehabilitation order or to a reparation order unless it revokes those orders.[140]

140. The significance of the overall length of the order can be seen in three main consequences:

- where a supervision requirement is included, the obligation to attend appointments as directed by the responsible officer continues for the whole period;
- where a young person is in breach of a youth rehabilitation order, one of the sanctions available to a court is to amend the order by including within it any requirement that it would have had power to include when the order was made;[141] however, that new requirement must be capable of being complied with before the expiry of the overall period;[142]
- a young person is liable to resentence for the offence(s) for which the order was made if convicted of another offence whilst the order is in force.[143]

141. In determining the length of an order, therefore, a court needs to allow sufficient time for the order as a whole to be complied with recognising that the young person is at risk of further sanction throughout the whole of the period. It is not clear what criteria should be used to determine the overall length, particularly where the requirement(s) included have their own time limits. Too long and the young person may be put at unnecessary risk of further sanction; too short and the flexibility of a court following breach may be inappropriately curtailed.

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[138] ibid., para. 32(2)
[139] ibid., para. 30
[140] ibid., para. 30(4)
[141] ibid., sched. 2, para. 6(2) (magistrates' court) and para. 8(2) (Crown Court)
[142] ibid. para. 6(6) and para. 8(6)
[143] ibid. para. 18 and para. 19

Question 6

What criteria should be used when setting the overall length of a youth rehabilitation order?

Youth rehabilitation order with intensive supervision and surveillance or with fostering

142. Such orders may be made where:

- the court is dealing with a young person for an offence punishable with imprisonment;
- that offence (or combination of offences) crosses the custody threshold;
- custody would be an appropriate sentence and;
- if the offender was under 15 at the time of conviction, the offender is a persistent offender.

143. When imposing such an order, the court must give its reasons for concluding that the offence(s) cross(es) the community sentence threshold and that the requirements set out above have been met.[144] When imposing a custodial sentence on a person aged under 18, in most circumstances a court will be required to state why it is of the opinion that a youth rehabilitation order with intensive supervision and surveillance or with fostering cannot be justified.[145]

a) Youth rehabilitation order with intensive supervision and surveillance

144. The core of this order is an extension of the activity requirement that, when included within a youth rehabilitation order other than one with intensive supervision and surveillance, provides for the offender to participate in activities or in residential exercises which may be prescribed in the order in detail or may be stated more generally;[146] the number of days must be specified and these must not exceed 90 days in aggregate. A youth rehabilitation order with intensive supervision and surveillance is an order that contains an "extended activity requirement", that is, an activity requirement with a maximum of 180

[144] ibid., s.174(2)(ca) and (cb)
[145] Criminal Justice Act 2003, s.174(4B) as inserted by Criminal Justice and Immigration Act 2008, sched.4, para.80(3)
[146] Criminal Justice and Immigration Act 2008, sched.1, paras.6-8

days. As a result, there are further obligations to include a supervision requirement[147] and a curfew requirement.[148]

145. Where appropriate, a youth rehabilitation order with intensive supervision and surveillance may also include additional requirements although the order as a whole must comply with the obligation that the requirements must be those most suitable for the offender and that any restrictions on liberty must be commensurate with the seriousness of the offence. Care will need to be taken to ensure that the requirements are not so onerous as to make the likelihood of breach almost inevitable.

b) Youth rehabilitation order with fostering

146. Where a fostering requirement is included within a youth rehabilitation order, it will require the offender to reside with a local authority foster parent for a specified period; that period must not exceed 12 months.[149] This requirement may be included only where the court has been notified that arrangements are available in the area of the relevant local authority. Before including such a requirement, the court must consult both the young person's parent or guardian (unless impracticable) and the local authority.

147. In addition, the court must be satisfied that a significant factor in the offence was the circumstances in which the young person was living and that the imposition of a fostering requirement would assist in the rehabilitation of the young person. Such a requirement cannot be included unless the offender was legally represented in court when the court was considering whether or not to impose the requirement or, having had the opportunity to be represented, the offender has not applied for representation or that right was withdrawn because of the offender's conduct.[150]

148. A fostering requirement cannot be included with intensive supervision and surveillance and it cannot be included in a youth rehabilitation order unless the

[147] a requirement to attend appointments with the responsible officer (or any other person determined by the responsible officer): ibid., para. 9

[148] a minimum of 2 hours and a maximum of 12 hours on any one day which must fall within the period of 6 months from the day on which the requirement first takes effect: ibid., para.14. It is likely that this curfew will be electronically monitored: ibid., para. 3(4)(b) and para.2

[149] Criminal Justice and Immigration Act 2008, sched.1, para.18

higher criteria described above have been met. Where appropriate, a youth rehabilitation order with fostering may also include other requirements (and must include supervision) although the order as a whole must comply with the obligation that the requirements must be those most suitable for the offender and that any restrictions on liberty must be commensurate with the seriousness of the offence.

Question 7

In addition to the statutory criteria, in what circumstances is it likely to be appropriate to include a fostering requirement in a youth rehabilitation order?

SUMMARY AND PROPOSAL

149. The Panel, therefore, proposes that the following approach should be adopted in determining the content and length of a youth rehabilitation order. The differences from the approach in relation to an adult offender derive from the principal aim of the youth justice system "to prevent offending by children and young people".[151]

150. When a court is considering sentence on a young person who has committed an offence that crosses the community sentence threshold (or one that has crossed the custody threshold but for which a youth rehabilitation order is nonetheless considered to be appropriate), the court should consider:

i) what would the "scaled approach" identify as the appropriate approach (this will be contained in the pre-sentence report)?
ii) what requirements are most suitable for the offender?
iii) are the restrictions on liberty that result from those requirements commensurate with the seriousness of the offence?
iv) what overall period is necessary to ensure that all requirements are satisfactorily completed?

Where the offender has previously been the subject of a community sentence, the approach should be based on the principle that repeat offending should not automatically result in an offender progressing from one range to the next but

[150] ibid., para.19

that the decision as to the appropriate range should be based upon the seriousness of the conviction offence.

Question 8

In relation to the imposition of a youth rehabilitation order, do you agree with the approach summarised in paragraphs 149 and 150? If not, why not?

Breach of youth rehabilitation order

151. Where a young person fails to comply with a youth rehabilitation order, the "responsible officer" must consider whether there has been a reasonable excuse. If the officer considers that there was no reasonable excuse and this is the first failure to comply with the order without reasonable excuse, the officer must issue a "warning".[152] The warning will describe the circumstances of the failure to comply, a statement that the failure is not acceptable and a warning that a further failure to comply may lead to the order being referred back to the court. In most circumstances, two warnings will be permitted within a 12 month period before the matter is referred back to court. There is a presumption in favour of referring the matter back to court after a third failure to comply and a discretionary power to do so after the second failure to comply.[153]

152. Breach of an order brought before a court in this way may arise from a failure to comply with one or more of the punitive or rehabilitative requirements of the order or may arise from a failure to keep an appointment or otherwise co-operate with the responsible officer. In a recent paper published by Barnardo's,[154] it was asserted that, in 2006/07, almost a quarter of all custodial sentences on young people were for breach of an order and that there has been a rise in the use of custody for breaching a community order.[155]

153. In relation to breach of a youth rehabilitation order, the court has the power to:

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[151] Crime and Disorder Act 1998, s.37
[152] Criminal Justice and Immigration Act 2008, schedule 2, para. 3
[153] ibid., para. 4
[154] *Locking up or giving up – is custody for children always the right answer?* September 2008 www.barnardos.org.uk
[155] Barnardo's propose that "there should be a graduated response to breach so that broken curfews or missed meetings do not carry the same penalty as a breach where an indictable offence is committed. Non compliance breaches should not carry a custodial penalty for children under 15". *Locking up or giving up – is custody for children always the right answer?* at p.7, September 2008 www.barnardos.org.uk

- impose a fine (in which case the order continues in its original form);
- amend the terms of the order; or
- revoke the order and re-sentence the offender.[156]

In amending the terms of the order, the court may impose any requirement that it could have imposed when making the order and this may be in addition to or in substitution for any requirements contained in the order.

154. If the youth rehabilitation order did not contain an unpaid work requirement and the court includes such a requirement using this power, the minimum period of unpaid work is 20 hours rather than the 40 hours minimum when the youth rehabilitation order was made; this will give greater flexibility when responding to the less serious breaches or where there are significant other requirements to be complied with.[157]

155. A court may not amend the terms of a youth rehabilitation order that did not include an extended activity requirement or a fostering requirement by inserting them at this stage; if this was considered appropriate, the offender would need to be resentenced and the original youth rehabilitation order revoked.[158]

156. In contrast with the powers in relation to an adult offender, there is no obligation on the court to make an order more onerous.

157. The Sentencing Guidelines Council has previously considered the approach to breach of a court order and emphasised that "the primary objective when sentencing for breach of requirements is to ensure that those requirements are completed".[159]

158. The Panel proposes that the approach to be adopted in response to breach of a youth rehabilitation order is that the primary objective is to ensure

[156] Criminal Justice and Immigration Act 2008, schedule 2, para. 6, 8
[157] ibid., para. 6(7) and para. 8(7)
[158] ibid., para. 6(8) and para. 8(8)
[159] *New Sentences: Criminal Justice Act 2003* p. 13, Sentencing Guidelines Council, December 2004 www.sentencing-guidelines.gov.uk ; see also *Breach of a Protective Order*

that the young person completes the requirements imposed by the court. Where the failure arises primarily from non-compliance with reporting or other similar obligations, the most appropriate response is likely to be the inclusion of (or increase in) primarily punitive requirement such as the curfew requirement, the exclusion requirement and the prohibited activity requirement.

Question 9

Are you aware of any reliable data on the extent to which orders are breached?

Question 10

Do you agree with the approach to dealing with a breach of a youth rehabilitation order described in paragraph 158? If not, why not?

CUSTODIAL SENTENCES

i) *Custodial sentences in the youth court*

159. Subject to the maximum penalty available for the conviction offence(s), the maximum length of a custodial sentence available in the youth court is 24 months, significantly in excess of the maximum summary powers available in relation to an adult offender. Any custodial sentence imposed in a youth court will be a detention and training order and must be for one of the specified periods of months – 4, 6, 8, 10, 12, 18 or 24.

160. Since the length of a custodial sentence must be commensurate with the seriousness of the offence, it is inevitable that the custody threshold is higher in the case of a young person than in the case of an adult - any case that warrants a custodial sentence of less than four months must result in a non-custodial sentence. The shortest period is substantially longer than the shortest period of imprisonment for an adult offender (5 days). Concerns have been expressed that, whilst the original thinking behind detention and training orders was to enable a continuous programme of education or training, rehabilitative work cannot be undertaken effectively within sentences of 4 or 6 months (because of the shortage of time) and that this is unlikely to reduce the risk of reoffending.

161. The effect of a detention and training order is that the young person spends the first half in custody (subject to early release provisions) and the second half under supervision in the community. It is not possible to suspend a detention and training order. Nor does legislation provide for time in custody on remand to be regarded as part of the sentence imposed; accordingly, a court should bear that period in mind when determining the length of sentence to impose.

162. There are restrictions on the imposition of a detention and training order based on the age of the offender. Where the offender is aged 10 or 11, a detention and training order may not be imposed; accordingly, no custodial sentence is available in the youth court; long term detention or detention for life may be imposed but only in the Crown Court (see paragraphs 169 and following below). Where the offender is aged between 12 and 14, a detention and training order may be imposed only if the young person is a "persistent offender".[160] This criterion does not have to be met before the Crown Court imposes long term detention or detention for life.

ii) ***Meaning of "persistent offender"***

163. No statutory definition has been provided. A dictionary definition of "persistent" is "persisting or having a tendency to persist"; "persist" is defined as "to continue firmly or obstinately in a course of action in spite of difficulty or opposition". For the purpose of prioritising cases within the Youth Justice System, the definition of "persistent offender" is "a young person aged 10-17 who has been sentenced by any criminal court in the UK on three or more separate occasions for one or more recordable offences, and within three years of the last sentencing occasion is subsequently arrested or has an information laid against them for a further recordable offence".[161] This has been held not to be appropriate for the purpose of interpreting this provision.[162] In this context, the

[160] Powers of Criminal Courts (Sentencing) Act 2000, s.100(2).
[161] *Tackling delays in the youth justice system*; issued 15 October 1997; see now http://www.justice.gov.uk/docs/pyo-jul-sept08.pdf
[162] *Charlton* [2001] 1 Cr.App.R.(S.) 120

term is “a wide one, allowing for some latitude of interpretation on the facts of particular cases”.[163]

164. In practice, difficult situations will arise where an offender aged 12-14 commits a serious offence but has no previous convictions; if the young offender pleads guilty, the only relevant sentencing choice available to a court is a referral order unless the offender can be considered to be persistent. The approach in such circumstances has been considered by the Court of Appeal.

165. In *Charlton*,[164] it was stated that persistent offending does not necessarily require there to be persistent appearances before a court; in that case, the young offender had committed offences on three days; the first two days were some seven weeks apart – the third day was a week after the second day. The second set of offences was committed whilst on bail for the first set. The Court of Appeal concluded that, in these circumstances, the criminal behaviour demonstrated a sufficient degree of persistence.

166. In *J.D.*,[165] a 14 year old charged with affray had a previous conviction for handling stolen goods and a caution for a similar offence but was not considered to be a persistent offender since the offence was of a different character. However, in *B,*[166] a girl aged 14 at the time of an offence of robbery in March 2008 had two previous convictions for common assault in June 2006 and a conviction for battery in November 2006; four violent offences within a two year period was held sufficient to satisfy the test of persistence and a 12 month detention and training order was upheld.

167. The interpretation of “persistent offender” needs to be considered in the context both of the revisions to the sentencing framework enacted in the 2008 Act and of the other provisions relating to the imposition of custodial sentences, particularly the requirement to use such sentences as “a measure of last resort”; the legal requirements following the implementation of the 2008 Act will be more

[163] *J.D.* (2001) 165 J.P. 1
[164] [2001] 1 Cr.App.R.(S.) 120
[165] (2001) 165 J.P. 1
[166] [2008] EWCA Crim 2579

extensive than those in place when the definitions were judicially developed . It should be noted also that it will be possible to impose a youth rehabilitation order with intensive supervision and surveillance or with fostering in relation to an offender aged under 15 years only if that young person is a persistent offender.[167] In this context, the definition is relevant to those aged 10 or 11 in addition to those aged 12-14.

168. It might be possible to establish criteria based on a number of offences admitted or proved within a given period. Since pre-court disposals are intended to divert young people who offend from the criminal justice system, it can be argued that it would be contradictory to include them in a definition of a persistent offender. Alternatively, the criteria could be based on a series of events which had led to action within the youth justice system (including, possibly, a reprimand, a final warning or a conditional caution) though this may present difficulties in relation to the obligation to use a custodial sentence as a "measure of last resort". Whilst a penalty notice for disorder is a sanction, there is less formality attached to the process and no requirement for a formal admission of guilt; however, some argue that it should be a relevant consideration.

Question 11

What is the most appropriate approach to determining whether a young person is a persistent offender?

iii) Sentencing in the Crown Court

169. There is a presumption that an offender aged under 18 will be tried summarily. In such circumstances, the maximum custodial sentence will be a detention and training order of no more than 24 months. However, where a young person is sentenced in the Crown Court as a result of the provisions described in this section, the sentence may be detention for life (murder) or long term detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000.

a. *"Grave crimes"*

[167] Criminal Justice and Immigration Act 2008, s.1(4)(c)

170. Where a young person could be sentenced to long term detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 and there is a "real possibility"[168] of such a sentence on conviction, the court will have the power to commit the young person to the Crown Court for trial. An offence comes within section 91 where it is punishable with 14 years or more imprisonment for an adult (or is an offence contrary to sections 3, 13, 25 or 26 of the Sexual Offences Act 2003[169]) and the court considers that, if convicted, the young person should be detained for a longer period than that available in a youth court.

171. The appeal courts have emphasised that the general power[170] should be used rarely.[171] In *R.(H., A. and O.) v Southampton Youth Court*[172] the Divisional Court summarised the approach to be adopted by a youth court when considering whether to commit such a case to the Crown Court. Noting that it was the general policy of Parliament that those under 18 should be tried in the youth court wherever possible, it was stated that trial in the Crown Court should be reserved for the most serious cases, recognising the greater formality of the proceedings and the greatly increased number of people involved. Those involving offenders aged under 15 will rarely attract a period of detention and those under 12 even more rarely. Accordingly, the current approach is that a young person aged 10 or 11 should be committed to the Crown Court only where charged with an offence of such exceptional gravity that, despite the normal prohibition on a custodial sentence for a person of that age, a sentence exceeding two years is a realistic possibility.

172. Since the implementation of the dangerous offender provisions in the Criminal Justice Act 2003 (as amended) (see below) there are likely to be even fewer occasions when the power needs to be used.

b. *"Dangerous offenders"*

[168] *R.(CPS) v. Redbridge Youth Court*, [2005] EWHC 1390
[169] sexual assault, child sex offences committed by a child or young person, sexual activity with a child family member, inciting a child family member to engage in sexual activity
[170] Magistrates' Courts Act 1980, s.24 and Powers of Criminal Courts (Sentencing) Act 2000, s.91
[171] See also *SC v. United Kingdom* [2005] Crim.L.R. 130 where the European Court of Human Rights upheld an appeal arising from the trial in the Crown Court of an 11 year old with learning difficulties charged with robbery – a custodial sentence could have been imposed only in the Crown Court on an offender of this age.
[172] [2004] EWHC 2912

173. The criteria to be satisfied before determining that a young person is a dangerous offender and that it is necessary to impose a sentence under the dangerous offender provisions are stringent and it is unlikely that many young people will be fall to be sentenced under those provisions. These provisions arise following conviction for one of a number of listed violent or sexual offences – a "specified offence". A "serious offence" is a specified offence with a maximum penalty of 10 years imprisonment or more in the case of an adult offender. A court will need to form the view that there is a significant risk both of the offender committing a further specified offence and of serious harm to members of the public arising from such an offence. Even where those criteria are found to exist, a court has discretion whether or not to impose a sentence under these provisions or another available sentence.[173]

174. An offender aged under 18 **must** be sentenced to detention for life if convicted of a "serious offence", the court is of the opinion that he or she is a dangerous offender, but for this section the offender would be liable to a sentence of detention for life under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 (s. 226(2)(a)), and the court considers that the seriousness of the offence (or of the offence and one or more offences associated with it), is such as to justify the imposition of a sentence of detention for life.[174]

175. An offender aged under 18 **may** be sentenced to detention for public protection where convicted of a "serious offence", the court is of the opinion that he or she is a dangerous offender, a sentence of detention for life is either not available or not justified, and the notional minimum term would be at least 2 years.

176. The court **may** impose an extended sentence on an offender aged under 18 who has been convicted of a "specified offence (including a serious offence)" where the court is of the opinion that he or she is a dangerous offender, a

[173] See *Dangerous Offenders: Guide for Sentencers and Practitioners* Sentencing Guidelines Council, July 2008 www.sentencing-guidelines.gov.uk
[174] Criminal Justice Act 2003, s.226

sentence of detention for life is either not available or not justified and the appropriate custodial term is at least 4 years.[175]

177. If an extended sentence is imposed, the appropriate custodial term (that is the total sentence before the extended licence period) must be at least four years. The offender will be entitled to automatic release after serving half the custodial term.

178. Where a young person is convicted of a "specified offence"[176] and a court concludes that there is a substantial risk of serious harm to members of the public arising from the commission by the offender of further specified offences, it may impose detention for public protection (providing the specified offence is a "serious" offence[177]) or an extended sentence. These sentences may be imposed only in the Crown Court. In each case the minimum period to be spent in custody under the sentence must be two years.[178] In July 2008, 74 young persons age 15-17 were in prison subject to an indeterminate sentence; 156 were in prison subject to a determinate sentence of 4 years or more, an increase of 26% on the number in July 2007.

179. A court must be particularly rigorous before concluding that a youth is a "dangerous offender".[179] The criteria relating to future offending and the risk of serious harm must be assessed in the light of the maturity of the offender, the possibility of change in a much shorter time than would apply for an adult and the wider circumstances of the young person. The case law pre-dates the changes introduced by the Criminal Justice and Immigration Act 2008 which has increased the minimum length of sentence and it is likely, therefore, that fewer of these sentences will be imposed.

180. The provisions by which a potentially "dangerous" young offender reaches the Crown Court are currently overlapping to some extent as a result of the only partial implementation of the provisions of the Criminal Justice Act 2003, which

[175] Section 228(2A) as inserted by the Criminal Justice and Immigration Act 2008
[176] as defined in Criminal Justice Act 2003, s. 224
[177] that is, an offence punishable by 10 years imprisonment or more in the case of an offender aged 18 or over
[178] Criminal Justice Act 2003 as amended by Criminal Justice and Immigration Act 2008; effective from 14 July 2008
[179] *CPS v. South East Surrey Youth Court* [2006] 2 Cr.App.R.(S) 26 at [17]; see also the review of statutory provisions and case law authority in *Dangerous Offenders: A Guide for Sentencers and Practitioners* at p.18 www.sentencing-guidelines.gov.uk

introduce a new section 51A to the Crime and Disorder Act 1998. This new section requires a young offender to be sent for trial where it appears the criteria for imposition of a sentence under the dangerous offender provisions will be met on conviction. However, the power to commit for sentence following conviction in a youth court or magistrates' court is preserved.[180]

181. Since the nature of the offence is likely to be very significant in determining both whether the offender meets the risk and harm criteria and, even so, whether a sentence under the provisions is necessary (given that there is now wide discretion) and since there is considerable authority stating strong arguments in favour of a young offender being dealt with in a youth court,[181] where a young person charged with a specified offence would not otherwise be committed or sent to the Crown Court for trial it seems preferable for the decision whether to commit under these provisions to be made after conviction in all but the most exceptional circumstances.

182. There are two potentially conflicting principles that arise - the presumption in favour of trial in a youth court and the need to sentence dangerous offenders in the Crown Court. As the legal provisions continue to provide for a decision relating to dangerousness to be taken either before or after conviction (see paragraph 180 above), the decision to retain a case for trial in a youth court should **not** be taken to be a decision that a custodial sentence of no longer than 2 years would not be appropriate (this would have the effect of removing the possibility of a sentence under the dangerous offender provisions, whereas the possibility of committing the offender to the Crown Court for sentence where such a sentence is required will always exist).

[180] Powers of Criminal Courts (Sentencing) Act 2000, s.3C
[181] see paragraph 171

Question 12

Do you agree:
a) that trial should generally take place in a youth court, and
b) that the decision whether a young person should be sentenced in the Crown Court on the basis of the dangerous offender provisions only is best made after conviction?

c. *Homicide*

183. One of the major exceptions to the presumption that a person aged under 18 should be tried summarily arises where the young person is charged with an offence of "homicide". The meaning of "homicide" is unclear. In its consultation paper *A New Homicide Act for England and Wales*,[182] the Law Commission referred to two general offences of homicide (murder and manslaughter) but also to a number of specific offences of homicide giving, as examples, infanticide and causing death by dangerous driving. For the purposes of section 91 (see paragraph 167 above), causing death by dangerous driving had been considered an offence of homicide when it was subject to a maximum sentence of 10 years imprisonment and so could not otherwise be sentenced in the Crown Court (and therefore to a custodial sentence in excess of 2 years) when committed by a young offender. However, it is now subject to a maximum of 14 years imprisonment (as is causing death by careless driving under the influence of drugs or alcohol) and so may be committed to the Crown Court under the more general provisions. This has the considerable advantage of being at the discretion of the court rather than mandatory.

184. A further complication arises from the creation of the two new offences of causing death by careless driving (maximum 5 years) and causing death by driving: disqualified, uninsured or unlicensed drivers (maximum 2 years). Logically, if causing death by dangerous driving is an "offence of homicide" so are these two offences; this would mean that all such offences charged in respect of a person under 18 years would have to be committed to the Crown Court for trial whereas an adult could be dealt with either in a magistrates' court or in the Crown Court. This would be contrary to the general presumption in favour of summary trial for those under 18.

[182] Consultation Paper No 177, December 2005 at para. 1.8 www.lawcom.gov.uk/murder.htm

d. *Statutory minimum sentence*

185. A further exception to the presumption in favour of summary trial arises where a young person is charged with an offence which has a statutory minimum custodial sentence of more than two years and the criteria for that sentence would be likely to be satisfied if the young person were convicted.[183] Accordingly, if a young person (aged 16 or over at the time of the offence) is charged with an offence of possession of a prohibited weapon[184] or ammunition contrary to section 5 of the Firearms Act 1968, for which the minimum sentence on conviction is 5 years, the case will need to be committed to the Crown Court for trial.[185] The same applies where an offender aged under 18 is convicted of using someone to mind such a weapon[186] and there are no exceptional circumstances sufficient to justify avoidance of the minimum sentence of 3 years.[187] A sentence under section 91 may also be imposed following committal where these mandatory sentence provisions apply.

e. *Charged jointly with an adult*

186. A further exception arises where a young person is charged jointly with a person aged 18 or over; if the court considers it necessary to commit them both for trial it will have the power to commit the young person to the Crown Court for trial.[188] In its draft Allocation guidelines,[189] the Sentencing Guidelines Council proposed that any presumption in favour of sending a youth to the Crown Court to be tried jointly with an adult must be balanced with the general presumption that young offenders should be dealt with in a youth court. The Council set out examples of factors that should be considered when deciding whether to separate the youth and adult defendants which included the young age of the offender, particularly where the age gap between the adult and youth offender is substantial, the immaturity and intellect of the youth, the relative culpability of the youth compared with the adult and whether or not the role played by the youth

[183] Magistrates' Courts Act 1980, s.24
[184] including an air rifle, air gun or air pistol able to use a self contained gas cartridge system
[185] a summary of the key statutory provisions can be found at *Dangerous Offenders: A Guide for Sentencers and Practitioners* at p.11 www.sentencing-guidelines.gov.uk
[186] Violent Crime Reduction Act 2006, s.28
[187] ibid., s.29(6)
[188] the procedures around the transfer to the Crown Court of a young person charged with an offence will change on the implementation of the relevant provisions in the Criminal Justice Act 2003, sched.3
[189] February 2006, www.sentencing-guidelines.gov.uk

was minor, lack of previous convictions on the part of the youth compared with the adult offender and whether the trial of the adult and youth could be severed without inconvenience to witnesses or injustice to the case as a whole.

f. *Summary and proposal*

187. It is clear under both domestic law and international convention that a custodial sentence must be imposed only as a "measure of last resort". Similarly, case law within this jurisdiction and through the European Courts establishes that the youth court is the tribunal before which most cases involving young people should be heard.

188. Accordingly, the Panel's preliminary view is that it should be rare for a young offender to be tried or sentenced in the Crown Court. Other than for an offence of homicide or where sentence is to be imposed under the dangerous offender provisions, a sentence beyond the powers of the youth court should be imposed only where that sentence is very substantially beyond those powers.

189. **The Panel, therefore, proposes that:**

i) for these purposes, "homicide" should be restricted to murder and manslaughter;

ii) where the offender is aged 10 or 11 and charged with an offence other than homicide, it will only be in the most exceptional circumstances that the offender will be committed to the Crown Court; normally this would only be where the court is likely to be satisfied that the dangerous offender criteria will be met and that a sentence under those provisions is necessary (in those circumstances, guilt can be determined in the youth court);

iii) where the offender is aged 12-14, is charged with an offence other than homicide and is not a "persistent offender", it will only be in the most exceptional circumstances that the offender will be committed to the Crown Court; normally this would only be where the court is likely to be satisfied that the dangerous offender criteria will be met and that a sentence under those provisions is necessary; where the offender is a

"persistent offender", there will be a strong presumption in favour of sentence within the youth court;

iv) where the offender is aged 15-16 and is charged with an offence other than homicide, there will be a strong presumption in favour of sentence within the youth court; sentence in the Crown Court is likely to be necessary only where the court is likely to be satisfied that the dangerous offender criteria will be met and that a sentence under those provisions is necessary;

v) in such circumstances, where appropriate the maximum period of 24 months may be imposed following a guilty plea at the first reasonable opportunity where that plea was a factor in retaining a case for sentence in the youth court.[190]

Question 13

In relation to the determination of whether a young person should be sentenced in the Crown Court, do you agree with the approach summarised in paragraphs 187-189?

v. *Determining length*

190. As with an adult offender, a court imposing a custodial sentence is required to set the shortest term commensurate with the seriousness of the offence(s).[191] Earlier in this paper, reference has been made to the emphasis on using a custodial sentence as "a measure of last resort" and to the expectation that "most young offenders can be punished and dealt with effectively in the community".[192]

191. In its offence specific guidelines, the Sentencing Guidelines Council has generally not issued guidelines for offenders aged under 18 because of the wide range of issues that arise and the marked differences in the sentencing framework depending on the age of the offender. However, guidelines have been issued in relation to a small number of offences under the Sexual Offences Act 2003 which have a lower maximum penalty under the statute when

[190] Changes enacted in Criminal Justice Act 2003, sched. 3 (but not yet in force) provide for a "plea before venue" procedure in relation to youths
[191] Criminal Justice Act 2003, s.153(2)
[192] Youth Crime Action Plan 2008, para. 4.2 www.homeoffice.gov.uk/documents/youth-crime-action-plan

committed by a person under 18, to the offence of robbery and for breach of an anti-social behaviour order.

192. In relation to the sexual offences, the maximum penalty for a young offender is set at 5 years compared with 10 or 14 years for an adult, an approximate reduction of between one half and one third. The Council guidelines provide a starting point for an offender aged 17; the descriptions of offence activity are often differently drafted to reflect the circumstances in which an offence is likely to occur but, typically, starting points are between one third and one half of the length of the equivalent starting point for an adult offender.

193. In relation to robbery, the starting points for the two most serious levels are substantial custodial sentences (8 years and 4 years). For a 17 year old offender, a reduction of approximately 12% is made for the most serious level (to 7 years) and a reduction of 25% is made for the middle level (to 3 years); the starting point for the least serious level of offence (involving the threat or use of minimal force and no weapon) is a community order rather than 12 months custody. The guideline states that, for offenders younger than 17, "sentencers should consider whether a lower starting point is justified in recognition of the offender's age or immaturity".[193]

194. In relation to breach of an anti-social behaviour order, the guideline emphasises that the custody threshold is at a significantly higher level than for an adult offender, that a community order is likely to be the appropriate sentence in most cases and that, where a custodial sentence is unavoidable, the starting point should be the minimum length of 4 months compared with 26 weeks for an adult offender.[194]

195. The Panel has considered whether it would be possible to provide guidance to assist a court in identifying sentence length that incorporates the requirement to impose such a sentence only as a "measure of last resort" but

[193] *Robbery* Sentencing Guidelines Council definitive guideline effective from 1 August 2006 at page 14: www.sentencing-guidelines.gov.uk
[194] *Breach of an anti-social behaviour order* Sentencing Guidelines Council definitive guideline effective from 5 January 2009: www.sentencing-guidelines.gov.uk

would be suitably flexible to reflect both the various age related restrictions and the potentially significant differences in maturity.

196. One approach is to identify a ratio by which the length of a custodial sentence for a young offender would reduce in comparison with that which would have been imposed on an adult. The key elements of such an approach for an offence that has crossed the custody threshold[195] could be:

- for a first time offender who has pleaded guilty, in most circumstances a referral order will be the most appropriate sentence;
- in most other circumstances a youth rehabilitation order will be the most appropriate sentence;
- where a custodial sentence is unavoidable, identify the starting point by reference to the starting point that would have been applicable if the offender had been an adult;
- in determining how to move from the starting point, take account of the maturity of the offender as well as chronological age;
- only where a sentence significantly above the powers of a youth court can be anticipated would a court expect to commit a case to the Crown Court under the grave crime provisions.

197. Where the young person is aged 17, the starting point might be approximately three quarters of that which would have been identified for an adult offender. Where the young person is aged 16, the proportion might be two thirds; where 15, one half; where 12-14, one third and, where 10-11, one fifth.

198. The Court of Appeal has recently considered appeals arising from the sentencing of serious cases committed by young people. In *James Green*[196] the offender was aged 16 at time of sentence but aged 15 at the time of the offence, wounding with intent to commit grievous bodily harm. After an argument concerning a trivial matter, the offender went home, collected a knife, returned to where he knew the victim would be and inflicted serious wounds upon him

[195] assuming a sentence under the dangerous offender provisions is not likely to be necessary
[196] [2008] EWCA Crim 2514

narrowly missing an artery. The victim had a continuing disability as a result of the attack. Concluding that the offender, despite his age and the absence of previous convictions, knew exactly what he was doing and that he did it deliberately and noting that the offence occurred within two weeks of a court appearance on another matter (which should have been a salutary warning), the Court determined that the sentence of a two year detention and training order should be replaced by a four year sentence.

199. If the offender had been an adult offender, the situation of this offence would appear to fall within the second level of seriousness set out in the Sentencing Guidelines Council guideline, *Assault and other offences against the person*.[197] Where an offence involves a pre-meditated wounding involving the use of a weapon acquired prior to the offence and carried to the scene with specific intent to injure the victim but without resulting in life threatening or particularly grave injury, the starting point for a first time adult offender pleading not guilty is 8 years within a range of 7-10 years. In *Green*, the offender pleaded guilty and the equivalent starting point could be estimated to have been in the region of 6 years. The 4 year sentence imposed would be two thirds of that figure; the proposals set out above provide for that ratio for an offender aged 16 (Green's age at sentence) but for a ratio of one half for an offender aged 15 (Green's age at the time of the offence).

200. A further serious offence of grievous bodily harm with intent was considered in *Joseph Hulme and Danny Hulme*.[198] The defendants were 16 years and 15 years at the time of the incident in which they were part of a group; others were convicted of murder of one of the victims of the group attack whilst these two were convicted of grievous bodily harm with intent against a second victim. The court considered that the offence fell within the highest level of seriousness in the Council guideline. In the case of an adult, this would have led to a range of up to 16 years and this offence would have justified a sentence at the top of the range. Allowing for the age of these defendants, the Court of Appeal agreed that the equivalent sentence would have been 13 years.

[197] effective from 3 March 2008 www.sentencing-guidelines.gov.uk
[198] [2008] EWCA Crim 2501

201. In *Zotiades*[199] the offender was aged 15 and was convicted of causing death by dangerous driving and of aggravated vehicle taking whilst aged 14. Having taken a vehicle, he drove it around a residential estate erratically and too fast for conditions. He lost control, hit a tree which snapped and hit a buggy carrying two young children, one of whom was killed. The other child in the buggy, an older brother and their mother all escaped physical injury but were badly affected. The offender ran away from the scene and did not plead guilty until a late stage. The offender had one other conviction for common assault. He was sentenced to 42 months detention and this was upheld on appeal.

202. If the offender had been an adult offender, the circumstances of this offence would have been likely to have placed it within the second level of seriousness set out in the Sentencing Guidelines Council guideline *Causing death by driving*.[200] This provides for offences where the driving created a *substantial* risk of injury and would have been aggravated by the commission of the offence of aggravated vehicle taking and by the irresponsible behaviour of leaving the scene. The guidelines provide for a starting point of 5 years custody within a range of 4-7 years for a first time adult offender who had pleaded not guilty. Following the proposal above, it could be anticipated that the sentence would have been around 2 years (if sentenced on the basis of age 14) or around 3 years (if sentenced on the basis of age 15).

203. In using an approach such as that set out above, care will need to be taken to ensure that proper account is taken of the maturity of the young person as well as the chronological age; this will be particularly necessary in the higher age ranges where some offenders will be extremely mature, more so than some offenders who are over 18, whilst others will be significantly less mature. Where an offence shows considerable planning or sophistication, a court may need to adjust the approach upwards; where the offender is particularly immature, the court may need to adjust the approach downwards.

[199] [2008] EWCA Crim 753
[200] effective from 4 August 2008 www.sentencing-guidelines.gov.uk

204. A number of consequences would flow from such an approach:

a) where an offence had a maximum penalty of 6 months custody, it would be rare for a young offender to receive a custodial sentence;

b) only the most serious offences committed by an offender aged 15 would require to be sentenced in the Crown Court; unless the young person shows unusual maturity or criminal sophistication, those cases requiring sentence in the Crown Court would be those where a sentence in excess of 6 years custody would be likely in respect of an adult offender or the dangerous offender provisions need to be considered;

c) in relation to offenders aged 12-14, those cases requiring sentence in the Crown Court would be those where a sentence in excess of 9 years custody would be likely in respect of an adult offender or the dangerous offender provisions need to be considered;

d) in relation to offenders aged 10-11, those cases requiring sentence in the Crown Court would be those where a sentence in excess of 15 years custody would be likely in respect of an adult offender or the dangerous offender provisions need to be considered;

e) existing guidance from the Court of Appeal that certain types of offender should be committed to the Crown Court under these provisions would no longer apply – this would include the guidance relating to the sentencing of burglary and rape.

205. The Panel recognises that the imposition of a custodial sentence requires considerable judgement and would welcome views on whether an approach such as that outlined is likely to be helpful and, if so, what the approach should contain. Inevitably, a general approach cannot produce a precise relationship both because of the variance in offences and in the circumstances of the offender and because of the prescribed periods for which a detention and training order may be imposed.

Question 14

In relation to the determination of the length of a custodial sentence, do you consider that an approach such as that described in paragraphs 195-197 would be helpful?
What elements do you consider should be included within it?
Are there any dangers that would flow from such an approach?

Crossing a significant age threshold between commission of an offence and sentence

206. The age of an offender may be significant in determining the sentences available. Generally, the relevant statutory provisions provide that the relevant age is that at the time of conviction rather than at the time the offence was committed. For example, in relation to a custodial sentence, a court may not make a detention and training order in relation to an offender under 15 "at the time of conviction" unless that young person is a persistent offender.[201]

207. The Court of Appeal has set out a general approach where an offender crosses a relevant age threshold between the date on which the offence was committed and the date of conviction.[202] A court should start from the point of the sentence that the offender would have been likely to have received if sentence had been imposed on the date on which the offence was committed. That is a powerful factor, though it is not the only factor. However, it will be rare for a court to have to consider passing a sentence more severe than the maximum it would have had jurisdiction to pass at the time the offence was committed. [203]

208. This approach has been applied most consistently in relation to those who attain the age of 15 between the commission of the offence and the date of conviction. A young person aged 12-14 may only be made subject to a detention and training order if considered to be a "persistent offender". In *LM*, a 15 year old boy who was not a persistent offender was convicted of an offence of causing grievous bodily harm committed when he was aged 14 and sentenced to a detention and training order; that decision was overturned on appeal.[204] Similarly, in relation to a 15 year old girl convicted of wounding with intent

[201] Powers of Criminal Courts (Sentencing) Act 2000, s.100(2)(a); see also *Robson (Kevin)* [2006] EWCA Crim 1414
[202] *Ghafoor* [2002] EWCA Crim 1857
[203] ibid., para.33

committed when she was aged 14 where the initial sentence was an 18 month detention and training order.[205]

209. A different approach may be necessary where an offender attains the age of 18 between conviction and sentence. Although the defendant in *Ghafoor* was a young person who committed an offence when aged 17 but had become 18 by the date of conviction, the case was decided before the implementation of section 142 of the Criminal Justice Act 2003.[206] The significance of this was considered by the Court of Appeal in *Bowker*.[207] The defendant had been convicted of an offence of violent disorder committed two days before his 18th birthday. The incident arose out of conflict between two rival gangs of youths and involved what the Judge describes as "scenes of sickening violence" in which the defendant played a prominent role. The defendant was sentenced to 28 months detention, a period in excess of that permissible if he had been sentenced as a 17 year old.

210. Having reviewed the authorities and having noted that this particular defendant was in the highest category of culpability for an offence committed in circumstances where a deterrent sentence was required, the Court of Appeal considered whether the offender should have been treated significantly differently from those aged 18 or over at the time of the offence, bearing in mind that the passing of the age threshold did not come about as a result of delays in the trial process. The defendant was one of three offenders for whom a starting point of three and a half years was appropriate; the others were two and half years older and 15 months older respectively. Credit was given for the offender's guilty plea.

211. The Court of Appeal noted that Parliament had provided that the form of custodial sentence is to be determined by the date of conviction, that the principal aim of the youth justice system was to prevent offending by those aged under 18 and that, since section 142 of the Criminal Justice Act 2003 applies to

[204] [2002] EWCA Crim 3047
[205] *R.* [2006] EWCA Crim 3184
[206] setting out the purposes of sentencing for an offender aged 18 or more "at the time of conviction"
[207] [2007] EWCA Crim 1608

the sentencing of those aged 18 or over *at the date of conviction*, the sentencing disposal has to take account of the matters set out in that section. When sentencing those under 18, a court will generally focus on the requirements of the offender and the offender's rehabilitation; when sentencing those over 18 more general public policy considerations may play a greater part, including deterrence.[208]

212. However, the Court of Appeal concluded that the implications of *Ghafoor* (which had not been drawn to the attention of the trial judge) should have led to a lower sentence and reduced the sentence to 24 months detention. Since violent disorder has a maximum penalty of 5 years imprisonment for an adult offender, a young offender could not be committed to the Crown Court with a view to sentence in that court (other than as a dangerous offender) and so 24 months would be the maximum sentence available.

213. **The Panel considers that**, as a matter of general principle, the approach should be as set out in *Ghafoor*, that is, that the starting point should be the likely sentence at the date the offence was committed and that it would be rare for the maximum sentence at that date to be exceeded.

Question 15

Where an offender crosses a significant age threshold between committing an offence and being sentenced for it, do you agree with the approach in paragraph 213?

EQUALITY AND HUMAN RIGHTS

214. When producing advice on sentencing, originally for the Court of Appeal and latterly for the Council, the Panel has always given careful consideration to the extent to which any of its proposals might impact unfairly on any specific groups of offender.

[208] *Bowker* [2007] EWCA Crim 1608 per Latham LJ at para.22

215. This approach has recently been codified in the Panel's statement of intention on diversity issues.[209] As each new project is commenced, the Panel carries out an initial consultation with selected groups to make sure that any known or suspected diversity issues are not overlooked. We are grateful to those who responded to our in initial enquiries in relation to the sentencing of youths; the points raised have been carefully considered and have largely been reflected earlier in this paper. We are content that existing guidelines take account of any general diversity issues and that the principle of offender mitigation will address any specific concerns raised in connection with individual offenders but there are additional issues that have been raised in relation to youths and are worthy of special mention.

216. When considering whether to impose a parenting order or a youth rehabilitation order with requirements that oblige a young offender to spend prolonged periods within the family unit or that require the involvement or support of parents or guardians, the court will wish to give careful consideration to the strength of the familial relationships and to any diversity issues that might impact on the success of the court order. Particular issues may arise in relation to an offender who is, or who runs the risk of, experiencing familial abuse or rejection on the grounds of sexual orientation. In considering such factors, which may be documented in a pre-sentence report, the court must take care not to disclose facts about an offender's sexual orientation without his or her consent. Similar issues might arise in a family where racial tensions exist.

217. When sentencing a young offender whose offence involves sexual activity, it has already been established that Crown Prosecutors and the court should take account of an offender's immaturity and normal juvenile experimentation.[210] This may be triggered by a desire to explore gender identity or sexual orientation and may result in offending behaviour beyond the limits of sexual offences. The Panel takes the view that behaviour linked to sexual immaturity or confusion may constitute offender mitigation and might deserve a certain degree of tolerance depending on the seriousness of the offending behaviour.

[209] See the What's New section of the joint Council and Panel website at www.sentencing-guidelines.gov.uk
[210] Sexual Offences Act 2003 – the Panel's Advice to the Council – page 4, para. 21, www.sentencing-guidelines.gov.uk

218. As was noted above (see paragraph 59 above), amongst young people in custody the incidence of mental disorder is far higher (31%) than in the general population (10%). In addition, it has been reported that one in five young offenders have an IQ of less than 70[211] and that this is likely to make it more difficult to complete interventions within a sentence. The Panel takes the view that proper identification of these issues and a proper response to them is very important in fulfilling the principal aim of the youth justice system and would welcome views on how a court might identify the presence of these factors and how it should respond to them.

219. We invite your views on the issues raised above. We are also genuinely interested to know whether there are any other diversity issues arising from this consultation that we might have overlooked, especially where it is possible that more than one issue relating to diversity might arise in relation to an individual offender.

Question 16

Do you have any views on the issues in relation to equality and human rights raised in paragraphs 214-218?

Question 17

Do you agree that the proposals in this paper adopt the right approach to issues of gender, age, disability, race or ethnic group (or any combination of those factors) or would further guidance be helpful?

[211] Chitsabesan et al., 2006

SUMMARY OF QUESTIONS

Question 1

Do you consider that the use of the terms best interests or well-being (see paragraph 37 above) signifies any difference in meaning from the use of the term welfare?

Question 2

In relation to balancing the purposes of sentencing, do you agree that the approach described in paragraphs 47-52 should be the general approach? If not, why not?

Question 3

Are you aware of any further information relevant to consideration of ethnicity and gender issues and sentencing patterns?

Question 4

The Panel would welcome your views on whether guidance would be helpful in relation to referral orders. If so, do you agree with the approach set out in paragraph 116?

Question 5

Is there scope for increasing the use of financial penalties?
If so, what wider circumstances might merit such a sentence?
Should the Education Maintenance Allowance be taken into account?

Question 6

What criteria should be used when setting the overall length of a youth rehabilitation order?

Question 7

In addition to the statutory criteria, in what circumstances is it likely to be appropriate to include a fostering requirement in a youth rehabilitation order?

Question 8

In relation to the imposition of a youth rehabilitation order, do you agree with the approach summarised in paragraphs 149 and 150? If not, why not?

Question 9

Are you aware of any reliable data on the extent to which orders are breached?

Question 10

Do you agree with the approach to dealing with a breach of a youth rehabilitation order described in paragraph 158? If not, why not?

Question 11

What is the most appropriate approach to determining whether a young person is a persistent offender?

Question 12

Do you agree:
a) that trial should generally take place in a youth court, and
b) that the decision whether a young person should be sentenced in the Crown Court on the basis of the dangerous offender provisions only is best made after conviction?

Question 13

In relation to the determination of whether a young person should be sentenced in the Crown Court, do you agree with the approach summarised in paragraphs 187-189?

Question 14

In relation to the determination of the length of a custodial sentence, do you consider that an approach such as that described in paragraphs 195-197 would be helpful?
What elements do you consider should be included within it?
Are there any dangers that would flow from such an approach?

Question 15

Where an offender crosses a significant age threshold between committing an offence and being sentenced for it, do you agree with the approach in paragraph 213?

Question 16

Do you have any views on the issues in relation to equality and human rights raised in paragraphs 214-218?

Question 17

Do you agree that the proposals in this paper adopt the right approach to issues of gender, age, disability, race or ethnic group (or any combination of those factors) or would further guidance be helpful?

LIST OF CONSULTEES

Copies of the consultation paper have been sent to the people and organisations listed below. They include those the Panel is required to consult by the direction of the Sentencing Guidelines Council.

In addition, copies have been sent to the Resident Judge and to the Liaison Judge at each Crown Court Centre in England and Wales and to relevant Government Departments.

Archbishop of Canterbury
Association of Chief Officers of Probation
Association of Chief Police Officers
Association of Directors of Social Services
Association of Women Judges
Association of Youth Offending Team Managers
Barnardo's
Catch-22
Centre for Crime and Justice Studies
Chairs of Magistrates' Courts Youth Court Panels
Chief Inspector of Prisons
Chief Inspector of Probation
Children's Commissioner for England
Children's Commissioner for Wales
Children's Society
Council of HM District Judges (Magistrates' Courts)
Council of HM Circuit Judges
Crime Concern
Criminal Law Solicitors' Association
Criminal Justice Alliance
Crown Prosecution Service
Department for Children, Families and Schools
Equality and Human Rights Commission
Fawcett Society
General Council of the Bar
Group 4 Falck
HM Inspectorate of Courts Administration
H M Prison Service
Howard League for Penal Reform
Justice
Justices' Clerks' Society
Law Commission
Law Society
Liberty
Local Government Association
London Criminal Courts Solicitors Association
Magistrates' Association
Managers, Secure Children's Homes
Ministry of Justice, Criminal Justice Group
Nacro (National Association for the Care and Resettlement of Offenders)

National Association of Probation Officers
National Bench Chairmen's Forum
National Children's Bureau
National Probation Service
Parole Board
Police Federation of England and Wales
Police Superintendents' Association
Prison Governors' Association
Prison Officers' Association
Prison Reform Trust
Probation Managers' Association
Rebound ECD, Global Solutions Ltd
Serco Group PLC
Society of Legal Scholars
Stonewall
TACT (The Adolescent and Childcare Trust, incorporating Children Law UK)
UK Youth Parliament
Victims Advisory Panel
Victim Support
Victims of Crime Trust
Voice
Women in Prison
YJB

Criminal Justice Act 2003

Part 12

Sentencing

Chapter 1
General Provisions about Sentencing

Matters to be taken into account in sentencing

142 Purposes of sentencing : offenders aged 18 or over

(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

(a) the punishment of offenders,

(b) the reduction of crime (including its reduction by deterrence),

(c) the reform and rehabilitation of offenders,

(d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences.

(2) Subsection (1) does not apply—

(a) in relation to an offender who is aged under 18,

(b) to an offence the sentence for which is fixed by law,

(c) to an offence the sentence for which falls to be imposed under section 51A(2) of the Firearms Act 1968 (c 27) (minimum sentence for certain firearms offences), under subsection (2) of section 110 or 111 of the Sentencing Act (required custodial sentences), under section 29(4) or (6) of the Violent Crime Reduction Act 2006 (minimum sentences in certain cases of using someone to mind a weapon) or under section 225(2) or 226(2) of this Act (dangerous offenders), or

(d) in relation to the making under Part 3 of the Mental Health Act 1983 (c 20) of a hospital order (with or without a restriction order), an interim hospital order, a hospital direction or a limitation direction.

(3) In this Chapter “sentence”, in relation to an offence, includes any order made by a court when dealing with the offender in respect of his offence; and “sentencing” is to be construed accordingly.

142A Purposes etc of sentencing: offenders under 18

(1) This section applies where a court is dealing with an offender aged under 18 in respect of an offence.

(2) The court must have regard to—

(a) the principal aim of the youth justice system (which is to prevent offending (or re-offending) by persons aged under 18: see section 37(1) of the Crime and Disorder Act 1998),

(b) in accordance with section 44 of the Children and Young Persons Act 1933, the welfare of the offender, and

(c) the purposes of sentencing mentioned in subsection (3) (so far as it is not required to do so by paragraph (a)).

(3) Those purposes of sentencing are—

(a) the punishment of offenders,

(b) the reform and rehabilitation of offenders,

(c) the protection of the public, and

(d) the making of reparation by offenders to persons affected by their offences.

(4) This section does not apply—

(a) to an offence the sentence for which is fixed by law,

(b) to an offence the sentence for which falls to be imposed under—

(i) section 51A(2) of the Firearms Act 1968 (minimum sentence for certain firearms offences),

(ii) section 29(6) of the Violent Crime Reduction Act 2006 (minimum sentences in certain cases of using someone to mind a weapon), or

(iii) section 226(2) of this Act (detention for life for certain dangerous offenders), or

(c) in relation to the making under Part 3 of the Mental Health Act 1983 of a hospital order (with or without a restriction order), an interim hospital order, a hospital direction or a limitation direction.

143 Determining the seriousness of an offence

(1) In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might forseeably have caused.

(2) In considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—

(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and

(b) the time that has elapsed since the conviction.

(3) In considering the seriousness of any offence committed while the offender was on bail, the court must treat the fact that it was committed in those circumstances as an aggravating factor.

(4) Any reference in subsection (2) to a previous conviction is to be read as a reference to—

(a) a previous conviction by a court in the United Kingdom, or

(b) a previous finding of guilt in service disciplinary proceedings

(5) Subsections (2) and (4) do not prevent the court from treating a previous conviction by a court outside the United Kingdom as an aggravating factor in any case where the court considers it appropriate to do so.

144 Reduction in sentences for guilty pleas

(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account—

(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and

(b) the circumstances in which this indication was given.

(2) In the case of an offence the sentence for which falls to be imposed under subsection (2) of section 110 or 111 of the Sentencing Act, nothing in that subsection prevents the court, after taking into account any matter referred to in subsection (1) of this section, from imposing any sentence which is not less than 80 per cent of that specified in that subsection.

145 Increase in sentences for racial or religious aggravation

(1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (c 37) (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).

(2) If the offence was racially or religiously aggravated, the court—

(a) must treat that fact as an aggravating factor, and

(b) must state in open court that the offence was so aggravated.

(3) Section 28 of the Crime and Disorder Act 1998 (meaning of “racially or religiously aggravated”) applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.

146 Increase in sentences for aggravation related to disability or sexual orientation

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

(i) the sexual orientation (or presumed sexual orientation) of the victim, or

(ii) a disability (or presumed disability) of the victim, or

(b) that the offence is motivated (wholly or partly)—

(i) by hostility towards persons who are of a particular sexual orientation, or

(ii) by hostility towards persons who have a disability or a particular disability.

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section “disability” means any physical or mental impairment.

General restrictions on community sentences

147 Meaning of “community sentence” etc

(1) In this Part “community sentence” means a sentence which consists of or includes—

(a) a community order (as defined by section 177), or

(b) one or more youth community orders

(c) a youth rehabilitation order.

(2) In this Chapter “youth community order” means—

(a) a curfew order as defined by section 163 of the Sentencing Act,

(b) an exclusion order under section 40A(1) of that Act,

(c) an attendance centre order as defined by section 163 of that Act,

(d) a supervision order under section 63(1) of that Act, or

(e) an action plan order under section 69(1) of that Act.

148 Restrictions on imposing community sentences

(1) A court must not pass a community sentence on an offender unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant such a sentence.

(2) Where a court passes a community sentence—

(a) the particular requirement or requirements forming part of the community order, or, as the case may be, youth rehabilitation order, comprised in the sentence must be such as, in the opinion of the court, is, or taken together are, the most suitable for the offender, and

(b) the restrictions on liberty imposed by the order must be such as in the opinion of the court are commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it.

(2A) Subsection (2) is subject to paragraph 3(4) of Schedule 1 to the Criminal Justice and Immigration Act 2008 (youth rehabilitation order with intensive supervision and surveillance).

(4) Subsections (1) and (2)(b) have effect subject to section 151(2).

(5) The fact that by virtue of any provision of this section—

(a) a community sentence may be passed in relation to an offence; or

(b) particular restrictions on liberty may be imposed by a community order or youth rehabilitation order,

does not require a court to pass such a sentence or to impose those restrictions.

149 Passing of community sentence on offender remanded in custody

(1) In determining the restrictions on liberty to be imposed by a community order or youth rehabilitation order in respect of an offence, the court may have regard to any period for which the offender has been remanded in custody in connection with the offence or any other offence the charge for which was founded on the same facts or evidence.

(2) In subsection (1) “remanded in custody” has the meaning given by section 242(2).

150 Community sentence not available where sentence fixed by law etc

The power to make a community order or youth rehabilitation order is not exercisable in respect of an offence for which the sentence—

(a) is fixed by law,

(b) falls to be imposed under section 51A(2) of the Firearms Act 1968 (c 27) (required custodial sentence for certain firearms offences),

(c) falls to be imposed under section 110(2) or 111(2) of the Sentencing Act (requirement to impose custodial sentences for certain repeated offences committed by offenders aged 18 or over), . . .

(ca) falls to be imposed under section 29(4) or (6) of the Violent Crime Reduction Act 2006 (required custodial sentence in certain cases of using someone to mind a weapon), or

(d) falls to be imposed under section 225(2) or 226(2) of this Act (requirement to impose sentence of imprisonment for life or detention for life).

150A Community order available only for offences punishable with imprisonment or for persistent offenders previously fined

(1) The power to make a community order is only exercisable in respect of an offence if—

(a) the offence is punishable with imprisonment; or

(b) in any other case, section 151(2) confers power to make such an order.

(2) For the purposes of this section and section 151 an offence triable either way that was tried summarily is to be regarded as punishable with imprisonment only if it is so punishable by the sentencing court (and for this purpose section 148(1) is to be disregarded).

151 Community order or youth rehabilitation order for persistent offender previously fined[1]

(A1) Subsection (2) provides for the making of a community order by the court in respect of an offence ("the current offence") committed by a person to whom subsection (1) or (1A) applies.

(1) This subsection applies to the offender if—

(za) the current offence is punishable with imprisonment,

(a) the offender was aged 16 or over when he was convicted,
(b) on three or more previous occasions the offender has, on conviction by a court in the United Kingdom of any offence committed by him after attaining the age of 16, had passed on him a sentence consisting only of a fine, and

[1] This section has yet to be implemented.

(c) despite the effect of section 143(2), the court would not (apart from this section) regard the current offence, or the combination of the current offence and one or more offences associated with it, as being serious enough to warrant a community sentence.

(1A) This subsection applies to the offender if—

(a) the current offence is not punishable with imprisonment;

(b) the offender was aged 18 or over when he was convicted; and

(c) on three or more previous occasions the offender has, on conviction by a court in the United Kingdom of any offence committed by him after attaining the age of 18, had passed on him a sentence consisting only of a fine.

(2) The court may make a community order in respect of the current offence instead of imposing a fine if it considers that, having regard to all the circumstances including the matters mentioned in subsection (3), it would be in the interests of justice to make such an order.

(2A) Subsection (2B) applies where—

(a) a person aged 16 or 17 is convicted of an offence ("the current offence");

(b) on three or more previous occasions the offender has, on conviction by a court in the United Kingdom of any offence committed by him after attaining the age of 16, had passed on him a sentence consisting only of a fine; and

(c) despite the effect of section 143(2), the court would not (apart from this section) regard the current offence, or the combination of the current offence and one or more offences associated with it, as being serious enough to warrant a youth rehabilitation order.

(2B) The court may make a youth rehabilitation order in respect of the current offence instead of imposing a fine if it considers that, having regard to all the circumstances including the matters mentioned in subsection (3), it would be in the interests of justice to make such an order.

(3) The matters referred to in subsection (2) and (2B) are—

(a) the nature of the offences to which the previous convictions mentioned in subsection (1)(b) (1A)(b) or (2A)(b) (as the case may be) relate and their relevance to the current offence, and

(b) the time that has elapsed since the offender's conviction of each of those offences.

(4) In subsections (1)(b), (1A)(b) and (2A)(b), the reference to conviction by a court in the United Kingdom includes a reference to the finding of guilt in service disciplinary proceedings; and, in relation to any such finding of guilt, the reference to the sentence passed is a reference to the punishment awarded.

(5) For the purposes of subsections (1)(b), (1A)(b) or (2A)(b), a compensation order or a surcharge under section 161A does not form part of an offender's sentence.

(6) For the purposes of subsections (1)(b), (1A)(b) and (2A)(b), it is immaterial whether on other previous occasions a court has passed on the offender a sentence not consisting only of a fine.

(7) This section does not limit the extent to which a court may, in accordance with section 143(2), treat any previous convictions of the offender as increasing the seriousness of an offence.

General restrictions on discretionary custodial sentences

152 General restrictions on imposing discretionary custodial sentences

(1) This section applies where a person is convicted of an offence punishable with a custodial sentence other than one—

(a) fixed by law, or

(b) falling to be imposed under section 51A(2) of the Firearms Act 1968 (c 27), under section 110(2) or 111(2) of the Sentencing Act, under section 29(4) or (6) of the Violent Crime Reduction Act 2006 or under section 225(2) or 226(2) of this Act.

(2) The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.

(3) Nothing in subsection (2) prevents the court from passing a custodial sentence on the offender if—

(a) he fails to express his willingness to comply with a requirement which is proposed by the court to be included in a community order and which requires an expression of such willingness, or

(b) he fails to comply with an order under section 161(2) (pre-sentence drug testing).

153 Length of discretionary custodial sentences: general provision

(1) This section applies where a court passes a custodial sentence other than one fixed by law or . . . imposed under section 225 or 226.

(2) Subject to section 51A(2) of the Firearms Act 1968 (c 27), sections 110(2) and 111(2) of the Sentencing Act, section 29(4) or (6) of the Violent Crime Reduction Act 2006 and sections 227(2) and 228(2) of this Act, the custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it.

General limit on magistrates' court's power to impose imprisonment

154 General limit on magistrates' court's power to impose imprisonment

(1) A magistrates' court does not have power to impose imprisonment for more than 12 months in respect of any one offence.

(2) Unless expressly excluded, subsection (1) applies even if the offence in question is one for which a person would otherwise be liable on summary conviction to imprisonment for more than 12 months.

(3) Subsection (1) is without prejudice to section 133 of the Magistrates' Courts Act 1980 (c 43) (consecutive terms of imprisonment).

(4) Any power of a magistrates' court to impose a term of imprisonment for non-payment of a fine, or for want of sufficient distress to satisfy a fine, is not limited by virtue of subsection (1).

(5) In subsection (4) “fine” includes a pecuniary penalty but does not include a pecuniary forfeiture or pecuniary compensation.

(6) In this section “impose imprisonment” means pass a sentence of imprisonment or fix a term of imprisonment for failure to pay any sum of money, or for want of sufficient to satisfy any sum of money, or for failure to do or abstain from doing anything required to be done or left undone.

(7) Section 132 of the Magistrates' Courts Act 1980 contains provisions about the minimum term of imprisonment which may be imposed by a magistrates' court.

155 Consecutive terms of imprisonment

(1) Section 133 of the Magistrates' Courts Act 1980 (consecutive terms of imprisonment) is amended as follows.

(2) In subsection (1), for “6 months” there is substituted “65 weeks”.

(3) Subsection (2) is omitted.

(4) In subsection (3) for “the preceding subsections” there is substituted “subsection (1) above”.

Procedural requirements for imposing community sentences and discretionary custodial sentences

156 Pre-sentence reports and other requirements

(1) In forming any such opinion as is mentioned in section 148(1) or (2)(b), section 152(2) or section 153(2), or in section 1(4)(b) or (c) of the Criminal Justice and Immigration Act 2008 (youth rehabilitation orders with intensive supervision and surveillance or fostering), a court must take into account all such information as is available to it about the circumstances of the offence or (as the case may be) of the offence and the offence or offences associated with it, including any aggravating or mitigating factors.

(2) In forming any such opinion as is mentioned in section 148(2)(a), the court may take into account any information about the offender which is before it.

(3) Subject to subsection (4), a court must obtain and consider a pre-sentence report before—

(a) in the case of a custodial sentence, forming any such opinion as is mentioned in section 152(2), section 153(2), section 225(1)(b), section 226(1)(b), section 227(1)(b) or section 228(1)(b)(i), or

(b) in the case of a community sentence, forming any such opinion as is mentioned in section 148(1) or (2)(b), or in section 1(4)(b) or (c) of the Criminal Justice and Immigration Act 2008, or any opinion as to the suitability for the offender of the particular requirement or requirements to be imposed by the community order or youth rehabilitation order.

(4) Subsection (3) does not apply if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a pre-sentence report.

(5) In a case where the offender is aged under 18, the court must not form the opinion mentioned in subsection (4) unless—

(a) there exists a previous pre-sentence report obtained in respect of the offender, and

(b) the court has had regard to the information contained in that report, or, if there is more than one such report, the most recent report.

(6) No custodial sentence or community sentence is invalidated by the failure of a court to obtain and consider a pre-sentence report before forming an opinion referred to in subsection (3), but any court on an appeal against such a sentence—

(a) must, subject to subsection (7), obtain a pre-sentence report if none was obtained by the court below, and

(b) must consider any such report obtained by it or by that court.

(7) Subsection (6)(a) does not apply if the court is of the opinion—

(a) that the court below was justified in forming an opinion that it was unnecessary to obtain a pre-sentence report, or

(b) that, although the court below was not justified in forming that opinion, in the circumstances of the case at the time it is before the court, it is unnecessary to obtain a pre-sentence report.

(8) In a case where the offender is aged under 18, the court must not form the opinion mentioned in subsection (7) unless—

(a) there exists a previous pre-sentence report obtained in respect of the offender, and

(b) the court has had regard to the information contained in that report, or, if there is more than one such report, the most recent report.

157 Additional requirements in case of mentally disordered offender

(1) Subject to subsection (2), in any case where the offender is or appears to be mentally disordered, the court must obtain and consider a medical report before passing a custodial sentence other than one fixed by law.

(2) Subsection (1) does not apply if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a medical report.

(3) Before passing a custodial sentence other than one fixed by law on an offender who is or appears to be mentally disordered, a court must consider—

(a) any information before it which relates to his mental condition (whether given in a medical report, a pre-sentence report or otherwise), and

(b) the likely effect of such a sentence on that condition and on any treatment which may be available for it.

(4) No custodial sentence which is passed in a case to which subsection (1) applies is invalidated by the failure of a court to comply with that subsection, but any court on an appeal against such a sentence—

(a) must obtain a medical report if none was obtained by the court below, and

(b) must consider any such report obtained by it or by that court.

(5) In this section "mentally disordered", in relation to any person, means suffering from a mental disorder within the meaning of the Mental Health Act 1983 (c 20).

(6) In this section "medical report" means a report as to an offender's mental condition made or submitted orally or in writing by a registered medical practitioner who is approved for the purposes of section 12 of the Mental Health Act 1983 by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder.

(7) Nothing in this section is to be taken to limit the generality of section 156.

158 Meaning of "pre-sentence report"

(1) In this Part "pre-sentence report" means a report which—

(a) with a view to assisting the court in determining the most suitable method of dealing with an offender, is made or submitted by an appropriate officer, and

(b) contains information as to such matters, presented in such manner, as may be prescribed by rules made by the Secretary of State.

(1A) Subject to any rules made under subsection (1)(b) and to subsection (1B), the court may accept a pre-sentence report given orally in open court.

(1B) But a pre-sentence report that—

(a) relates to an offender aged under 18, and

(b) is required to be obtained and considered before the court forms an opinion mentioned in section 156(3)(a),

must be in writing.

(2) In subsection (1) "an appropriate officer" means—

(a) where the offender is aged 18 or over, an officer of a local probation board or an officer of a provider of probation services, and

(b) where the offender is aged under 18, an officer of a local probation board, an officer of a provider of probation services, a social worker of a local authority . . . or a member of a youth offending team.

Disclosure of pre-sentence reports etc

159 Disclosure of pre-sentence reports

(1) This section applies where the court obtains a pre-sentence report, other than a report given orally in open court.

(2) Subject to subsections (3) and (4), the court must give a copy of the report—

(a) to the offender or his counsel or solicitor,

(b) if the offender is aged under 18, to any parent or guardian of his who is present in court, and

(c) to the prosecutor, that is to say, the person having the conduct of the proceedings in respect of the offence.

(3) If the offender is aged under 18 and it appears to the court that the disclosure to the offender or to any parent or guardian of his of any information contained in the report would be likely to create a risk of significant harm to the offender, a complete copy of the report need not be given to the offender or, as the case may be, to that parent or guardian.

(4) If the prosecutor is not of a description prescribed by order made by the Secretary of State, a copy of the report need not be given to the prosecutor if the court considers that it would be inappropriate for him to be given it.

(5) No information obtained by virtue of subsection (2)(c) may be used or disclosed otherwise than for the purpose of—

(a) determining whether representations as to matters contained in the report need to be made to the court, or

(b) making such representations to the court.

(6) In relation to an offender aged under 18 for whom a local authority have parental responsibility and who—

(a) is in their care, or

(b) is provided with accommodation by them in the exercise of any social services functions,

references in this section to his parent or guardian are to be read as references to that authority.

(7) In this section and section 160—

"harm" has the same meaning as in section 31 of the Children Act 1989 (c 41);

"local authority" and "parental responsibility" have the same meanings as in that Act;

"social services functions", in relation to a local authority, has the meaning given by section 1A of the Local Authority Social Services Act 1970 (c 42).

160 Other reports of local probation boards, providers of probation services and members of youth offending teams

(1) This section applies where—

(a) a report by an officer of a local probation board, an officer of a provider of probation services or a member of a youth offending team is made to any court (other than a youth court) with a view to assisting the court in determining the most suitable method of dealing with any person in respect of an offence, and

(b) the report is not a pre-sentence report.

(2) Subject to subsection (3), the court must give a copy of the report—

(a) to the offender or his counsel or solicitor, and

(b) if the offender is aged under 18, to any parent or guardian of his who is present in court.

(3) If the offender is aged under 18 and it appears to the court that the disclosure to the offender or to any parent or guardian of his of any information contained in the report would be likely to create a risk of significant harm to the offender, a complete copy of the report need not be given to the offender, or as the case may be, to that parent or guardian.

(4) In relation to an offender aged under 18 for whom a local authority have parental responsibility and who—

(a) is in their care, or

(b) is provided with accommodation by them in the exercise of any social services functions,

references in this section to his parent or guardian are to be read as references to that authority.

Pre-sentence drug testing

161 Pre-sentence drug testing[2]

[2]This section has yet to be implemented.

(1) Where a person is convicted of an offence and the court is considering passing a community sentence or a suspended sentence, it may make an order under subsection (2) for the purpose of ascertaining whether the offender has any specified Class A drug in his body.

(2) The order requires the offender to provide, in accordance with the order, samples of any description specified in the order.

(3) Where the offender has not attained the age of 17, the order must provide for the samples to be provided in the presence of an appropriate adult.

(4) If it is proved to the satisfaction of the court that the offender has, without reasonable excuse, failed to comply with the order it may impose on him a fine of an amount not exceeding level 4.

(5) In subsection (4) "level 4" means the amount which, in relation to a fine for a summary offence, is level 4 on the standard scale.

(6) The court may not make an order under subsection (2) unless it has been notified by the Secretary of State that the power to make such orders is exercisable by the court and the notice has not been withdrawn.

(8) In this section—

"appropriate adult", in relation to a person under the age of 17, means—

(a) his parent or guardian or, if he is in the care of a local authority or voluntary organisation, a person representing that authority or organisation,

(b) a social worker of a local authority . . ., or

(c) if no person falling within paragraph (a) or (b) is available, any responsible person aged 18 or over who is not a police officer or a person employed by the police;

"specified Class A drug" has the same meaning as in Part 3 of the Criminal Justice and Court Services Act 2000 (c 43).

Surcharges

161A Court's duty to order payment of surcharge

(1) A court when dealing with a person for one or more offences must also (subject to subsections (2) and (3)) order him to pay a surcharge.

(2) Subsection (1) does not apply in such cases as may be prescribed by an order made by the Secretary of State.

(3) Where a court dealing with an offender considers—

(a) that it would be appropriate to make a compensation order, but

(b) that he has insufficient means to pay both the surcharge and appropriate compensation,

the court must reduce the surcharge accordingly (if necessary to nil).

(4) For the purposes of this section a court does not "deal with" a person if it—

(a) discharges him absolutely, or

(b) makes an order under the Mental Health Act 1983 in respect of him.

161B Amount of surcharge

(1) The surcharge payable under section 161A is such amount as the Secretary of State may specify by order.

(2) An order under this section may provide for the amount to depend on—

(a) the offence or offences committed,

(b) how the offender is otherwise dealt with (including, where the offender is fined, the amount of the fine),

(c) the age of the offender.

This is not to be read as limiting section 330(3) (power to make different provision for different purposes etc).

Fines

162 Powers to order statement as to offender's financial circumstances

(1) Where an individual has been convicted of an offence, the court may, before sentencing him, make a financial circumstances order with respect to him.

(2) Where a magistrates' court has been notified in accordance with section 12(4) of the Magistrates' Courts Act 1980 (c 43) that an individual desires to plead guilty without appearing before the court, the court may make a financial circumstances order with respect to him.

(3) In this section "a financial circumstances order" means, in relation to any individual, an order requiring him to give to the court, within such period as may be specified in the order, such a statement of his financial circumstances as the court may require.

(4) An individual who without reasonable excuse fails to comply with a financial circumstances order is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(5) If an individual, in furnishing any statement in pursuance of a financial circumstances order—

(a) makes a statement which he knows to be false in a material particular,

(b) recklessly furnishes a statement which is false in a material particular, or

(c) knowingly fails to disclose any material fact,

he is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(6) Proceedings in respect of an offence under subsection (5) may, notwithstanding anything in section 127(1) of the Magistrates' Courts Act 1980 (c 43) (limitation of time), be commenced at any time within two years from the date of the commission of the offence or within six months from its first discovery by the prosecutor, whichever period expires the earlier.

163 General power of Crown Court to fine offender convicted on indictment

Where a person is convicted on indictment of any offence, other than an offence for which the sentence is fixed by law or falls to be imposed under section 110(2) or 111(2) of the Sentencing Act or under section 225(2) or 226(2) of this Act, the court, if not precluded from sentencing an offender by its exercise of some other power, may impose a fine instead of or in addition to dealing with him in any other way in which the court has power to deal with him, subject however to any enactment requiring the offender to be dealt with in a particular way.

164 Fixing of fines

(1) Before fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances.

(2) The amount of any fine fixed by a court must be such as, in the opinion of the court, reflects the seriousness of the offence.

(3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court.

(4) Subsection (3) applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine.

(4A) In applying subsection (3), a court must not reduce the amount of a fine on account of any surcharge it orders the offender to pay under section 161A, except to the extent that he has insufficient means to pay both.

(5) Where—

(a) an offender has been convicted in his absence in pursuance of section 11 or 12 of the Magistrates' Courts Act 1980 (c 43) (non-appearance of accused), or

(b) an offender—

(i) has failed to furnish a statement of his financial circumstances in response to a request which is an official request for the purposes of section 20A of the Criminal Justice Act 1991 (c 53) (offence of making false statement as to financial circumstances),

(ii) has failed to comply with an order under section 162(1), or

(iii) has otherwise failed to co-operate with the court in its inquiry into his financial circumstances,

and the court considers that it has insufficient information to make a proper determination of the financial circumstances of the offender, it may make such determination as it thinks fit.

165 Remission of fines

(1) This section applies where a court has, in fixing the amount of a fine, determined the offender's financial circumstances under section 164(5).

(2) If, on subsequently inquiring into the offender's financial circumstances, the court is satisfied that had it had the results of that inquiry when sentencing the offender it would—

(a) have fixed a smaller amount, or

(b) not have fined him,

it may remit the whole or part of the fine.

(3) Where under this section the court remits the whole or part of a fine after a term of imprisonment has been fixed under section 139 of the Sentencing Act (powers of Crown Court in relation to fines) or section 82(5) of the Magistrates' Courts Act 1980 (magistrates' powers in relation to default) it must reduce the term by the corresponding proportion.

(4) In calculating any reduction required by subsection (3), any fraction of a day is to be ignored.

Savings for power to mitigate etc

166 Savings for powers to mitigate sentences and deal appropriately with mentally disordered offenders

(1) Nothing in—

(a) section 148 or 151(2) or (2B) (imposing community sentences),
(b) section 152, 153 or 157 (imposing custodial sentences),

(c) section 156 (pre-sentence reports and other requirements),

(d) section 164 (fixing of fines),

(e) paragraph 3 of Schedule 1 to the Criminal Justice and Immigration Act 2008 (youth rehabilitation order with intensive supervision and surveillance), or

(f) paragraph 4 of Schedule 1 to that Act (youth rehabilitation order with fostering),

prevents a court from mitigating an offender's sentence by taking into account any such matters as, in the opinion of the court, are relevant in mitigation of sentence.

(2) Section 152(2) does not prevent a court, after taking into account such matters, from passing a community sentence even though it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that a community sentence could not normally be justified for the offence.

(3) Nothing in the sections mentioned in subsection (1)(a) to (f) prevents a court—

(a) from mitigating any penalty included in an offender's sentence by taking into account any other penalty included in that sentence, and

(b) in the case of an offender who is convicted of one or more other offences, from mitigating his sentence by applying any rule of law as to the totality of sentences.

(4) Subsections (2) and (3) are without prejudice to the generality of subsection (1).

(5) Nothing in the sections mentioned in subsection (1)(a) to (f) is to be taken—

(a) as requiring a court to pass a custodial sentence, or any particular custodial sentence, on a mentally disordered offender, or

(b) as restricting any power (whether under the Mental Health Act 1983 (c 20) or otherwise) which enables a court to deal with such an offender in the manner it considers to be most appropriate in all the circumstances.

(6) In subsection (5) “mentally disordered”, in relation to a person, means suffering from a mental disorder within the meaning of the Mental Health Act 1983.

Duty of court to explain sentence

174 Duty to give reasons for, and explain effect of, sentence

(1) Subject to subsections (3) and (4), any court passing sentence on an offender—

(a) must state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed, and

(b) must explain to the offender in ordinary language—

(i) the effect of the sentence,

(ii) where the offender is required to comply with any order of the court forming part of the sentence, the effects of non-compliance with the order,

(iii) any power of the court, on the application of the offender or any other person, to vary or review any order of the court forming part of the sentence, and

(iv) where the sentence consists of or includes a fine, the effects of failure to pay the fine.

(2) In complying with subsection (1)(a), the court must—

(a) where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different kind, or is outside that range, state the court's reasons for deciding on a sentence of a different kind or outside that range,

(b) where the sentence is a custodial sentence and the duty in subsection (2) of section 152 is not excluded by subsection (1)(a) or (b) or (3) of that section or any other statutory provision, state that it is of the opinion referred to in section 152(2) and why it is of that opinion,

(c) where the sentence is a community sentence, other than one consisting of or including a youth rehabilitation order with intensive supervision and surveillance or fostering, and the case does not fall within section 151(2), state that it is of the opinion that section 148(1) applies and why it is of that opinion,

(ca) where the sentence consists of or includes a youth rehabilitation order with intensive supervision and surveillance and the case does not fall within paragraph 5(2) of Schedule 1 to the Criminal Justice and Immigration Act 2008, state that it is of the opinion that section 1(4)(a) to (c) of that Act and section 148(1) of this Act apply and why it is of that opinion,

(cb) where the sentence consists of or includes a youth rehabilitation order with fostering, state that it is of the opinion that section 1(4)(a) to (c) of the Criminal Justice and Immigration Act 2008 and section 148(1) of this Act apply and why it is of that opinion,

(d) where as a result of taking into account any matter referred to in section 144(1), the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, state that fact, and

(e) in any case, mention any aggravating or mitigating factors which the court has regarded as being of particular importance.

(3) Subsection (1)(a) does not apply—

(a) to an offence the sentence for which is fixed by law (provision relating to sentencing for such an offence being made by section 270), or

(b) to an offence the sentence for which falls to be imposed under section 51A(2) of the Firearms Act 1968 (c 27), under subsection (2) of section 110 or 111 of the Sentencing Act or under section 29(4) or (6) of the Violent Crime Reduction Act 2006 (required custodial sentences).

(4) The Secretary of State may by order—

(a) prescribe cases in which subsection (1)(a) or (b) does not apply, and

(b) prescribe cases in which the statement referred to in subsection (1)(a) or the explanation referred to in subsection (1)(b) may be made in the absence of the offender, or may be provided in written form.

(4A) Subsection (4B) applies where—

(a) a court passes a custodial sentence in respect of an offence on an offender who is aged under 18, and

(b) the circumstances are such that the court must, in complying with subsection (1)(a), make the statement referred to in subsection (2)(b).

(4B) That statement must include—

(a) a statement by the court that it is of the opinion that a sentence consisting of or including a youth rehabilitation order with intensive supervision and surveillance or fostering cannot be justified for the offence, and

(b) a statement by the court why it is of that opinion.

(5) Where a magistrates' court passes a custodial sentence, it must cause any reason stated by virtue of subsection (2)(b) to be specified in the warrant of commitment and entered on the register.

(6) In this section—

“guidelines” has the same meaning as in section 172;

“the register” has the meaning given by section 163 of the Sentencing Act.

Criminal Justice and Immigration Act 2008

Part 1

Youth Rehabilitation Orders

Youth rehabilitation orders

1 Youth rehabilitation orders

(1) Where a person aged under 18 is convicted of an offence, the court by or before which the person is convicted may in accordance with Schedule 1 make an order (in this Part referred to as a "youth rehabilitation order") imposing on the person any one or more of the following requirements—

(a) an activity requirement (see paragraphs 6 to 8 of Schedule 1),

(b) a supervision requirement (see paragraph 9 of that Schedule),

(c) in a case where the offender is aged 16 or 17 at the time of the conviction, an unpaid work requirement (see paragraph 10 of that Schedule),

(d) a programme requirement (see paragraph 11 of that Schedule),

(e) an attendance centre requirement (see paragraph 12 of that Schedule),

(f) a prohibited activity requirement (see paragraph 13 of that Schedule),

(g) a curfew requirement (see paragraph 14 of that Schedule),

(h) an exclusion requirement (see paragraph 15 of that Schedule),

(i) a residence requirement (see paragraph 16 of that Schedule),

(j) a local authority residence requirement (see paragraph 17 of that Schedule),

(k) a mental health treatment requirement (see paragraph 20 of that Schedule),

(l) a drug treatment requirement (see paragraph 22 of that Schedule),

(m) a drug testing requirement (see paragraph 23 of that Schedule),

(n) an intoxicating substance treatment requirement (see paragraph 24 of that Schedule), and

(o) an education requirement (see paragraph 25 of that Schedule).

(2) A youth rehabilitation order—

(a) may also impose an electronic monitoring requirement (see paragraph 26 of Schedule 1), and
(b) must do so if paragraph 2 of that Schedule so requires.

(3) A youth rehabilitation order may be—

(a) a youth rehabilitation order with intensive supervision and surveillance (see paragraph 3 of Schedule 1), or

(b) a youth rehabilitation order with fostering (see paragraph 4 of that Schedule).

(4) But a court may only make an order mentioned in subsection (3)(a) or (b) if—

(a) the court is dealing with the offender for an offence which is punishable with imprisonment,

(b) the court is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that, but for paragraph 3 or 4 of Schedule 1, a custodial sentence would be appropriate (or, if the offender was aged under 12 at the time of conviction, would be appropriate if the offender had been aged 12), and

(c) if the offender was aged under 15 at the time of conviction, the court is of the opinion that the offender is a persistent offender.

(5) Schedule 1 makes further provision about youth rehabilitation orders.

(6) This section is subject to—

(a) sections 148 and 150 of the Criminal Justice Act 2003 (c 44) (restrictions on community sentences etc), and

(b) the provisions of Parts 1 and 3 of Schedule 1.

4 Meaning of "the responsible officer"

(1) For the purposes of this Part, "the responsible officer", in relation to an offender to whom a youth rehabilitation order relates, means—

(a) in a case where the order—

(i) imposes a curfew requirement or an exclusion requirement but no other requirement mentioned in section 1(1), and

(ii) imposes an electronic monitoring requirement,

the person who under paragraph 26(4) of Schedule 1 is responsible for the electronic monitoring required by the order;

(b) in a case where the only requirement imposed by the order is an attendance centre requirement, the officer in charge of the attendance centre in question;

(c) in any other case, the qualifying officer who, as respects the offender, is for the time being responsible for discharging the functions conferred by this Part on the responsible officer.

(2) In this section "qualifying officer", in relation to a youth rehabilitation order, means—

(a) a member of a youth offending team established by a local authority for the time being specified in the order for the purposes of this section, or

(b) an officer of a local probation board appointed for or assigned to the local justice area for the time being so specified or (as the case may be) an officer of a provider of probation services acting in the local justice area for the time being so specified.

(3) The Secretary of State may by order—

(a) amend subsections (1) and (2), and

(b) make any other amendments of—

(i) this Part, or

(ii) Chapter 1 of Part 12 of the Criminal Justice Act 2003 (c 44) (general provisions about sentencing),

that appear to be necessary or expedient in consequence of any amendment made by virtue of paragraph (a).

(4) An order under subsection (3) may, in particular, provide for the court to determine which of two or more descriptions of responsible officer is to apply in relation to any youth rehabilitation order.

5 Responsible officer and offender: duties in relation to the other

(1) Where a youth rehabilitation order has effect, it is the duty of the responsible officer—

(a) to make any arrangements that are necessary in connection with the requirements imposed by the order,

(b) to promote the offender's compliance with those requirements, and

(c) where appropriate, to take steps to enforce those requirements.

(2) In subsection (1) "responsible officer" does not include a person falling within section 4(1)(a).

(3) In giving instructions in pursuance of a youth rehabilitation order relating to an offender, the responsible officer must ensure, as far as practicable, that any instruction is such as to avoid—

(a) any conflict with the offender's religious beliefs,

(b) any interference with the times, if any, at which the offender normally works or attends school or any other educational establishment, and

(c) any conflict with the requirements of any other youth rehabilitation order to which the offender may be subject.

(4) The Secretary of State may by order provide that subsection (3) is to have effect with such additional restrictions as may be specified in the order.

(5) An offender in respect of whom a youth rehabilitation order is in force—

(a) must keep in touch with the responsible officer in accordance with such instructions as the offender may from time to time be given by that officer, and

(b) must notify the responsible officer of any change of address.

(6) The obligation imposed by subsection (5) is enforceable as if it were a requirement imposed by the order.

Powers of Criminal Courts (Sentencing) Act 2000

Referral orders

16 Duty and power to refer certain young offenders to youth offender panels

(1) This section applies where a youth court or other magistrates' court is dealing with a person aged under 18 for an offence and—

(a) neither the offence nor any connected offence is one for which the sentence is fixed by law;

(b) the court is not, in respect of the offence or any connected offence, proposing to impose a custodial sentence on the offender or make a hospital order (within the meaning of the Mental Health Act 1983) in his case; and

(c) the court is not proposing to discharge him absolutely in respect of the offence.

(2) If—

(a) the compulsory referral conditions are satisfied in accordance with section 17 below, and

(b) referral is available to the court,

the court shall sentence the offender for the offence by ordering him to be referred to a youth offender panel.

(3) If—

(a) the discretionary referral conditions are satisfied in accordance with section 17 below, and

(b) referral is available to the court,

the court may sentence the offender for the offence by ordering him to be referred to a youth offender panel.

(4) For the purposes of this Part an offence is connected with another if the offender falls to be dealt with for it at the same time as he is dealt with for the other offence (whether or not he is convicted of the offences at the same time or by or before the same court).

(5) For the purposes of this section referral is available to a court if—

(a) the court has been notified by the Secretary of State that arrangements for the implementation of referral orders are available in the area in which it appears to the court that the offender resides or will reside; and

(b) the notice has not been withdrawn.

(6) An order under subsection (2) or (3) above is in this Act referred to as a "referral order".

(7) No referral order may be made in respect of any offence committed before the commencement of section 1 of the Youth Justice and Criminal Evidence Act 1999.

17 The referral conditions

(1) For the purposes of section 16(2) and subsection (2) below above the compulsory referral conditions are satisfied in relation to an offence if the offence is an offence punishable with imprisonment and the offender—

(a) pleaded guilty to the offence and to any connected offence; and

(b) has never been convicted by or before a court in the United Kingdom of any offence other than the offence and any connected offence; and

(c) ...

(2) For the purposes of section 16(3) above, the discretionary referral conditions are satisfied in relation to an offence if—

(a) the compulsory referral conditions are not satisfied in relation to the offence;

(b) the offender pleaded guilty—

(i) to the offence; or

(ii) if the offender is being dealt with by the court for the offence and any connected offence, to at least one of those offences; and

(c) subsection (2A), (2B) or (2C) below is satisfied in relation to the offender.

(2A) This subsection is satisfied in relation to the offender if the offender has never been convicted by or before a court in the United Kingdom ("a UK court") of any offence other than the offence and any connected offence.

(2B) This subsection is satisfied in relation to the offender if the offender has been dealt with by a UK court for any offence other than the offence and any connected offence on only one previous occasion, but was not referred to a youth offender panel under section 16 above on that occasion.

(2C) This subsection is satisfied in relation to the offender if—

(a) the offender has been dealt with by a UK court for any offence other than the offence and any connected offence on one or more previous occasions, but has been referred to a youth offender panel under section 16 above on only one previous occasion;

(b) an appropriate officer recommends to the court as suitable for the offender a referral to a youth offender panel under that section in respect of the offence; and

(c) the court considers that there are exceptional circumstances which justify ordering the offender to be so referred.

(2D) In subsection (2C)(b) above "appropriate officer" means—

(a) a member of a youth offending team;

(b) an officer of a local probation board; or

(c) an officer of a provider of probation services.

(3) The Secretary of State may by regulations make such amendments of this section as he considers appropriate for altering in any way the descriptions of offenders in the case of which the compulsory referral conditions or the discretionary referral conditions fall to be satisfied for the purposes of section 16(2) or (3) above (as the case may be).

(4) Any description of offender having effect for those purposes by virtue of such regulations may be framed by reference to such matters as the Secretary of State considers appropriate, including (in particular) one or more of the following—

(a) the offender's age;

(b) how the offender has pleaded;

(c) the offence (or offences) of which the offender has been convicted;

(d) the offender's previous convictions (if any);

(e) how (if at all) the offender has been previously punished or otherwise dealt with by any court; and

(f) any characteristics or behaviour of, or circumstances relating to, any person who has at any time been charged in the same proceedings as the offender (whether or not in respect of the same offence).

18 Making of referral orders: general

(1) A referral order shall—

(a) specify the youth offending team responsible for implementing the order;

(b) require the offender to attend each of the meetings of a youth offender panel to be established by the team for the offender; and

(c) specify the period for which any youth offender contract taking effect between the offender and the panel under section 23 below is to have effect (which must not be less than three nor more than twelve months).

(2) The youth offending team specified under subsection (1)(a) above shall be the team having the function of implementing referral orders in the area in which it appears to the court that the offender resides or will reside.

(3) On making a referral order the court shall explain to the offender in ordinary language—

(a) the effect of the order; and

(b) the consequences which may follow—

(i) if no youth offender contract takes effect between the offender and the panel under section 23 below; or

(ii) if the offender breaches any of the terms of any such contract.

(4) Subsections (5) to (7) below apply where, in dealing with an offender for two or more connected offences, a court makes a referral order in respect of each, or each of two or more, of the offences.

(5) The orders shall have the effect of referring the offender to a single youth offender panel; and the provision made by them under subsection (1) above shall accordingly be the same in each case, except that the periods specified under subsection (1)(c) may be different.

(6) The court may direct that the period so specified in either or any of the orders is to run concurrently with or be additional to that specified in the other or any of the others; but in exercising its power under this subsection the court must ensure that the total period for which such a contract as is mentioned in subsection (1)(c) above is to have effect does not exceed twelve months.

(7) Each of the orders mentioned in subsection (4) above shall, for the purposes of this Part, be treated as associated with the other or each of the others.

19 Making of referral orders: effect on court's other sentencing powers

(1) Subsections (2) to (5) below apply where a court makes a referral order in respect of an offence.

(2) The court may not deal with the offender for the offence in any of the prohibited ways.

(3) The court—

(a) shall, in respect of any connected offence, either sentence the offender by making a referral order or make an order discharging him absolutely; and

(b) may not deal with the offender for any such offence in any of the prohibited ways.

(4) For the purposes of subsections (2) and (3) above the prohibited ways are—

(a) imposing a sentence which consists of or includes a youth rehabilitation order on the offender;

(b) ordering him to pay a fine;
(c) making a reparation order in respect of him; and

(d) making an order discharging him conditionally.

(5) The court may not make, in connection with the conviction of the offender for the offence or any connected offence—

(a) an order binding him over to keep the peace or to be of good behaviour; or

(b) an order under section 150 below (binding over of parent or guardian); . . .

(c) . . .

(6) Subsections (2), (3) and (5) above do not affect the exercise of any power to deal with the offender conferred by paragraph 5 (offender referred back to court by panel) or paragraph 14 (powers of a court where offender convicted while subject to referral) of Schedule 1 to this Act.

(7) Where section 16(2) above requires a court to make a referral order, the court may not under section 1 above defer passing sentence on him, but section 16(2) and subsection (3)(a) above do not affect any power or duty of a magistrates' court under—

(a) section 8 above (remission to youth court, or another such court, for sentence);

(b) section 10(3) of the Magistrates' Courts Act 1980 (adjournment for inquiries); or

(c) section 35, 38, 43 or 44 of the Mental Health Act 1983 (remand for reports, interim hospital orders and committal to Crown Court for restriction order).

20 Making of referral orders: attendance of parents etc

(1) A court making a referral order may make an order requiring—

(a) the appropriate person, or

(b) in a case where there are two or more appropriate persons, any one or more of them,

to attend the meetings of the youth offender panel.

(2) Where an offender is aged under 16 when a court makes a referral order in his case—

(a) the court shall exercise its power under subsection (1) above so as to require at least one appropriate person to attend meetings of the youth offender panel; and

(b) if the offender falls within subsection (6) below, the person or persons so required to attend those meetings shall be or include a representative of the local authority mentioned in that subsection.

(3) The court shall not under this section make an order requiring a person to attend meetings of the youth offender panel—

(a) if the court is satisfied that it would be unreasonable to do so; or

(b) to an extent which the court is satisfied would be unreasonable.

(4) Except where the offender falls within subsection (6) below, each person who is a parent or guardian of the offender is an "appropriate person" for the purposes of this section.

(5) Where the offender falls within subsection (6) below, each of the following is an "appropriate person" for the purposes of this section—

(a) a representative of the local authority mentioned in that subsection; and

(b) each person who is a parent or guardian of the offender with whom the offender is allowed to live.

(6) An offender falls within this subsection if he is (within the meaning of the Children Act 1989) a child who is looked after by a local authority.

(7) If, at the time when a court makes an order under this section—

(a) a person who is required by the order to attend meetings of a youth offender panel is not present in court, or

(b) a local authority whose representative is so required to attend such meetings is not represented in court,

the court must send him or (as the case may be) the authority a copy of the order forthwith.

COMMUNITY ORDER REQUIREMENTS

1. Prior to making a youth rehabilitation order, a court must "obtain and consider" information about the family circumstances of the young person and the effect that a youth rehabilitation order would be likely to have on those circumstances. Any requirement must (so far as practicable) avoid conflict with the young person's religious beliefs and avoid interference with times when the young person would normally work or attend an educational establishment. Where an order contains more than one requirement (or more than one youth rehabilitation order is being made), the court must consider whether the requirements are compatible with each other.

Where an order is made in the Crown Court, that court may direct that proceedings relating to the enforcement, amendment or revocation of the order should be in a youth court or other magistrates' court.

The Secretary of State has power to enable (or require) courts to periodically review a youth rehabilitation order.

2. Generally, an order will take effect on the day after it is made; however, where a young person is subject to a detention and training order when the youth rehabilitation order is made, the court instead may order that the youth rehabilitation order will take effect when the supervision element of the detention and training order is commenced or when the whole term of that order ends.

3. The requirements that can be included in a youth rehabilitation order are:

a) activity requirement
b) supervision requirement
c) unpaid work requirement (16/17 year olds)
d) programme requirement
e) attendance centre requirement
f) prohibited activity requirement
g) curfew requirement
h) exclusion requirement
i) residence requirement (16/17 year olds)
j) local authority residence requirement
k) mental health treatment requirement
l) drug treatment requirement
m) drug testing requirement
n) intoxicating substance requirement
o) electronic monitoring requirement
p) education requirement
q) intensive supervision and surveillance
r) fostering

4. Activity requirement

An activity requirement may require participation in activities at a place specified and for a number of days specified which must not exceed 90 days in total. This may include participation in residential exercises. A Court may only include an Activity Requirement if it has consulted an appropriate officer and is satisfied both that it is feasible to secure compliance and that provision for the activities can be made.

5. Supervision requirement

A requirement to attend appointments as required by the responsible officer. This requirement lasts for the length of the order which may not be for more than 3 years.

6. Unpaid work requirement

A requirement for an offender aged 16 or 17 on the date of conviction to work a specified number of hours between 40 and 240 which normally should be completed within 12 months.

7. Programme requirement

The young person must participate in a programme, that is, a systematic set of activities, at a specified place on a specified number of days. Where appropriate, this may include a requirement to reside at a specified place for a specified period. A Court may only include a Programme Requirement if it is recommended by the appropriate officer and the court is satisfied that the programme is available to the offender

8. Attendance centre requirement

A requirement to attend an attendance centre for the specifed period. This requires the young person to attend at the beginning of the period and then, during the period, “to engage in occupation, or receive instruction” as directed. For a young person aged 16 or over at the time of conviction, the minimum length is 12 hours and the maximum is 36 hours; at age 14 or 15, the minimum is 12 hours and the maximum is 24 hours; at age 13 or below, the maximum is 12 hours. A Court may only include an attendance centre requirement where it has been notified that a place at a centre is available for the young person and it is satisifed that the centre is reasonably accessible

9. Prohibited activity requirement

The offender is required to refrain from specified activities on a specified day or days, or during a specified period. A Court may only include a prohibited activity requirement if it has consulted an appropriate officer.

10. Curfew

The young person will be required to stay at a particular location for between two and twelve hours a day; the periods may not fall outside six months

beginning with the day on which the requirement is made. Before making this requirement, a court must obtain and consider information about the place to be specified – this must include information about the attitude of people "likely to be affected by the enforced presence there of the offender". The court must also make an electronic monitoring requirement (see para. 19 below) unless the court considers it to be inappropriate or electronic monitoring is not available.

11. Exclusion

The young person is prohibited from entering a specified place during a specified period. That period must not exceed 3 months. The requirement may operate for different places for different days. The court must also make an electronic monitoring requirement (see para. 19 below) unless the court considers it to be inappropriate or electronic monitoring is not available.

12. Residence requirement

The young person (who must be aged 16 or over at the the date of conviction) is required to live with a specifed person or in a specified place. The court must consider the home surroundings of the offender before making an order containing this requirement. It may not specify a hostel or institution as a place where an offender must reside except on the recommendation of an appropriate officer. Where the order requires residence at a specified place, it may also provide that it does not prohibit residence elsewhere with the prior approval of the responsible officer.

13. Local authority residence requirement

A requirement that the young person resides in accommodation provided by a local authority for the specified period, which must not exceed 6 months,nor may it apply once the young person attains age 18. The requirement may also state that the young person is not to reside with a specified person. This requirement may not be included unless the court is satisfied that a significant factor in the offence was the circumstances in which the young person was living and that the requirement will assist rehabilitation. Further,

the young person must be legally represented when the court is considering whether to include this requirement (or is not represented because of his or her own conduct) and there must have been consultation with a parent or guardian (unless impracticable) and the local authority.

14. Mental health treatment

After taking independent professional advice, the court may include a mental health treatment requirement. The requirement may be for residential or non-residential treatment. A court must be satisfied, on the evidence of a registered medical practitioner, that the offender's condition requires treatment but does not require a hospital order or guardianship order under the Mental Health Act 1983. It must be satisfied also that the necessary arrangements have or can be made and that the offender is willing to comply.

15. Drug treatment requirement

This requirement provides for residential or non-residential treatment to reduce or eliminate dependency on (or a propensity to misuse) controlled drugs. This requirement may be included only if arrangements can be made for the treatment, it has been recommended to the Court by an appropriate officer and the young person has expressed willingness to comply. The court must be satisifed that the young person is dependent on (or has a tendency to misuse) controlled drugs and that that is susceptible to treatment.

16. Drug testing requirement

The young person is required to provide samples as directed in order to find out whether there is a controlled drug in the body. This will operate alongside the previous requirement; the court must specify the minimum number of samples in each month and may specify when, how and what type of sample must be provided. As with the previous requirement, it may be included only where the court has been notified that arrangements are in place to enable the testing to take place and the young person has expressed willingness to comply.

17. Intoxicating substance treatment requirement

This requirement is similar to that for drug treatment save that it relates to an "intoxicating substance", that is alcohol and any other substance or product (but not a controlled drug) "capable of being inhaled or otherwise used for the purpose of causing intoxication". Again, it can be included only if arrangements can be made for the treatment, it has been recommended to the Court by an appropriate officer and the young person has expressed willingness to comply. The court must be satisifed that the young person is dependent on (or has a tendency to misuse) intoxicating substances and that that is susceptible to treatment.

18. Education requirement

The young person must comply with "approved education arrangements". These will be made by the parent or guardian of the young person and approved by the local education authority (LEA). The court must consult the LEA and must be satisfied both that, in the view of the LEA, suitable arrangements exist to provide efficient full time education suited to the young person and that such a requirement is necessary to secure the good conduct of the young person or to prevent further offending.

19. Electronic monitoring requirement

This requirement provides for electronic monitoring in order to secure compliance with another requirement. The court must have been notified that arrangements are in place in the area and that provision can be made for the monitoring being proposed.

20. Intensive supervision and surveillance requirement

This requirement may be included in an order only where the offence is imprisonable, where, but for the power to include this requirement or a fostering requirement, a custodial sentence would be appropriate and, if the

young person is under 15 at the time of conviction, where that young person is a persistent offender.

Additionally, even if those criteria are not met, an order can be made where a young person fails to comply with an order for pre-sentence drug testing.

The requirement includes an activity requirement (see para. 4 above) but the maximum number of days is increased from 90 to 180. If the requirement is for more than 90 days, it is described as an "extended activity requirement" and the court must then also include a supervision requirement (see para. 5 above) and a curfew requirement (see para. 10 above); the curfew must be accompanied by electronic monitoring unless the exceptions apply (see para. 19 above).

Other requirements (but not the fostering requirement) also may be included subject to the general duty regarding compatibility (see para. 1 above) and the statutory obligation to ensure that restrictions on liberty are commensurate with the seriousness of the offence(s).

21. Youth rehabilitation order with fostering

This requirement can be imposed only where the same circumstances exist as are required for intensive supervision and surveillance (though it may not be made where there is a failure to comply with pre-sentence drug testing alone). In addition, the court must be satisfied that a significant factor in the offence was the circumstances in which the young person was living and that the imposition of a fostering requirement would assist in the rehabilitation of the young person.

This requirement may be included only where the court has been notified that arrangements are available in the area of the relevant local authority. Before including such a requirement, the court must consult both the young person's parent or guardian (unless impracticable) and the local authority. A supervision requirement also must be made.

The requirement may not be included unless the young person was legally represented when the court was considering whether to include the requirement or, if not, that was because of the conduct of the young person.

The court must specify the period during which the young person must reside with a foster parent, which must not exceed 12 months nor operate after the young person has attained age 18.

ASSET

From YJB website

Common Assessment Framework

The Common Assessment Framework is a standardised approach to assessing the needs of children and young people who may need additional help in order to meet the five priority outcomes set out in the Every Child Matters[1] programme. It has been designed for practitioners in all agencies to allow effective communication and collaboration, and it plays an important role in providing early intervention.

Asset

Asset provides a common, structured framework for assessment of all young people involved in the criminal justice system. It is a standard assessment of the factors contributing to a young person's offending. Research commissioned by the YJB has established the main risk factors that lead to youth offending and also the protective factors that can prevent it.

Asset should be completed at the beginning and end of all interventions, and at the mid-point of Detention and Training Orders. It should inform the completion of T forms or other assessment and planning documentation within the secure estate.

Youth offending team (YOT) workers should complete Asset before reports for external audiences are written (e.g. Pre-Sentence reports, or reports for Referral Order Panels). These reports should be informed by the Asset assessment.

Extracted from YJB – Common Assessment Framework, Guidance for Practitioners: YJB, July 2006

Asset

It aims to look at the young person's offence or offences and identify a multitude of factors or circumstances – ranging from lack of educational attainment to mental health problems – which may have contributed to such behaviour. … In addition, *Asset* can help to measure changes in needs and risk of reoffending over time.

The following pages are Appendix A from "The Scaled Approach"

[1] Being healthy, staying safe, enjoying and achieving, making a positive contribution, economic well-being.

APPENDIX A:
ASSESSING THE LIKELIHOOD OF REOFFENDING

The information used to make the assessment of a young person's likelihood of reoffending is taken from *Asset*. The 'static' factors listed opposite are contained within *Asset – Core Profile*, and the dynamic factors are taken from the 12 sections within *Asset* normally scored. Testing has shown that including these 'static' factors with the dynamic factors has increased the predictive accuracy of *Asset*.

The scoring associated with the burglary and motoring offences listed opposite reflects the fact that these were the two offence types most closely associated with reconviction, using a representative sample of young people at the time of *Asset* being validated. For more details, see the full research report on the YJB website.[14]

The static factors should be scored individually in accordance with the table opposite, and should total no more than 16. However, it is also possible to score 0; for example, a young person with no previous convictions, reprimands or warnings whose primary index offence is theft would score 0.

The total static factors score should be added to the total dynamic factors score, with the final total being no more than 64.

14. www.yjb.gov.uk/Publications/Resources/Downloads/ASSETReport2003.pdf

15. For the full list of relevant motoring, vehicle theft, authorised taking and burglary offences, please see Appendix B of *Asset* documentation, available online at www.yjb.gov.uk/NR/rdonlyres/4548066B-1849-4E21-BC10-4B5303AEEDA9/0/14Appendices.pdf

Sample form

Likelihood of reoffending

Static factors	Scoring	Score
Offence type[35]	• Motoring offences/vehicle theft/ unauthorised taking = 4 • Burglary (domestic and non-domestic) = 3 • Other offence = 0	Click here
Age at first reprimand/caution/warning	10 to 12 = 4 13 to 17 = 2 No previous reprimand/caution/warning = 0	Click here
Age at first conviction	10 to 13 = 4 14 to 17 = 3 No previous convictions = 0	Click here
Number of previous convictions	4 or more = 4 1 to 3 = 3 No previous convictions = 0	Click here
Total static factors score (0–16)		0

Dynamic factors/*Asset* section	Scoring	Score
Living arrangements	0, 1, 2, 3, 4	Click here
Family and personal relationships	0, 1, 2, 3, 4	Click here
Education, training and employment	0, 1, 2, 3, 4	Click here
Neighbourhood	0, 1, 2, 3, 4	Click here
Lifestyle	0, 1, 2, 3, 4	Click here
Substance use	0, 1, 2, 3, 4	Click here
Physical health	0, 1, 2, 3, 4	Click here
Emotional and mental health	0, 1, 2, 3, 4	Click here
Perception of self and others	0, 1, 2, 3, 4	Click here
Thinking and behaviour	0, 1, 2, 3, 4	Click here
Attitudes to offending	0, 1, 2, 3, 4	Click here
Motivation to change	0, 1, 2, 3, 4	Click here
Total dynamic factors score (0–48)		0
TOTAL SCORE (0–64)		

Overall assessed likelihood of reoffending

Rating	
Low (score 0–24)	
Medium (score 25–41)	
High (score 42–64)	

Scaled Approach – Extract from YJB proposal, as published September 2008, subject to confirmation in the light of Sentencing Guidelines Council definitive guidelines.

Table 1: Possible sentence structures by intervention level

Intervention level	Function	Typical case management approach	Possible sentence requirement/ component (not exclusive)
LOW	Enabling compliance and Repairing harm	• Organising interventions to meet basic requirements of order • Engaging parents in interventions and/or to support young person • Monitoring compliance • Enforcement	• Reparation • Stand-alone unpaid work • Supervision • Stand-alone attendance centre
MEDIUM	Enabling compliance and Repairing harm and Enabling help/change	• Brokering access to external interventions • Co-ordinating interventions with specialists in YOT • Providing supervision • Engaging parents in interventions and/or supporting young person • Providing motivation to encourage compliance • Proactively addressing reasons for non-compliance • Enforcement	• Supervision • Reparation • Requirement/component to help young person or change behaviour, e.g. drug treatment, offending behaviour programme, education programme • Combination of the above
HIGH	Enabling compliance and Repairing harm and Enabling help/change and Ensuring control	• Extensive[3] • Help/change function plus additional controls, restrictions and monitoring	• Supervision • Reparation *plus* • Requirement/component to help young person or change behaviour • Requirement/component to monitor or restrict movement, e.g. prohibited activity, curfew, exclusion or electronic monitoring • Combination of the above