

Youth offending and sentencing in Scotland and other jurisdictions

Literature review

Submitted to the Scottish Sentencing Council in June 2018

Published April 2019

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Literature review prepared for the consideration of the Scottish Sentencing Council. The views expressed are those of the authors and do not necessarily represent those of the Council.

The Scottish Sentencing Council

Literature review of youth offending and sentencing in Scotland and other jurisdictions



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1 The principles and purposes of sentencing

1.1 Introduction

Globally, youth justice models tend to favour either a 'justice' or 'welfare' approach. However, in practice, there are a range of approaches such as community rehabilitation, punitive and punishment models, protection and welfare approaches, which are either closer to 'justice' or 'welfare' models or sit somewhere in between. Most countries exhibit cyclical shifts within these, dependent on pressures from the public, advocacy groups, emerging evidence, the economy, practical issues, media and political sentiment.

1.2 General principles of sentencing

General principles and purposes of sentencing can be distilled into a set of common themes. Many countries employ some or all of these when determining sentencing, but the degree to which they are instructive, how they are interpreted, and which are most important, varies from jurisdiction to jurisdiction. In general, the principles of sentencing tend to be a combination of:

- **Proportionality** - Proportionality is often considered the most important principle of sentencing, with some countries such as Canada stating this as their "fundamental principle"¹. This principle can be defined as: "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender"². In other words, a judgement about the "seriousness"³ of the case should be made, and the sentence then based on this.
- **Parity** - Parity of sentencing is the principle that sentencing should be fair in that individuals deemed equally culpable should receive similar sentences. Von Hirsch has argued that this principle contains the idea of the defendant as the "moral agent"⁴ who knows "right from wrong"⁵, with the justice system as a "blaming"⁶ tool, to confirm who is responsible for an offence⁷.

¹ A Scottish Sentencing Council, 2017. *Principles and Purposes of Sentencing in Scotland and Other Jurisdictions: A Brief Overview* [PDF] Available at: <https://www.scottishsentencingcouncil.org.uk/media/1510/principles-and-purposes-of-sentencing-in-scotland-and-other-jurisdictions-a-brief-overview.pdf> [Accessed May 2018]

² Scottish Sentencing Council, 2017. *Principles and Purposes of Sentencing in Scotland and Other Jurisdictions: A Brief Overview* [PDF] Available at: <https://www.scottishsentencingcouncil.org.uk/media/1510/principles-and-purposes-of-sentencing-in-scotland-and-other-jurisdictions-a-brief-overview.pdf> [Accessed May 2018]

³ Armstrong, S. and McAra, L., 2006. *Sentencing as a social practice*, Perspectives on Punishment: The Contours of Control. Oxford University Press, Oxford, UK, pp. 155-174. Available at: <https://strathprints.strath.ac.uk/3373> [Accessed May 2018]

⁴ Frase, R., 1997. *Sentencing Principles in Theory and Practice* [PDF] Available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1495&context=faculty_articles [Accessed May 2018]

⁵ Frase, R., 1997. *Sentencing Principles in Theory and Practice* [PDF] Available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1495&context=faculty_articles [Accessed 28/5/18]

⁶ Frase, R., 1997. *Sentencing Principles in Theory and Practice* [PDF] Available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1495&context=faculty_articles [Accessed 28/5/18]

⁷ Frase, R., 1997. *Sentencing Principles in Theory and Practice* [PDF] Available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1495&context=faculty_articles [Accessed 28/5/18]

- **Totality** - The totality principle is the concept that the sum of all offences should be considered together. This becomes important in cases where an individual has committed more than one offence or has a criminal history. The totality principle refers to the idea that “the overall sentence must be just and appropriate in light of the overall offending behaviour”⁸.
- **Transparency** - The principle of transparency refers to the notion that sentencing processes and practices should be open and clear⁹.
- **Parsimony** - The principle of parsimony is that the minimum sentence befitting a crime should be given, and no more. However, it has been argued that parsimony as a principle of sentencing is a circular argument because if it is simply the “utilitarian” goal of “maximising efficiency” then it is a consequence, as opposed to a principle of sentencing¹⁰.

The Scottish Sentencing Council have released Draft Sentencing Guidelines on the Principles and Purposes of Sentencing which emphasise that sentences in Scotland must be “fair and proportionate”¹¹.

1.3 General purposes of sentencing

The purposes of sentencing can be separated from the principles, though in guidelines and legislation the two are often blurred. The most common purposes are:

- **Deterrence** - Reduction of crime through deterrence is one of the overarching purposes of sentencing cross-nationally. Deterrence can be general, with the aim of deterring an individual from all crimes, or specific, designed to deter someone from a particular crime.
- **Retribution** - Retribution is closely linked to the principle of proportionality. In most countries there is an element of punishment in sentencing. The idea of retribution is that an offender receives their “just deserts”¹². This purpose is key to justice approaches, and a focus on this tends to lead to harsher, more punitive sentencing.
- **Community safety** - Protection of the community is a key purpose of sentencing, particularly within more justice-based approaches.

⁸ Sentencing Advisory Council website [Online] Available at: <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors> [Accessed 28/5/18]

⁹ Scottish Sentencing Council, 2017. *Principles and Purposes of Sentencing in Scotland and Other Jurisdictions: A Brief Overview* [PDF] Available at: <https://www.scottishsentencingcouncil.org.uk/media/1510/principles-and-purposes-of-sentencing-in-scotland-and-other-jurisdictions-a-brief-overview.pdf> [Accessed 28/5/18]

¹⁰ Frase, R., 1997. *Sentencing Principles in Theory and Practice* [PDF] Available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1495&context=faculty_articles [Accessed 28/5/18]

¹¹ Scottish Sentencing Council, 2017. *Principles and Purposes of Sentencing: Draft Sentencing Guideline, August 2017*. [Online] Available at: <https://www.scottishsentencingcouncil.org.uk/media/1505/principles-and-purposes-of-sentencing-draft-sentencing-guideline.pdf> [Accessed 28/06/2018]

¹² Frase, R., 1997. *Sentencing Principles in Theory and Practice* [PDF] Available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1495&context=faculty_articles [Accessed May 2018]

- **Norm reinforcement and denunciation** - One of the purposes of sentencing is to “condemn”¹³ certain behaviours. Sentencing acts as the “demonstration of behaviours that are the norm in society and those which are not”¹⁴.
- **Rehabilitation** - Rehabilitation is the central tenet of welfarist approaches and focuses on the individual committing the crime. The purpose of sentencing in this instance is to reform the offender and help them reintegrate into society¹⁵.
- **Reparation and restorative justice** - Restorative justice sits somewhere between welfarist and justice approaches, with the focus not just on the offender but on the victim as well. Restorative justice “emphasises responsibility and restoration through having the opportunity to witness and address the harm caused to a victim through an offence”¹⁶.

The general principles and purposes of sentencing tend to be the same for young offenders as adults but are applied in different ways. Rather than proportionality, there is often a greater focus on rehabilitation of young offenders. For example, in England and Wales, sentencing guidelines for children and young people specify “for a child or young person the sentence should focus on rehabilitation where possible”¹⁷.

1.4 International sentencing comparisons and the role of discretion

The above principles and purposes can provide some direction to sentencing, but they do not provide a “set of rules” from which the “correct” sentence can be drawn¹⁸. The way in which the “cafeteria”¹⁹ style option list of principles and purposes can be used by a judicial system is extensive. A plethora of different documents explaining how they should be put into practice exists, for example in the form of guidelines. Such guidelines may have more or less discretion built into the system, which will affect the freedom that judges have, and thus the level of consistency in sentencing. Some guidelines may be

¹³ Sentencing Advisory Council website [Online] Available at: <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors> [Accessed 28/5/18]

¹⁴ Frase, R., 1997. *Sentencing Principles in Theory and Practice* [PDF] Available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1495&context=faculty_articles [Accessed May 2018]

¹⁵ Scottish Sentencing Council, 2017. *Principles and Purposes of Sentencing in Scotland and Other Jurisdictions: A Brief Overview* [PDF] Available at: <https://www.scottishsentencingcouncil.org.uk/media/1510/principles-and-purposes-of-sentencing-in-scotland-and-other-jurisdictions-a-brief-overview.pdf> [Accessed May 2018]

¹⁶ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> [Accessed May 2018]

¹⁷ Sentencing Council, 2017. *Sentencing Children and Young People, Overarching Principles and Offence Specific guidelines for Sexual Offences and Robbery: Definitive Guideline*, p.4. [Online] Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf [Accessed on 28/06/2018]

¹⁸ Armstrong, S. and McAra, L., 2006. *Sentencing as a social practice*, Perspectives on Punishment: The Contours of Control. Oxford University Press, Oxford, UK, pp. 155-174. Available at: <https://strathprints.strath.ac.uk/3373> [Accessed May 2018]

¹⁹ Scottish Sentencing Council, 2017. *Principles and Purposes of Sentencing in Scotland and Other Jurisdictions: A Brief Overview* [PDF] Available at: <https://www.scottishsentencingcouncil.org.uk/media/1510/principles-and-purposes-of-sentencing-in-scotland-and-other-jurisdictions-a-brief-overview.pdf> [Accessed May 2018]

written in statute, such as in England and Wales, or designed for judges to “have regard” to, such as in Scotland²⁰.

There is a tension between producing guidelines that are “expansive and specific enough that there is consistency and rigorousness in assessing cases, whilst not making them so limited as to treat cases as uniform that are not”²¹. This tension has led to a spectrum in the level of discretion each jurisdiction permits. At one end are the grid-based guidelines of the USA and “comparitivism”²². Grid-based guidelines are rigid, minimising the discretion that a judge has. Though such guidelines increase the consistency in sentencing, they risk “unjustified parity”²³. Unjustified parity occurs when two offenders are treated as identical that should not be. The USA’s guidelines have been criticised for allowing such situations to occur, “forcing” cases together that are not in fact that similar²⁴.

At the opposite end of the spectrum lies “individualism”²⁵, and the accompanying risk of undue inconsistency in sentencing. In this case the issue is unjustified *disparity*. This occurs when two offenders with similar cases are treated as different, despite little cause to do so. “Interjudge disparity” is a risk of individualism and allows “extra-legal” factors such as race and gender to potentially influence a sentencing decision²⁶. Freiberg and Krasnostein have argued that in Australia individualism currently “wins out”, “leading to inequality and unfairness in sentencing”²⁷.

1.5 The historical context and theoretical underpinnings of sentencing young offenders in Scotland

Historically, Scotland has favoured a welfare-based approach to youth justice, focusing on treatment over punishment. However, the jurisdiction also demonstrates the fluidity of general principles and purposes of sentencing, with clear shifts towards and away from a welfarist model over time, dependent on changing political and cultural tides.

²⁰ Scottish Sentencing Council, 2017. *Principles and Purposes of Sentencing in Scotland and Other Jurisdictions: A Brief Overview* [PDF] Available at: <https://www.scottishsentencingcouncil.org.uk/media/1510/principles-and-purposes-of-sentencing-in-scotland-and-other-jurisdictions-a-brief-overview.pdf> [Accessed May 2018]

²¹ Armstrong, S. and McAra, L., 2006. *Sentencing as a social practice*, Perspectives on Punishment: The Contours of Control. Oxford University Press, Oxford, UK, pp. 155-174. [PDF] Available at: <https://strathprints.strath.ac.uk/3373> [Accessed May 2018]

²² Freiberg and Krasnostein, 2013. *Pursuing Consistency in an Individualistic Sentencing Framework: If you know where you’re going, how do you know when you’ve got there?* [PDF] Available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4354&context=lcp> [Accessed May 2018]

²³ Freiberg and Krasnostein, 2013. *Pursuing Consistency in an Individualistic Sentencing Framework: If you know where you’re going, how do you know when you’ve got there?* [PDF] Available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4354&context=lcp> [Accessed May 2018]

²⁴ Armstrong, S. and McAra, L., 2006. *Sentencing as a social practice*, Perspectives on Punishment: The Contours of Control. Oxford University Press, Oxford, UK, pp. 155-174. [PDF] Available at: <https://strathprints.strath.ac.uk/3373> [Accessed May 2018]

²⁵ Freiberg and Krasnostein, 2013. *Pursuing Consistency in an Individualistic Sentencing Framework: If you know where you’re going, how do you know when you’ve got there?* [PDF] Available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4354&context=lcp> [Accessed May 2018]

²⁶ Freiberg and Krasnostein, 2013. *Pursuing Consistency in an Individualistic Sentencing Framework: If you know where you’re going, how do you know when you’ve got there?* [PDF] Available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4354&context=lcp> [Accessed May 2018]

²⁷ Freiberg and Krasnostein, 2013. *Pursuing Consistency in an Individualistic Sentencing Framework: If you know where you’re going, how do you know when you’ve got there?* [PDF] Available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4354&context=lcp> [Accessed May 2018]

The Kilbrandon Report, published in 1964, remains one of the most influential documents in Scottish youth justice history. The Kilbrandon Committee advocated for “social education”, working with children and their families using a “case work approach”²⁸. The aim of this model was to help children and their parents establish “a fuller awareness of their situation and problems” and to identify a solution “that lies to their hands”²⁹. The publishing of this report marked a notable shift towards a truly welfarist approach. Two developments following the Kilbrandon report cemented this welfarist approach in Scotland. The first was the Social Work Act of 1968, which advocated 16-17-year olds be subject to different disposals than that of adult offenders³⁰. The second was the formation of the Children’s Hearing System in 1971, with its focus on prevention, and on the welfare of the individual³¹. A parallel trend also occurred in Europe with the ratification of the United Nations Convention on the Rights of the Child³².

The Children’s Hearing System remained “relatively unchanged” until the introduction of the Children (Scotland) Act 1995³³. This act marked the beginning of a period in which the welfarist approach to youth justice was “supplanted” by a focus on “public protection”³⁴. A change in government was instrumental in this turn towards a more punitive youth justice model. This punitive trend continued into the early 2000s under the Labour/Liberal Democrat coalition. Under this government many policy areas in Scotland saw “greater merging with English policy agendas”, despite devolution³⁵. Under the Antisocial Behaviour etc. (Scotland) Act 2004, “a range of harsh and punitive measures were introduced including anti-social behaviour orders for 12-15-year-olds and parenting orders, as well as the ability of police to disperse groups of young people”³⁶.

²⁸ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p.27 [Accessed May 2018]

²⁹ The Kilbrandon Committee, 1964, p.14. Cited in Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p.27 [Accessed May 2018]

³⁰ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p.27 [Accessed May 2018]

³¹ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p.14 [Accessed May 2018]

³² Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p. [Accessed May 2018]

³³ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p.28 [Accessed May 2018]

³⁴ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p. 28 [Accessed May 2018]

³⁵ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p.30 [Accessed May 2018]

³⁶ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p. 32 [Accessed May 2018]

However, in Scotland youth practitioners were more resistant to these changes, thus their effect was felt less acutely than in England³⁷.

In 2006, the Getting It Right for Every Child (GIRFEC) principles were introduced nationally. These stated that children and young people needed to be “safe, healthy, achieving, nurtured, active, respected, responsible and included”³⁸, emphasising child welfare. In 2008, the Scottish Government published ‘Preventing Offending by Young People – a Framework for Action’. This was the “first policy document specifically on youth justice published by the Scottish National Party”³⁹ and signalled a changed back towards a more welfarist approach, underpinned by GIRFEC. There was also a shift away from “the quantification of risk and statistical analysis of reoffending”, with “softer outcomes” becoming incorporated⁴⁰. In 2011, the Whole System Approach (WSA) came into force in Scotland. This placed a focus on individualised and multi-agency responses to youth offending, tackling the drivers of youth behaviour⁴¹. In addition, the introduction of the Community Justice Act in 2016 has strengthened the community dimension to this approach, with sentencing often leading to a form of community payback, supervision and/or support, as opposed to incarceration⁴².

The Scottish Government’s Youth Justice Strategy was “refreshed”⁴³ and launched in June 2015. This refreshed strategy identified “three themes for action for 2015 – 2020” which were:

1. Advancing the Whole System Approach
2. Improving Life Chances
3. Developing Capacity and Improvement”⁴⁴.

At present, the Scottish youth justice system appears to be continuing in a trend towards a more welfarist approach. However, it should be noted that, though the language of

³⁷ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> [Accessed May 2018]

³⁸ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p.36 [Accessed May 2018]

³⁹ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p. 16 [Accessed May 2018]

⁴⁰ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> p. 40 [Accessed May 2018]

⁴¹ Scottish Government, 2017. *Whole System Approach for Young People who Offend* [Online] Available at: <http://www.gov.scot/Topics/Justice/policies/young-offending/whole-system-approach> [Accessed May 2018]

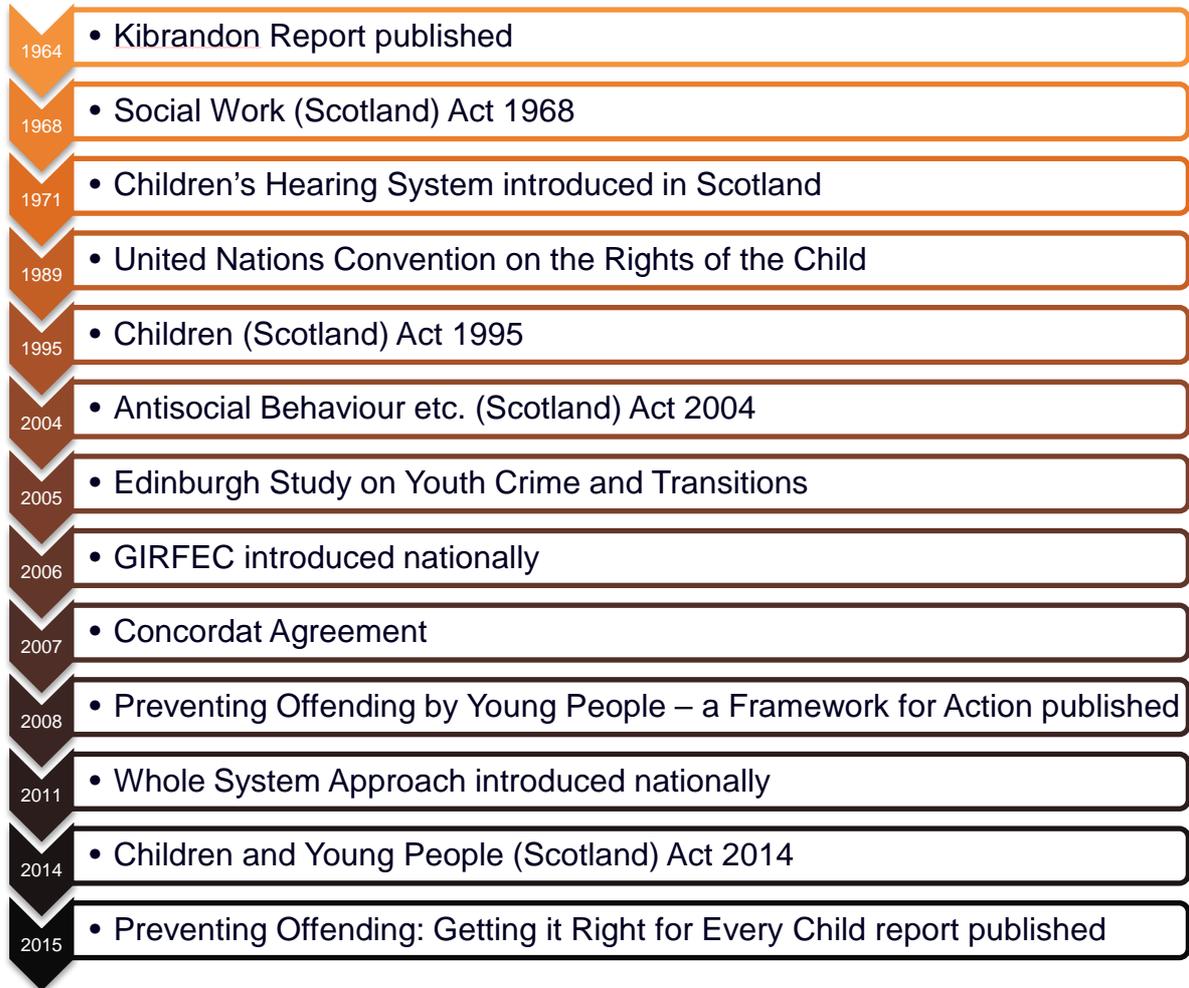
⁴² Ministry of Justice, 2016. *Community Justice (Scotland) Act 2016*. [PDF] Available at: https://www.legislation.gov.uk/asp/2016/10/pdfs/asp_20160010_en.pdf [Accessed May 2018]

⁴³ Centre For Youth and Criminal Justice, 2016. *A Guide to Youth Justice in Scotland: policy, practice and legislation* [PDF] Available at: <http://www.cycj.org.uk/wp-content/uploads/2016/06/A-guide-to-Youth-Justice-in-Scotland.pdf> [Accessed May 2018]

⁴⁴ All themes from Centre For Youth and Criminal Justice, 2016. *A Guide to Youth Justice in Scotland: policy, practice and legislation* [PDF] Available at: <http://www.cycj.org.uk/wp-content/uploads/2016/06/A-guide-to-Youth-Justice-in-Scotland.pdf> [Accessed May 2018]

GIRFEC and the WSA is explicitly welfarist, some authors believe there is an undercurrent that remains more punitive and actuarial in nature⁴⁵.

Timeline of youth justice in Scotland



⁴⁵ Robertson, L., 2017. *A Practice-based Approach to Youth Justice: The Whole System Approach in Scotland*, School of Social and Political Sciences, College of Social Sciences, University of Glasgow [PDF] Available at: <http://theses.gla.ac.uk/8493/1/2017RobertsonPhD.pdf> [Accessed May 2018]

2 The practice of sentencing young offenders

2.1 Introduction

The involvement of young people in the adult criminal justice system depends on their age, offence and circumstances. In Scotland, young offenders can be considered in either the Children’s Hearing System or the criminal justice system. The Children’s Hearing System is described by the Scottish Government as taking “an integrated and holistic approach to care and justice, in which the child’s best interests are the paramount consideration”⁴⁶. The system is based upon principles set out by the Kilbrandon Report of 1964 including ensuring that young people’s needs are considered, and their welfare is the “paramount consideration”⁴⁷. Offering rounded support is seen as a way to minimise risks of future offending and ensure young people are provided with the tools to stay out of the criminal justice system in adulthood.

The age of criminal responsibility in Scotland is 8 years, but custodial sentences cannot be imposed on anyone under the age of 12.⁴⁸ If an offence is “serious”, a child over 12 can be prosecuted and dealt with in court⁴⁹ while those under 12 cannot be prosecuted. For young people who are aged 16 and 17, the likelihood of being dealt with through the adult criminal justice system is “significantly greater” than for children under 16⁵⁰. Despite the recognition of a need for rounded support for those under 16, a level of concern has been voiced about the “sharp boundary” between the Children’s Hearing System and the adult justice system⁵¹, where those dealt with in courts are not offered the same level of multi-agency support.

A range of different sentencing options exists for young people involved in the adult criminal justice system. The number of proceedings against children under 18 in the criminal courts has fallen significantly from 9,374 in 2005-6 to 2,246 in 2014-15⁵². Despite the continued use of custodial sentences for young people, the average number of under 21s in prison dropped from 847 in 2000-01 to 416 in 2016-17⁵³. Considering

⁴⁶ Scottish Government, 2018. *Policy: Child Protection, Children’s Hearings*. [online] Available at: <<https://beta.gov.scot/policies/child-protection/childrens-hearings/>> [Accessed 01/05/2018]

⁴⁷ Children’s Hearings Scotland, 2018. *The Children’s Hearings System: Background*. [online] Available at: <<http://www.chscotland.gov.uk/the-childrens-hearings-system/background/>> [Accessed on 01/05/2018]

⁴⁸ Citizens Advice Scotland, 2015. *Young people and the law*. [online] Available at: <https://www.citizensadvice.org.uk/scotland/law-and-courts/legal-system-s/taking-legal-action-s/young-people-and-the-law-s/> [Accessed on 01/05/2018]

⁴⁹ Citizens Advice Scotland, 2015. *Young people and the law*. [online] Available at: <https://www.citizensadvice.org.uk/scotland/law-and-courts/legal-system-s/taking-legal-action-s/young-people-and-the-law-s/> [Accessed on 01/05/2018]

⁵⁰ McCallum, F., 2016. *Children and the Scottish Criminal Justice System*. SPICe Briefing, 14 June 2016, 16/54. [PDF] Available at: <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-54_Children_and_the_Scottish_Criminal_Justice_System.pdf> [Accessed on 01/05/2018] p. 6

⁵¹ Scottish Consortium for Crime and Criminal Justice, 2018. *FAQs: Children, Families, Young People and the Criminal Justice System*. [online] Available at: <<http://www.scccj.org.uk/index.php/scottish-crime-and-justice-faqs/children-families-young-people-and-the-criminal-justice-system/>> [Accessed on 01/05/2018]

⁵² McCallum, F., 2016. *Children and the Scottish Criminal Justice System*. SPICe Briefing, 14 June 2016, 16/54. [PDF] Available at: <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-54_Children_and_the_Scottish_Criminal_Justice_System.pdf> [Accessed on 01/05/2018] p.15

⁵³ Scottish Prison Service, 2017. *SPS Prison Population: Annual Population*. [online] Available at: <<http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?ID=3414&SID=629>> [Accessed on 01/05/2018]

proceedings against children aged 16 and 17 in the criminal courts, the most frequent sentencing outcome is a community sentence, followed by admonition or financial penalty; custodial sentences were less common and only given in only 171 out of 2229 cases in 2014-15 (under 8%)⁵⁴. An in-depth examination of ‘what works’ in sentencing young offenders is provided in Chapter 4.

2.2 Non-custodial sentences

Non-custodial or community sentences are given to young offenders and can take various forms. Research has shown that placing young offenders in secure care or prison for low level offences increases the likelihood of reoffending, and for this reason “robust community alternatives can be more effective”⁵⁵. While the benefits of non-custodial sentences have been recognised by the Scottish Government, they have emphasised the need to provide “intensive support and supervision” for young people alongside other court-ordered requirements⁵⁶.

Community Payback Order (CPO)

Community Payback Orders (CPOs) were introduced in 2011 and can be imposed on individuals of any age⁵⁷. The number of these orders given has increased over time with 19,136 issued in 2016-17⁵⁸. CPOs are described by Cabinet Secretary for Justice Michael Matheson as making “individuals pay back to their communities for the damage caused by their offending”⁵⁹. CPOs can include one or a combination of unpaid work, supervision, drug or alcohol treatment, mental health treatment, a conduct requirement, a programme requirement (where a person must attend a programme with the aim of reducing future offending), a residence requirement (where a person must live at a certain address) or a compensation requirement⁶⁰. A judge will decide which elements of a CPO should be required as part of the offender’s sentence based on their offence and what can be done “to help stop the person from committing more crimes”⁶¹. CPOs are claimed to be beneficial in requiring offenders to contribute to their communities while being provided with opportunities to make “positive choices”⁶².

⁵⁴ McCallum, F., 2016. *Children and the Scottish Criminal Justice System*. SPICe Briefing, 14 June 2016, 16/54. [PDF] Available at: <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-54_Children_and_the_Scottish_Criminal_Justice_System.pdf> [Accessed on 01/05/2018] p.17

⁵⁵ Scottish Government, 2017a. *Children and Young People: Whole System Approach*. [online] Available at: <<http://www.gov.scot/Topics/Justice/policies/young-offending/whole-system-approach>> [Accessed on 02/05/2018]

⁵⁶ Scottish Government, 2017a. *Children and Young People: Whole System Approach*. [online] Available at: <<http://www.gov.scot/Topics/Justice/policies/young-offending/whole-system-approach>> [Accessed on 02/05/2018]

⁵⁷ Scottish Government, 2011a. *Assisting Young People aged 16 and 17 in Court*. [online] Available at: <<http://www.gov.scot/Publications/2011/09/27155150/16>> [Accessed on 02/05/2018]

⁵⁸ Scottish Government, 2018b. *Criminal Justice Social Work Statistics in Scotland: 2016-17*. [online] Available at: <<http://www.gov.scot/Publications/2018/02/1455/10>> [Accessed on 02/05/2018]

⁵⁹ Scottish Government, 2017b. *Community Payback Order: Scottish Government Summary of Local Authority Reports 2015-16*. [PDF] Available at: <<http://www.gov.scot/Resource/0051/00513840.pdf>> [Accessed on 02/05/2018] p.4

⁶⁰ Scottish Justice and Licensing (Scotland) Act, 2010. *Community Payback Orders*. [online] Available at: <<https://www.legislation.gov.uk/asp/2010/13/part/1/crossheading/community-payback-orders>> [Accessed on 02/05/2018]

⁶¹ Scottish Sentencing Council, 2018. *Community Payback Orders*. [online] Available at: <<https://www.scottishsentencingcouncil.org.uk/about-sentencing/community-payback-orders/>> [Accessed on 02/05/2018]

⁶² Scottish Government, 2017b. *Community Payback Order: Scottish Government Summary of Local Authority Reports 2015-16*. [PDF] Available at: <<http://www.gov.scot/Resource/0051/00513840.pdf>> [Accessed on 02/05/2018] p.4

The most common requirement of a CPO is having to complete between 20 and 300 hours of unpaid work and this work can include activities such as cleaning public areas, gardening or helping in a charity shop⁶³. If a CPO containing an unpaid work requirement is imposed on a young person aged 16 or 17 at the date of sentence, the court must also make an offender supervision requirement⁶⁴ involving a Criminal Justice Social Worker.

Completion rates for CPOs in 2016-17 were the lowest for 16 and 17 year olds with the proportion of successful completions showing a “consistent increase with age”⁶⁵. Completion rates were 60% for 16-17 year olds and 62% for 18-20 year olds, compared with 77% for over 40s⁶⁶. For this reason, it has been suggested that orders are only used where “absolutely necessary”:

“Orders should take consideration of the child’s age, developmental capacities and likely limited knowledge and experience of measures of this nature, whilst also considering potential fears and a sense of hopelessness about successfully completing orders. Consideration should be given as to how the barriers to successful compliance can be reduced and what support may be required.”

Debbie Nolan, Centre for Youth and Criminal Justice⁶⁷

Fines

In some cases, an offender’s sentence will involve paying a fine or compensation to a victim. The appropriateness of giving fines to children has been questioned. Penalties might not be paid due to the child’s inability to pay or alternatively if parents or carers pay, they are being punished by paying on behalf of the child⁶⁸. A total of 44,999 financial penalties were issued in 2016-17 in Scotland, with an average fine of £200 and average compensation order of £250⁶⁹. The effectiveness of court-ordered fines has been questioned in Australia because fines can have “disproportionately harsh consequences or lead to secondary crime” for young people⁷⁰ due to their lower incomes. In addition, it is noted that there are practical difficulties for courts when attempting to accurately assess the “means and capacity of the offender to pay a fine

⁶³ Scottish Sentencing Council, 2018. *Community Payback Orders*. [online] Available at: <<https://www.scottishsentencingcouncil.org.uk/about-sentencing/community-payback-orders/>> [Accessed on 02/05/2018]

⁶⁴ Community Payback, 2010. *National Outcomes and Standards for Social Work Services in the Criminal Justice System: Community Payback Orders Practice Guidance*. [PDF] Available at: <<https://www.whatdotheyknow.com/request/77618/response/195553/attach/3/CPO%20Practice%20Guidance.pdf>> [Accessed on 18/05/2018] p.21

⁶⁵ Scottish Government, 2018c. *Criminal Justice Social Work Statistics in Scotland: 2016-17*. [PDF] Available at: <<http://www.gov.scot/Resource/0053/00530929.pdf>> [Accessed on 02/05/2018] p.17

⁶⁶ Scottish Government, 2018c. *Criminal Justice Social Work Statistics in Scotland: 2016-17*. [PDF] Available at: <<http://www.gov.scot/Resource/0053/00530929.pdf>> [Accessed on 02/05/2018] p.17

⁶⁷ Nolan, D., 2017. *Community Payback Orders – Use of unpaid work or other activity*. Centre for Youth and Criminal Justice, Info Sheet 72, April 2017. [PDF] Available at <<http://www.cycj.org.uk/wp-content/uploads/2018/04/Info-sheet-72.pdf>> [Accessed on 02/05/2018]

⁶⁸ Dyer, F., 2016. *Young People at Court in Scotland*. Centre for Youth and Criminal Justice, January 2016. [PDF] Available at: <<http://www.cycj.org.uk/wp-content/uploads/2016/02/YoungPeopleAtCourtFINAL.pdf>> [Accessed on 02/05/2018] p.12

⁶⁹ Scottish Government, 2018d. *Criminal Proceedings in Scotland, 2016-17*. [PDF] Available at <<http://www.gov.scot/Resource/0053/00532010.pdf>> [Accessed on 02/05/2018] p.59

⁷⁰ New South Wales Sentencing Council, 2006. *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices*. October 2006. [PDF] Available at: <http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Projects_Complete/Fines/interim_report_on_fines.pdf> [Accessed on 02/05/2018] p.viii

and the impact of that fine upon the offender's dependants"⁷¹. Overall, obligating young people to pay fines must involve a consideration of the specific challenges they may face in being able to fulfil this requirement.

Deferred sentence or Structured Deferred Sentence (SDS)

Deferred or Structured Deferred Sentences offer young people a chance to make changes or seek interventions to avoid a custodial sentence. If a deferred sentence is given, an individual could seek assistance on a "voluntary basis" to address a problem such as issues with alcohol use⁷². The period of deferment allows an individual to demonstrate good behaviour and engagement with relevant services⁷³. Structured Deferred Sentences are seen to be particularly suitable for young people and involve a period of "intensive social work or related interventions" for between three and six months to address issues related to offending behaviour⁷⁴. The intervention takes place after conviction but before sentencing. Deferred sentences allow young people to engage with relevant support outside of the custodial system. When Structured Deferred Sentences were piloted in Scotland, it was found that "almost all offenders interviewed described benefiting in some way" and this included "learning to evaluate actions; changing attitudes or behaviour; getting support; having an opportunity/chance; and gaining structure/stability"⁷⁵. At the same time, criminal justice professionals saw Structured Deferred Sentences as a chance for offenders to change their behaviour, get a lesser sentence and access the right support⁷⁶.

Drug Treatment and Testing Order (DTTOs)

⁷¹ New South Wales Sentencing Council, 2006. *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices*. October 2006. [PDF] Available at:

<http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Projects_Complete/Fines/interim_report_on_fines.pdf> [Accessed on 02/05/2018] p.viii

⁷² Scottish Government, 2010. *National Outcomes and Standards for Social Work Services in the Criminal Justice System: Criminal Justice Social Work Reports and Court-Based Services Practice Guidance*. [PDF] Available at:

<<http://www.gov.scot/Resource/Doc/925/0116779.pdf>> [Accessed on 02/05/2018] p.54

⁷³ Scottish Government, 2010. *National Outcomes and Standards for Social Work Services in the Criminal Justice System: Criminal Justice Social Work Reports and Court-Based Services Practice Guidance*. [PDF] Available at:

<<http://www.gov.scot/Resource/Doc/925/0116779.pdf>> [Accessed on 02/05/2018] p.54

⁷⁴ Scottish Government, 2010. *National Outcomes and Standards for Social Work Services in the Criminal Justice System: Criminal Justice Social Work Reports and Court-Based Services Practice Guidance*. [PDF] Available at:

<<http://www.gov.scot/Resource/Doc/925/0116779.pdf>> [Accessed on 02/05/2018] p.54

⁷⁵ Macdivitt, K., 2008. *An Evaluation of the Structured Deferred Sentence Pilots*. Scottish Government Social Research. [PDF] Available at: <<http://www.gov.scot/Resource/Doc/219353/0058866.pdf>> [Accessed on 18/05/2018] p.32

⁷⁶ Macdivitt, K., 2008. *An Evaluation of the Structured Deferred Sentence Pilots*. Scottish Government Social Research. [PDF] Available at: <<http://www.gov.scot/Resource/Doc/219353/0058866.pdf>> [Accessed on 18/05/2018] p.32

Drug Treatment and Testing Orders (DTTOs) require a young offender to address their drug misuse over a period of six months to three years⁷⁷. DTTOs may be imposed on a person over 16, and the young person must consent to the order being made⁷⁸. A DTTO may only be imposed where the court is satisfied that the offender is “dependent on or has propensity to misuse drugs”, the dependency or propensity “may be susceptible to treatment” and the offender is a “suitable person” to be subject to an order⁷⁹. While there is no legal definition of a “suitable person”, suitability is linked to factors such as motivation to address drug misuse, and adequate stability of location and circumstances to enable successful intervention and monitoring⁸⁰. DTTOs have been praised by Howard League Scotland who have advocated for their use in sentencing⁸¹. Howard League Scotland argue that DTTOs “blend the provision of health and criminal justice needs for people who present significant risks of serious morbidity, mortality and offending recidivism”⁸².

Electric Monitoring (EM)

Electric monitoring (EM) has been available in Scotland since 2002 to enforce “home confinement in the context of various legally specified orders”⁸³. The Scottish Government ‘Electronic Monitoring in Scotland’ Working Group published their final report on the use of EM in 2016 and argued that both radio frequency and GPS technologies can “empower” young people to “resist adverse peer pressure”⁸⁴. The Working Group felt that EM could successfully be used flexibly with other measures (or on its own) to meet “different goals for different individuals” in sentencing⁸⁵. In a survey which examined the views of youth justice practitioners on the use of Movement Restriction Conditions, it was found that if restrictions were combined with intensive support this could help in reducing the “frequency and seriousness of a child or young person’s offending behaviour”⁸⁶. It is evident that the use of EM is developing as technology progresses and that these advancements could lead to the wider use of EM in youth justice.

⁷⁷ Iriss, 2017a. *Youth and Criminal Justice in Scotland, The Young Person’s Journey: Alternatives to Custody*. [online] Available at: <<http://content.iriss.org.uk/youthjustice/alt-custody.html>> [Accessed on 18/05/2018]

⁷⁸ Iriss, 2017a. *Youth and Criminal Justice in Scotland, The Young Person’s Journey: Alternatives to Custody*. [online] Available at: <<http://content.iriss.org.uk/youthjustice/alt-custody.html>> [Accessed on 18/05/2018]

⁷⁹ Scottish Government, 2011b. *Drug Treatment and Testing Orders: Guidance for Schemes*. [PDF] Available at: <<http://www.gov.scot/Resource/Doc/353029/0118820.pdf>> [Accessed on 02/05/2018] p.5

Scottish Government, 2011b. *Drug Treatment and Testing Orders: Guidance for Schemes*. [PDF] Available at: <<http://www.gov.scot/Resource/Doc/353029/0118820.pdf>> [Accessed on 02/05/2018] p.5

⁸¹ Howard League Scotland, 2018. *Drug Treatment and Testing Order*. [online] Available at: <<http://howardleague.scot/policy/drug-treatment-and-testing-orders>> [Accessed on 03/05/2018]

⁸² Howard League Scotland, 2018. *Drug Treatment and Testing Order*. [online] Available at: <<http://howardleague.scot/policy/drug-treatment-and-testing-orders>> [Accessed on 03/05/2018]

⁸³ Scottish Government, 2016a. *Electronic Monitoring in Scotland: Working Group Final Report*. [PDF] Available at: <<http://www.gov.scot/Resource/0050/00506734.pdf>> [Accessed on 03/05/2017] p.3

⁸⁴ Scottish Government, 2016a. *Electronic Monitoring in Scotland: Working Group Final Report*. [PDF] Available at: <<http://www.gov.scot/Resource/0050/00506734.pdf>> [Accessed on 03/05/2017] p.4

⁸⁵ Scottish Government, 2016a. *Electronic Monitoring in Scotland: Working Group Final Report*. [PDF] Available at: <<http://www.gov.scot/Resource/0050/00506734.pdf>> [Accessed on 03/05/2017] p.4

⁸⁶ Orr, D., (2013) *Movement Restriction Conditions (MRCs) and youth justice: Learning from the past, challenges in the present and possibilities for the future*. CYCJ, Briefing Paper, No. 2, December 2013. [PDF] Available at: <<http://www.cycl.org.uk/wp-content/uploads/2014/05/Briefing-Paper-2-David-Orr.pdf>> [Accessed on 03/05/2018] p.1

2.3 Custodial sentences

Young Offenders' Institution (YOIs) and secure care

Young Offenders Institutions (YOIs) are facilities for 16-21 year olds and the main establishment of this type for males and females in Scotland is HMYOI Polmont⁸⁷. Young people can only be sent to YOIs if they have been sentenced or remanded to custody⁸⁸. Secure care, accommodation and education in Scotland is available for young people aged 10-18⁸⁹. Secure care is designated as an appropriate setting for children who have been “deemed to be a significant risk to themselves or others in the community”⁹⁰. The Scottish Government has stated that secure care offers “intensive support and safe boundaries that enable their highly vulnerable children to re-engage and move forward positively in their communities”⁹¹.

The Scottish Prison Service (SPS) has claimed that their aim is “to use the time a young person spends in custody to enable them to prepare for a positive future”⁹². Around 1,000 young people enter into custody per year, 37% serving a custodial sentence for the first time⁹³. The number of young people given a custodial sentence in Scotland has decreased over time: in late 2014 amongst 18-20 year olds there were 391 men and 24 women in custody and amongst 16-17 year olds there were 48 boys and 1 girl in custody⁹⁴. Despite an emphasis on ensuring that periods in custody should provide support and learning opportunities, there are concerns about the potential disruption associated with custody for young people⁹⁵. Therefore, the possible harms of custody for individuals must be weighed up in sentencing processes.

2.4 Background of sentenced young people in Scotland

⁸⁷ Iriss 2017b. *Youth and Criminal Justice in Scotland, The Young Person's Journey: Young Offenders Institutions in Scotland*. [online] Available at: <<http://content.iriss.org.uk/youthjustice/yo-young-offenders.html>> [Accessed on 03/05/2018]

⁸⁸ Iriss 2017b. *Youth and Criminal Justice in Scotland, The Young Person's Journey: Young Offenders Institutions in Scotland*. [online] Available at: <<http://content.iriss.org.uk/youthjustice/yo-young-offenders.html>> [Accessed on 03/05/2018]

⁸⁹ Iriss 2017c. *Youth and Criminal Justice in Scotland, The Young Person's Journey: Secure Care*. [online] Available at: <<http://content.iriss.org.uk/youthjustice/sc-secure-care.html>> [Accessed on 18/05/2018]

⁹⁰ Scottish Government, 2018e. *Secure care measures for young people who offend*. [online] Available at: <<http://www.gov.scot/Topics/Justice/policies/young-offending/secure-care>> [Accessed on 03/05/2018]

⁹¹ Scottish Government, 2018e. *Secure care measures for young people who offend*. [online] Available at: <<http://www.gov.scot/Topics/Justice/policies/young-offending/secure-care>> [Accessed on 03/05/2018]

⁹² Scottish Prison Service, 2014. *Unlocking Potential, Transforming Lives: Vision for Young People in Custody*. [PDF] Available at: <http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPS_Young_People_Strategy_Dec_2014%5B1%5D2884_1559.pdf> [Accessed on 03/05/2018] p.2

⁹³ Scottish Prison Service, 2014. *Unlocking Potential, Transforming Lives: Vision for Young People in Custody*. [PDF] Available at: <http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPS_Young_People_Strategy_Dec_2014%5B1%5D2884_1559.pdf> [Accessed on 03/05/2018] p.2

⁹⁴ Scottish Prison Service, 2014. *Unlocking Potential, Transforming Lives: Vision for Young People in Custody*. [PDF] Available at: <http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPS_Young_People_Strategy_Dec_2014%5B1%5D2884_1559.pdf> [Accessed on 03/05/2018] p.2

⁹⁵ Youth Justice Improvement Board, 2017. *Children and Young People in Custody in Scotland: Looking Behind the Data*. October 2017. [PDF] Available at: <<http://www.cycj.org.uk/wp-content/uploads/2017/10/Young-People-in-Custody-October-2017.pdf>> [Accessed on 03/05/2018] p.11

There is increasing evidence that young offenders are some of the most vulnerable young people in society⁹⁶. 34% of young people in custody in Scotland have been in care, and one study has shown that young men in custody have experienced an average of 5 bereavements each, “a high proportion of these being traumatic”⁹⁷. Amongst young people in secure care, a difficult childhood is “more apparent than within the wider community”⁹⁸. Research by Kibble Education and Care Centre found that the children who came into their service had “extremely high levels” of Adverse Childhood Experiences (ACEs) including emotional, physical and sexual abuse, neglect, domestic violence and household substance misuse⁹⁹. The Sentencing Council for England and Wales published guidelines in March 2017 which require the youth justice system to look “with far greater detail” at the background and circumstances of each child or young person when sentencing¹⁰⁰. A consideration of the often intersecting factors that might lead a young person to offend is necessary to enable suitable and effective sentencing practices.

2.5 Reoffending and desistance

Young male offenders have high levels of reconviction when compared with other age groups. Males under 21 had a reconviction rate of 37.3% in 2014-15 whereas amongst males aged 21 to 40 the rate is around 30%, and for males aged over 40 this drops to 20.8%¹⁰¹. For females, the correlation between age and reconviction is less clear-cut. The reconviction rate for 26 to 40 year olds is higher than for those aged under 25 or those over 40¹⁰². The Scottish Government has identified the cost of reoffending at around £3 billion per year, and despite a reduction in reoffending over time has identified a series of steps to further reduce reoffending¹⁰³. These include focusing on “tough and effective community sentences”, investing in prisons to support rehabilitation and ensuring offenders have access to appropriate services¹⁰⁴.

⁹⁶ Youth Justice Improvement Board, 2017. *Children and Young People in Custody in Scotland: Looking Behind the Data*. October 2017. [PDF] Available at: <http://www.cycj.org.uk/wp-content/uploads/2017/10/Young-People-in-Custody-October-2017.pdf> [Accessed on 03/05/2018] p.4

⁹⁷ Scottish Prison Service, 2014. *Unlocking Potential, Transforming Lives: Vision for Young People in Custody*. [PDF] Available at: http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPS_Young_People_Strategy_Dec_2014%5B1%5D2884_1559.pdf [Accessed on 03/05/2018] p.2

⁹⁸ Youth Justice Improvement Board, 2017. *Children and Young People in Custody in Scotland: Looking Behind the Data*. October 2017. [PDF] Available at: <http://www.cycj.org.uk/wp-content/uploads/2017/10/Young-People-in-Custody-October-2017.pdf> [Accessed on 03/05/2018] p.4

⁹⁹ Youth Justice Improvement Board, 2017. *Children and Young People in Custody in Scotland: Looking Behind the Data*. October 2017. [PDF] Available at: <http://www.cycj.org.uk/wp-content/uploads/2017/10/Young-People-in-Custody-October-2017.pdf> [Accessed on 03/05/2018] p.4

¹⁰⁰ Sentencing Council, 2017. *Sentencing Council publishes new guidelines on sentencing children and young people and offenders who plead guilty*. [online] Available at: <https://www.sentencingcouncil.org.uk/news/item/sentencing-council-publishes-new-guidelines-on-sentencing-children-and-young-people-and-offenders-who-plead-guilty/> [Accessed on 18/05/2018]

¹⁰¹ Scottish Government, 2017c. *Reconviction Rates in Scotland: 2014-15 Offender Cohort*. [PDF] Available at: <http://www.gov.scot/Resource/0051/00517255.pdf> [Accessed on 18/05/2018] p.13

¹⁰² Scottish Government, 2017c. *Reconviction Rates in Scotland: 2014-15 Offender Cohort*. [PDF] Available at: <http://www.gov.scot/Resource/0051/00517255.pdf> [Accessed on 18/05/2018] p.13

¹⁰³ Scottish Government, 2016b. *Reducing Reoffending*. [online] Available at: <http://www.gov.scot/Topics/Justice/policies/reducing-reoffending> [Accessed on 18/05/2018]

¹⁰⁴ Scottish Government, 2016b. *Reducing Reoffending*. [online] Available at: <http://www.gov.scot/Topics/Justice/policies/reducing-reoffending> [Accessed on 18/05/2018]

Most offenders desist from crime as they get older. It is evidenced that offending usually “begins in early adolescence, peaks during the late teens and tapers off in young adulthood”¹⁰⁵. For this reason, it has been recommended that criminal justice policies and practices should avoid “intervening too much, too soon and in the wrong ways” as this can lead to the establishment of “criminal reputations and identities” thus preventing desistance¹⁰⁶. McIvor, Jamieson and Murray explored desistance amongst three groups of young people aged 14-15, 18-19 and 22-25¹⁰⁷. For the youngest group, desistance for both girls and boys was associated with the “real or potential consequences of offending” and a growing appreciation that offending was “pointless or wrong”¹⁰⁸. The middle age group related desistance to “increasing maturity” through events such as getting a job or studying at college or university¹⁰⁹. Amongst the oldest group, desistance was linked to family responsibilities or conscious lifestyle changes¹¹⁰.

Differences between young men and women are evident where young men take longer to “grasp opportunities for change” offered by life transitions¹¹¹ i.e. they may desist in their late rather than early or mid-twenties. A study by Graham and Bowling found that failure to desist for young men could be explained by a high frequency of prior offending, continued contact with “delinquent peers” and heavy alcohol or drug use¹¹².

Overall, while most young people will desist from crime, certain factors can lead to persistence for a small subsection of young offenders. Loeber et al. have identified several explanatory processes for persistence and desistance amongst young adults including brain maturation, social risk and protective factors such as family and peers, mental illness, substance abuse, neighbourhood, and justice response¹¹³.

2.6 International comparisons

¹⁰⁵ Sapouna, M., Bisset, C., Conlong, A. and Matthews, B. (2015) *What Works to Reduce Reoffending: A Summary of the Evidence*. Justice Analytical Services, Scottish Government. [PDF] Available from: <<http://www.gov.scot/Resource/0047/00476574.pdf>> [Accessed on 04/05/2018]

¹⁰⁶ Weaver, B. and McNeill, F., 2008. *Giving Up Crime: Directions for Policy*. [PDF] Available from: <http://www.sccjr.ac.uk/wp-content/uploads/2008/11/Giving_Up_Crime_tcm8-2569.pdf> [Accessed on: 04/05/2018] p.1

¹⁰⁷ McIvor G., Jamieson, J. and Murray, C., 2000. *Study Examines Gender Differences in Desistance From Crime*. Offender Programs Report 4(1): 5-9. Cited in Weaver, B. and McNeill, F., 2008. *Giving Up Crime: Directions for Policy*. [PDF] Available from: <http://www.sccjr.ac.uk/wp-content/uploads/2008/11/Giving_Up_Crime_tcm8-2569.pdf> [Accessed on: 04/05/2018] p.3

¹⁰⁸ McIvor G., Jamieson, J. and Murray, C., 2000. *Study Examines Gender Differences in Desistance From Crime*. Offender Programs Report 4(1): 5-9. Cited in Weaver, B. and McNeill, F., 2008. *Giving Up Crime: Directions for Policy*. [PDF] Available from: <http://www.sccjr.ac.uk/wp-content/uploads/2008/11/Giving_Up_Crime_tcm8-2569.pdf> [Accessed on: 04/05/2018] p.3

¹⁰⁹ McIvor G., Jamieson, J. and Murray, C., 2000. *Study Examines Gender Differences in Desistance From Crime*. Offender Programs Report 4(1): 5-9. Cited in Weaver, B. and McNeill, F., 2008. *Giving Up Crime: Directions for Policy*. [PDF] Available from: <http://www.sccjr.ac.uk/wp-content/uploads/2008/11/Giving_Up_Crime_tcm8-2569.pdf> [Accessed on: 04/05/2018] p.3

¹¹⁰ McIvor G., Jamieson, J. and Murray, C., 2000. *Study Examines Gender Differences in Desistance From Crime*. Offender Programs Report 4(1): 5-9. Cited in Weaver, B. and McNeill, F., 2008. *Giving Up Crime: Directions for Policy*. [PDF] Available from: <http://www.sccjr.ac.uk/wp-content/uploads/2008/11/Giving_Up_Crime_tcm8-2569.pdf> [Accessed on: 04/05/2018] p.3

¹¹¹ Weaver, B. and McNeill, F., 2008. *Giving Up Crime: Directions for Policy*. [PDF] Available from: <http://www.sccjr.ac.uk/wp-content/uploads/2008/11/Giving_Up_Crime_tcm8-2569.pdf> [Accessed on: 04/05/2018] p.3

¹¹² Graham, J. and Bowling, B., 1995. *Young People and Crime*. Home Office Research Study No. 145. Cited in Weaver, B. and McNeill, F., 2008. *Giving Up Crime: Directions for Policy*. [PDF] Available from: <http://www.sccjr.ac.uk/wp-content/uploads/2008/11/Giving_Up_Crime_tcm8-2569.pdf> [Accessed on: 04/05/2018] p.4

¹¹³ Loeber, R., Hoeve, M., Slot, N. W., van der Laan, P. H. (eds.), 2012. *Persists and desisters in crime from adolescence into adulthood. Explanation, prevention and punishment*. Farnham: Ashgate. Cited in Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.21

Sentencing practices for young offenders differ across jurisdictions. Almost all European justice systems have acknowledged that young adulthood should be taken into account in criminal justice laws and practice¹¹⁴. In Germany, young adults are considered in juvenile courts where all 14 to 18 year olds, and two thirds of 18 to 21 year olds are given sanctions under the Juvenile Justice Act¹¹⁵. These sanctions include educational measures, disciplinary measures such as fines and community service, and youth prison sentences and can be tailored according to the needs of each individual offender¹¹⁶. Youth prison sentences differ from adult prison sentences, as they are undertaken in separate youth prisons where a “much wider range of educational and vocational training is offered”¹¹⁷.

In England and Wales, the Sentencing Council has published guidelines on sentencing for assaults, drug offences and burglaries which take “age and/or lack of maturity” of the offender into account¹¹⁸. These guidelines provide the opportunity to “mitigate sentences” for those **beyond** the age of 18 on the basis of their maturity, which signals a move away from “rigid age boundaries”¹¹⁹. Amongst offenders aged 10 to 18 in England and Wales, 4.9% were fined, 7% were sentenced to immediate custody and 68.6% received a community sentence in 2011¹²⁰. This breakdown of sentences differs significantly for those in the 18 to 21 age group, where only 22% received a community sentence, thus mirroring adult sentencing more closely than juvenile sentencing¹²¹.

Finland and Sweden are seen to have adopted a significantly different approach to sentencing young offenders¹²². Neither country has a specific juvenile justice system, and because there are so few prisoners under age 18 in Finland, there are no youth

¹¹⁴ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.5

¹¹⁵ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p. 39

¹¹⁶ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.39-40

¹¹⁷ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.40

¹¹⁸ Sentencing Guidelines Council, 2011. *Assault: Definitive Guideline* & Sentencing Guidelines Council, 2012. *Burglary Offences: Definitive Guideline*. Cited in Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.52

¹¹⁹ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.53

¹²⁰ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.53

¹²¹ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.53

¹²² Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.54

prisons¹²³. Across all court sentences for 15-17 year olds in Finland, just under 80% were fines in 2012 and 0.1% involved community service¹²⁴. Establishing a separate youth justice system is seen to be less necessary in Scandinavian countries because these jurisdictions endeavour to pursue alternatives to custodial sentences across **all** age groups¹²⁵. In Sweden, there is a “long-standing principle” where courts are expected to “surrender” offenders between 15 and 17 years old to the social services system¹²⁶ so that they can receive the appropriate support. However, the system is seen to be moving away from the welfare approach towards an approach which prioritises control and punishment¹²⁷.

¹²³ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.54-55

¹²⁴ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.56

¹²⁵ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed on 04/05/2018] p.57

¹²⁶ Hollander, A. and Tarnfalk, M., 2017. *Juvenile Crime and the Justice System in Sweden*. [online] Available at: <<https://lawexplores.com/juvenile-crime-and-the-justice-system-in-sweden/>> [Accessed on 18/05/2018]

¹²⁷ Hollander, A. and Tarnfalk, M., 2017. *Juvenile Crime and the Justice System in Sweden*. [online] Available at: <<https://lawexplores.com/juvenile-crime-and-the-justice-system-in-sweden/>> [Accessed on 18/05/2018]

3 The definition of young offender

3.1 Context and consistency in the definition of young offender

The term 'young' or 'juvenile' offender is common amongst the literature, with the majority of authors, as well as legal systems, distinguishing between 'young offenders' and 'adult offenders'. However, the extent to which this can be usefully compared, both across different research papers, and between jurisdictions, is hampered by the inconsistency as to how 'youth' is defined. Considerable discrepancy exists as to when youth ends, and to a lesser extent, when it begins. Some accounts distinguish between stages of being young, such as childhood, adolescence and young adults, whereas others do not. Some clearly define the parameters of 'young offender', whereas others use the term without stating their underlying rationale.

3.2 Criminal culpability and the definition of young offender

The lack of a consistent definition of young offender stems from the multitude of criteria that can be employed. These criteria are important because they set the boundaries as to who can and should be included within the scope of a study, and thus who they apply to within policy and guidelines. For example, if the upper limit of 'young offender' is aligned with when a particular jurisdiction grants someone as "criminally responsible"¹²⁸ for their actions, then this will tend to narrow the range of ages that it refers to. In Europe, the average age at which someone is deemed criminally responsible is 14 years old¹²⁹, and thus this could act as a logical cut-off point when considering what should count as 'young offender'. However, variation exists even within Europe. For example, in Sweden, Finland and Norway, the age of criminal responsibility is 15, in Belgium and Luxembourg it is 18, while in England and Wales, and Scotland, the age is far lower than the average, at 10 and 12 years respectively¹³⁰.

While the average age of culpability in Europe is 14, this does not mean that all those aged 14 and over will be tried as an adult and sent to an adult prison. In fact, most under 18s in the Western world, and beyond, will be given greater leniency than adults, be incarcerated less often, and *if* sentenced to prison, will most likely end up within a specialised youth correctional facility¹³¹. For example, while 18 to 20-year olds may have adult status in England and Wales and are tried in adult courts, "the disposals to which they are subject are different to adults" including the "use of a separate custodial institution"¹³². In the Philippines, "prison sentences are suspended while the offender

128 Goldson, B., 2013. 'Unsafe, Unjust and Harmful to Wider Society': Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales. [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1473225413492054>

129 Goldson, B., 2013. 'Unsafe, Unjust and Harmful to Wider Society': Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales. [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1473225413492054>

130 Goldson, B., 2013. 'Unsafe, Unjust and Harmful to Wider Society': Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales. [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1473225413492054>

131 Hazel, N., 2008. *Cross-national comparison of youth justice*. The University of Salford. Available from: http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf [Accessed May 2018]

132 Hazel, N., 2008. *Cross-national comparison of youth justice*. The University of Salford. Available from: http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf. [Accessed May 2018] p.36

has the status of ‘youth’ from 15 to 17 years, and then given more lenient custodial sentences than adults until they are 21 years old”¹³³. In Switzerland, ‘young adults’ are given “less severe sentences until they are 25 years old”¹³⁴. The reality is that most countries tend to demonstrate gradations in the status and treatment of ‘young offenders’¹³⁵ dependent on age, often past the point at which they are legally considered an ‘adult’.

3.3 Legal rights and subjective ‘adulthood’

As the age of criminal responsibility appears to vary, and seems rarely to correspond with decisions in sentencing, the definition of young offender could instead be aligned with the age at which a particular jurisdiction grants a person certain legal rights. However, this will then be dependent on the legal rights felt to represent adulthood in a particular culture, eg marriage, voting age or when someone can legally work. As such judgements tend to be highly subjective and dependent on a range of other factors, this may not be an appropriate basis on which to sentence individuals.

3.4 Other factors affecting the definition of young offender

Other criteria that may influence the definition of a ‘young offender’ include the aims of the author, their school of thought and their field of research. For example, the UN defines “youth” as any persons “between the ages of 15 and 24 years old”¹³⁶. It does so because its imperative is “statistical consistency”¹³⁷, thus “all UN statistics on youth are based on this definition” and youth is separated from child¹³⁸. However, at the national level, this definition becomes more flexible, and a particular country or continental understanding may be adopted. For example, the African Youth Charter extends the definition of youth considerably, including “every person between the ages of 15 and 35 years”¹³⁹. These examples make the definition of youth, and young offender, begin to look more arbitrary, and less of a sound basis on which guidelines may be produced.

3.5 Neurological research as a basis and rationale for defining young offenders

It could be argued that such inconsistency in the definition of ‘young offender’ need not matter to sentencing, so long as adults are not deemed to fundamentally differ from

133 Hazel, N., 2008. *Cross-national comparison of youth justice*. The University of Salford. Available from: http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf [Accessed May 2018] p.36

134 Hazel, N., 2008. *Cross-national comparison of youth justice*. The University of Salford. Available from: http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf [Accessed May 2018] p.36

135 Hazel, N., 2008. *Cross-national comparison of youth justice*. The University of Salford. Available from: http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf [Accessed May 2018]

136 UNESCO. *What do we mean by “youth”?* [online]. Available at: <http://www.unesco.org/new/en/social-and-human-sciences/themes/youth/youth-definition/> [Accessed May 2018]

137 UNESCO. *What do we mean by “youth”?* [online]. Available at: <http://www.unesco.org/new/en/social-and-human-sciences/themes/youth/youth-definition/> [Accessed May 2018]

138 UNESCO. *What do we mean by “youth”?* [online]. Available at: <http://www.unesco.org/new/en/social-and-human-sciences/themes/youth/youth-definition/> [Accessed May 2018]

139 UNESCO. *What do we mean by “youth”?* [online]. Available at: <http://www.unesco.org/new/en/social-and-human-sciences/themes/youth/youth-definition/> [Accessed May 2018]

young people, or in their responses to sentencing. The definition only becomes important if there are substantial and significant grounds to believe that sentencing should differ based on age. Research into brain development and maturation over the last two decades offers compelling evidence that young people do indeed fundamentally differ from adults, and that the developmental processes occurring at this age require different interventions to be ‘effective’.

3.6 The different stages of brain development

It has long been uncontroversial to differentiate children from adults, with the accompanying notion that the brain is still developing in childhood, and that it has reached maturity in adulthood. However, a growing body of evidence suggests that within this larger transition from childhood to adulthood, there exist smaller discrete stages of maturity. For simplicity, Pruin and Dunkel split these into three distinct phases of development: “physical maturity”, “intellectual maturity” and “emotional maturity”¹⁴⁰. These stages of development fall roughly at the transition points commonly recognised as different life stages; childhood, adolescence and being a young adult.

Physical maturity of the brain occurs first, (aged 12-13)¹⁴¹ signifying an end to childhood and the beginning of adolescence. Intellectual maturity, the development of “fundamental logical-operational thought processes”¹⁴² generally continues up until the age of 18 (the end of adolescence). Emotional maturity is the final and most cognitively sophisticated phase and involves the development of higher “executive functions”¹⁴³ such as the ability to plan, and to “control emotions”¹⁴⁴. This phase is associated with changes in the prefrontal cortex, striatum and amygdala¹⁴⁵. Advances in functional neuroimaging have shown these regions not to fully mature until around the age of 25, representing the upper limit of the “young adult”¹⁴⁶ life stage. This is in contrast to the upper limit of ‘young offender’, which tends to be 18 or 21 years of age.

¹⁴⁰ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed May 2018] p.32

¹⁴¹ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed May 2018] p.32

¹⁴² Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed May 2018] p.32

¹⁴³ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed May 2018] p.32

¹⁴⁴ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed May 2018] p.32

¹⁴⁵ Pruin, I. and Dunkel, F., 2015. *Better in Europe? European responses to young adult offending*. Universitat Greifswald. [PDF] Available from <https://www.barrowcadbury.org.uk/wp-content/uploads/2015/02/T2A_Better-in-Europe_Report-online.pdf> [Accessed May 2018] p.32

¹⁴⁶ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <<https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf>> [Accessed May 2018]

The development of intellectual and emotional maturity does not occur uniformly, with regions such as the striatum and amygdala undergoing “a fluctuating course of development”¹⁴⁷. These regions are most important to “sensation seeking”¹⁴⁸ behaviours and are “most excitable”¹⁴⁹ during adolescence and well into early adulthood. Galva et al conclude that this “enhanced activation”¹⁵⁰ renders adolescents and young adults “more reward-seeking, risk-sensitive and emotionally reactive than younger or older individuals”¹⁵¹. These behaviours are compounded by the immaturity of the prefrontal cortex, the region critical for impulse control and rational decision making¹⁵².

3.7 The implications of asymmetrical brain development

This asymmetrical brain development has profound implications for the way in which we conceive of young offenders and understand their behaviours. “Hyperactivation”¹⁵³ of sensation seeking behaviours means “at no other time in life is there greater intrinsic motivation to explore new experiences than during adolescence”¹⁵⁴. This is an important part of growing up and can be positive, encouraging young people to take up new hobbies and interests, and to seek out knowledge, but it can equally be funnelled into dangerous risk-taking and provide “excitement”¹⁵⁵ to offending, something that can be a major obstacle to desistance¹⁵⁶. The extent to which sensation seeking is positive or negative depends largely on social context and opportunities available. A strong network of prosocial peers and role-models make offending less likely, whereas interaction with others engaging in criminal activities increases the likelihood of offence^{157 158}.

3.8 The effects of sentencing on young offenders

This knowledge has two-fold implications for sentencing. Firstly, it suggests a mechanism by which disadvantage can increase the likelihood of interaction with the criminal justice

¹⁴⁷ Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018] p.263

¹⁴⁸ Bonnie. R and Scott. E., 2013. *The Teenage Brain: Adolescent Brain Research and the Law*. [PDF] Available from <http://journals.sagepub.com/doi/pdf/10.1177/0963721412471678> [Accessed May 2018] p.159

¹⁴⁹ Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018] p. 263

¹⁵⁰ Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018] p.263

¹⁵¹ Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018] p.263

¹⁵² Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018]

¹⁵³ Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018] p.263

¹⁵⁴ Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018] p.262

¹⁵⁵ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.7

¹⁵⁶ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.7

¹⁵⁷ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf>

¹⁵⁸ Bateman, T., 2017. *The state of youth justice 2017 An overview of trends and developments*. National Association for Youth Justice. [PDF] Available from: <http://thenayj.org.uk/wp-content/uploads/2017/09/State-of-Youth-Justice-report-for-web-Sep17.pdf> [Accessed May 2018]

system. Adolescents and young adults experiencing greater deprivation and disadvantage are likely to have fewer opportunities to engage in positive sensation-seeking behaviours¹⁵⁹. This lack of opportunities makes people more likely to channel their desire for new experiences into negative risk-taking behaviours.

Secondly, those who do come into contact with the criminal justice system have their intellectual and emotional development interrupted further, finding themselves more restricted to negative sensation seeking. Custodial sentences as an adolescent or young adult bring people into contact with older people involved in criminal activities, while excluding them from many positive opportunities, such as employment and education¹⁶⁰. This makes reoffending more likely, as it both normalises offending, and increases exposure to opportunities to offend¹⁶¹.

Custodial sentencing has a secondary effect on adolescents and young adults. Part of the development of intellectual and emotional maturity is the establishment of identity and the formation of habits. Being labelled as a young offender gives an individual a ready-to-go self-identity kit, complete with all the negative stereotypes and connotations this entails. This identity can act as a self-fulfilling prophecy, making offending habitual and instinctive. Habits formed as an adolescent or young adult have been shown to persist into adulthood¹⁶². As engagement in criminal activities also increases exposure to alcoholism and substance misuse, incarceration as a young offender can be detrimental to longer term health and increase the likelihood of alcohol and drug dependencies¹⁶³.

3.9 Adolescents, young adults and tailored interventions

Adolescence and early adulthood has been described as a second sensitive period¹⁶⁴, when the brain is highly plastic and “unstable”¹⁶⁵. As the previous sections have demonstrated, this can leave adolescents and young adults prone to risk and influence, with potentially disastrous effects. However, this plasticity equally offers a second window of opportunity, when young people are particularly open to positive influences and there is great potential to change attitudes¹⁶⁶. In contrast to this knowledge, being an adolescent or young adult tends to be accompanied by a rapid drop in support

¹⁵⁹ Bateman, T., 2017. *The state of youth justice 2017 An overview of trends and developments*. National Association for Youth Justice. [PDF] Available from: <http://thenayj.org.uk/wp-content/uploads/2017/09/State-of-Youth-Justice-report-for-web-Sep17.pdf>

¹⁶⁰ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018]

¹⁶¹ Hirsch, A., 2001 *Proportionate Sentences for Juveniles How Different than for Adults?* [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1462474501003002002> [Accessed May 2018]

¹⁶² House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018]

¹⁶³ Bonnie, R and Scott, E., 2013. *The Teenage Brain: Adolescent Brain Research and the Law*. [PDF] Available from <http://journals.sagepub.com/doi/pdf/10.1177/0963721412471678> [Accessed May 2018] p.159

¹⁶⁴ Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018] p.263

¹⁶⁵ Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018] p.262

¹⁶⁶ Galvan, A., 2014. *Insights about Adolescent Behaviour, Plasticity, and Policy from Neuroscience Research*. Neuron. [PDF] Available from: <https://www.sciencedirect.com/science/article/pii/S0896627314005492> [Accessed May 2018]

available, something Dr Chitabesan has termed “double jeopardy”¹⁶⁷. This reinforces the need for tailored, specific interventions based on the needs and vulnerabilities of young offenders.

However, direct intervention is not always necessary or the most effective way to get adolescents and young adults to desist from criminal activities. Some of the most important factors in desisting as an adolescent or young adult are settling in a relationship, gaining employment, stable accommodation and “developing a sense of agency”¹⁶⁸. Crucially, these opportunities can be delayed, or disappear altogether, as a result of receiving a custodial sentence as a young offender.

3.10 Atypical brain development and young offenders

People who persistently offend into adulthood are more likely to have “atypical” brain development and “neuro-psychological deficits”¹⁶⁹. 60-90% of young people in custody are estimated to have communication impairments, compared with 5-7% of the general population¹⁷⁰. Head injuries, Autistic Spectrum Disorder and learning disabilities are also estimated to be more common among the young prison population, as is conduct disorder, a mental illness strongly associated with offending behaviour¹⁷¹. Such atypical brain development means an individual will be less likely to comprehend the severity of their sentence, to process the information they are receiving and to comply successfully with demands placed on them¹⁷². The prevalence of such disorders within the young offender population could represent an argument in itself for granting young offenders “diminished responsibility”¹⁷³.

There is evidence that traumatic brain injury (TBI) should be carefully considered when sentencing young offenders. TBI delays brain development to the extent that individuals are unlikely to reach “full neurological development” by their mid-20s¹⁷⁴, if ever. The Centre for Mental Health has estimated that “a traumatic brain injury increases the

¹⁶⁷ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.8

¹⁶⁸ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.8

¹⁶⁹ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.9

¹⁷⁰ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.10

¹⁷¹ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.10

¹⁷² House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.11

¹⁷³ Bonnie. R and Scott. E., 2013. *The Teenage Brain: Adolescent Brain Research and the Law*. [PDF] Available from <http://journals.sagepub.com/doi/pdf/10.1177/0963721412471678> [Accessed May 2018] p.159

¹⁷⁴ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.10

likelihood of crime by at least 50%”¹⁷⁵. Head injury also doubles the likelihood that “someone with no prior psychiatric history will go on to develop a diagnosable mental health problem”¹⁷⁶ and increases the likelihood of substance misuse¹⁷⁷. The connection between head injuries, impaired development and increased crime is particularly important for adolescents, as this is the “peak period”¹⁷⁸ when head injuries are likely to occur.

3.11 The effects of trauma and adversity on brain development

Trauma has been shown to have an effect on prefrontal cortex development¹⁷⁹. This suggests that those who have experienced adverse childhood experiences are less likely to have a mature prefrontal cortex. This means that for those with trauma, 25 may not represent an appropriate upper limit to young adult.

While research into differences between the sexes in brain development has thrown up mixed results, there is some evidence to suggest that trauma can affect males and females differently. A recent Stanford Study found evidence of different brain developments in the insula region for boys and girls with PTSD, while no such differences were apparent in the control group.¹⁸⁰ This could imply a need for gender considered interventions for young offenders who have experienced trauma.

3.12 The normative argument for defining young offenders

While cognitive development offers a useful vantage point from which to view the definition of young offender, used in isolation it has considerable limitations. To take the neuroscientific argument of brain development to its logical conclusion, would be to assess each individual’s maturity separately, and to sentence based on individual cognitive skill rather than age¹⁸¹. This would not only be time-consuming, but lead to huge inconsistencies between the sentences given for similar, even identical crimes. Further, it could result in more severe sentences for individuals felt to be more “morally sophisticated”¹⁸².

¹⁷⁵ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.10

¹⁷⁶ Parsonage, M., 2016 *Traumatic Brain Injury and Offending An Economic Analysis*. Centre for Mental Health [PDF] Available from: www.centreformentalhealth.org.uk/Handlers/Download.ashx?IDMF=12411de6-dfc4-41cb-987b-e1e790ebb7e6 [Accessed May 2018] p.4

¹⁷⁷ House of Commons Justice Committee, 2016. *The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17*. [PDF] Available from: <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf> [Accessed May 2018] p.10

¹⁷⁸ Parsonage, M., 2016 *Traumatic Brain Injury and Offending An Economic Analysis*. Centre for Mental Health [PDF] Available from: www.centreformentalhealth.org.uk/Handlers/Download.ashx?IDMF=12411de6-dfc4-41cb-987b-e1e790ebb7e6 [Accessed May 2018] p.6

¹⁷⁹ Carrion, V. and Wong, S., 2012. *Can Traumatic Stress Alter the Brain? Understanding the Implications of Early Trauma on Brain Development and Learning*. Journal of Adolescent Health. [PDF]. Available from: [https://www.jahonline.org/article/S1054-139X\(12\)00172-3/pdf](https://www.jahonline.org/article/S1054-139X(12)00172-3/pdf) [Accessed May 2018]

¹⁸⁰ Digitale, E., 2016. *Traumatic stress changes brains of boys, girls differently* [online]. Available from: <https://med.stanford.edu/news/all-news/2016/11/traumatic-stress-changes-brains-of-boys-girls-differently.html> [Accessed May 2018]

¹⁸¹ Hirsch, A., 2001 *Proportionate Sentences for Juveniles How Different than for Adults?* [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1462474501003002002> [Accessed May 2018]

¹⁸² Hirsch, A., 2001 *Proportionate Sentences for Juveniles How Different than for Adults?* [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1462474501003002002> [Accessed May 2018]

In his 2001 paper on proportionate sentencing, Von Hirsch argues for normative considerations to be taken into account, alongside empirical evidence. He appeals to the idea of the “ordinary process of growing up” and what is “reasonably” expected of adolescents and young adults in society. Von Hirsch explains that, in most modern societies, adolescence has come to be recognised as a distinct life stage in which individuals are encouraged to “test the limits”¹⁸³ in order to learn how to “act autonomously”¹⁸⁴. Von Hirsch argues for being “partially tolerant”¹⁸⁵ of offences committed by young people, not *necessarily* because they are less culpable, but because “learning to make choices carries with it the risk of bad choices”¹⁸⁶ and the overstepping of boundaries. Used in combination, both this and the neuroscientific arguments provide cause to distinguish between young and adult offenders, and for their sentences to differ.

3.13 Summary

- Young offenders tend to be distinguished from adult offenders in the literature, but the underlying reasons for doing so appear inconsistent
- The average age at which a young person is considered criminally culpable varies internationally and does not always reflect whether an individual will actually be treated as an adult or young offender. In general, gradations in sentence leniency correlate with age
- Criteria such as the age of criminal culpability and certain legal rights do not present a sound basis on which to define young offenders
- Cognitive science presents the most compelling evidence that young offenders should be defined separately from adult offenders. Functional neuroimaging has revealed specific neurobiological changes in the brain during adolescence and young adulthood, including a number of distinct stages of development: physical, intellectual and emotional maturity
- Emotional maturity involves the maturation of the prefrontal cortex and is often incomplete until around 25 years of age, suggesting an extension to the age at which individuals may be considered young
- The continuing development of the brain during adolescence and young adulthood means this population has less impulse control, ability to plan and make rational decisions, and greater intrinsic motivation for exploration and sensation seeking. This suggests diminished responsibility for young offenders

¹⁸³ Hirsch, A., 2001 *Proportionate Sentences for Juveniles How Different than for Adults?* [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1462474501003002002> [Accessed May 2018]

¹⁸⁴ Hirsch, A., 2001 *Proportionate Sentences for Juveniles How Different than for Adults?* [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1462474501003002002> [Accessed May 2018]

¹⁸⁵ Hirsch, A., 2001 *Proportionate Sentences for Juveniles How Different than for Adults?* [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1462474501003002002> [Accessed May 2018]

¹⁸⁶ Hirsch, A., 2001 *Proportionate Sentences for Juveniles How Different than for Adults?* [PDF] Available from: <http://journals.sagepub.com/doi/pdf/10.1177/1462474501003002002> [Accessed May 2018]

- Adolescence and young adulthood act as a sensitive period when people are more open to influence, both positive and negative. A strong network of prosocial peers and role-models make offending less likely, whereas interaction with others engaging in criminal activities increases the likelihood of offence
- Involvement in the criminal justice system can delay or interrupt the development of intellectual and emotional maturity, encouraging negative identity and habit formation
- People who persistently offend into adulthood are more likely to have atypical brain development and neuro-psychological deficits
- Trauma has been shown to delay brain development in adolescents and young adults, making individuals who have experienced trauma more prone to offending, and less likely to desist
- There is a normative argument for defining young offenders as separate from adults. In many modern societies adolescence and young adulthood is seen as the period in which individuals learn to become independent and to make their own decisions. This process increases the likelihood of offence, as making decisions for the first time often involves making mistakes.

4 What works in sentencing young offenders

4.1 Introduction

Gaining a full picture of ‘what works’ in sentencing young offenders requires a consideration of various **types** of young offenders in Scotland. An intervention can be deemed successful if it has the effect of reducing overall reoffending rates or encouraging desistance from crime. Ensuring a reduction in the occurrence of repeated offences can involve measures which support individual young people to make meaningful change in their lives. Young people involved in the criminal justice system who have ACEs, mental health issues or speech and language difficulties may require additional or alternative types of support. In addition, within groups of ‘young’ offenders, individuals from different age groups may require distinct interventions. Overall, what works should be understood in terms of how young people can be best supported to avoid prolonged engagement with the criminal justice system.

Despite a necessary focus on ensuring that those who are involved in the criminal justice system are supported to desist, Nugent and Barnes highlight the problem that focusing on desistance as the driver of policy can lead to “crises management” rather than prevention or early intervention¹⁸⁷. Therefore, sentencing should take place against a backdrop of measures which aim to prevent young people from initial involvement in crime.

4.2 Tailoring interventions, building relationships and prioritising therapeutic approaches

Sentencing practices can be understood as ‘working’ if reoffending rates fall as a consequence of their implementation. In this context, young people are understood to have been either sufficiently deterred from engaging in further crime or rehabilitated. The Ministry of Justice has identified that effective interventions in reducing youth reoffending consider an individual’s risk of reoffending, the needs of the individual, the individual’s ability to respond to an intervention and the “wider offending context”¹⁸⁸. Therapeutic programmes tend to be more successful in reducing reoffending than those

¹⁸⁷ Nugent, B. and Barnes, P., 2013. Desistance and Young People: Includem’s work with children and young people and the limitations of desistance theory. *Scottish Justice Matters*, 1(2), p.23

¹⁸⁸ Adler, J. R., Edwards, S. K., Scally, M., Gill, D., Puniskis, M. J., Gekowski, A. and Horvath, M. A. H., 2016. *What Works in Managing Young People who Offend? A Summary of the International Evidence*. Ministry of Justice. [PDF] Available from: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/498493/what-works-in-managing-young-people-who-offend.pdf> [Accessed on 04/05/2018] p.1-2

which are focused on “punitive and control approaches”¹⁸⁹. Skills building, counselling and mentoring are examples of therapeutic interventions¹⁹⁰.

Therapeutic environments and interventions have been shown internationally to reduce reoffending. A study of juvenile institutions in Norway, Finland, Sweden and Germany demonstrated the benefits of the institutions being set up as “social therapeutic communities” where young people were assessed by their needs above their potential risks¹⁹¹. In addition, the provision of specific forms of therapy such as speech and language therapy “significantly reduces the risk of reoffending”¹⁹². This is because the therapy increases verbal communication skills and enables young people to access a broader range of rehabilitation and treatment programmes¹⁹³. Furthermore, in an examination of intervention effectiveness, Cognitive Behavioural Therapy approaches have been shown to reduce reoffending and offer a “net positive return on investment”¹⁹⁴. Overall, broader therapeutic approaches and one-to-one therapies can be implemented across both custodial and non-custodial settings to tackle offending behaviour and enable positive change.

Building successful and supportive relationships with practitioners is particularly important for young people. It is the “relationship formed between the professional and young person” rather than the particular content an intervention that ensures progress in the prevention of future offending¹⁹⁵. Through the establishment of relationships with practitioners, the needs of a young person can be best identified and addressed¹⁹⁶.

The skills and attitudes of staff are significant in nurturing change in young people. Dowden and Andrews explored the importance of staff practice in delivering “effective correctional treatment” and argued that the “interpersonal influence exerted by the

¹⁸⁹ Adler, J. R., Edwards, S. K., Scally, M., Gill, D., Puniskis, M. J., Gekowski, A. and Horvath, M. A. H., 2016. *What Works in Managing Young People who Offend? A Summary of the International Evidence*. Ministry of Justice. [PDF] Available from: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/498493/what-works-in-managing-young-people-who-offend.pdf> [Accessed on 04/05/2018] p.2

¹⁹⁰ Adler, J. R., Edwards, S. K., Scally, M., Gill, D., Puniskis, M. J., Gekowski, A. and Horvath, M. A. H., 2016. *What Works in Managing Young People who Offend? A Summary of the International Evidence*. Ministry of Justice. [PDF] Available from: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/498493/what-works-in-managing-young-people-who-offend.pdf> [Accessed on 04/05/2018] p.2

¹⁹¹ Kidson, H., 2013. *Reducing Recidivism amongst Young People in Custody through Welfare Lead Rehabilitation*. Winston Churchill Memorial Trust [PDF] Available from: <https://www.wcmt.org.uk/sites/default/files/migrated-reports/1189_1.pdf> [Accessed on 10/05/2018] p.2

¹⁹² Royal College of Speech and Language Therapists, 2018. *Giving Voice: Working with Young Offenders*. [PDF] Available from: <https://www.rcslt.org/delete/giving_voice/giving_voice_a4_fact_sheet_young_offenders> [Accessed on 21/05/2018] p.1

¹⁹³ Royal College of Speech and Language Therapists, 2018. *Giving Voice: Working with Young Offenders*. [PDF] Available from: <https://www.rcslt.org/delete/giving_voice/giving_voice_a4_fact_sheet_young_offenders> [Accessed on 21/05/2018] p.2

¹⁹⁴ Adler, J. R., Edwards, S. K., Scally, M., Gill, D., Puniskis, M. J., Gekowski, A. and Horvath, M. A. H., 2016. *What Works in Managing Young People who Offend? A Summary of the International Evidence*. Ministry of Justice. [PDF] Available from: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/498493/what-works-in-managing-young-people-who-offend.pdf> [Accessed on 04/05/2018] p. 16

¹⁹⁵ McNeill, F., 2006. Community Supervision: Context and Relationships Matter in Goldson, B. and Munchie, J. (eds.) *Youth Crime and Justice*. London: Sage. Cited in Mason, P. and Prior, D., 2008. *Engaging Young People who Offend*. Youth Justice Board. [PDF] Available from: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/356204/Final_EYP_source.pdf> [Accessed on 10/05/2018] p.19

¹⁹⁶ Mason, P. and Prior, D., 2008. *Engaging Young People who Offend*. Youth Justice Board. [PDF] Available from: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/356204/Final_EYP_source.pdf> [Accessed on 10/05/2018] p.20

correctional staff member is maximised under conditions characterised by open, warm and enthusiastic communication”¹⁹⁷. A study of Bjørgvin Prison for young people in Norway concluded that staff training was “central” to effective rehabilitations, staff were extremely knowledgeable about children’s needs and rights and were “highly motivated” to help young people”¹⁹⁸. Within various sentencing options, involved practitioners should have the appropriate spaces and training to develop constructive relationships with young people.

4.3 Fostering identities away from offending and avoiding labels

Young people involved in offending are often vulnerable and can fall into a cycle of repeated contact with the criminal justice system. The Edinburgh Study of Youth Transitions and Crime (ESYTC) was a study of “pathways into and out of offending” among 4300 young people in the City of Edinburgh¹⁹⁹. It found that young people involved in serious and prolonged offending are amongst the “most vulnerable group of people in our society”²⁰⁰. The study showed that:

“Boys from single parent households and those living in the most deprived neighbourhoods of Edinburgh were more likely to be excluded from school or charged by the police than equally badly-behaved girls, and those living with two parents in more affluent areas.”

Professor Susan McVie, Edinburgh Law School²⁰¹

The Edinburgh Study showed that a group of “usual suspects” had been created and that those in this group become “sucked into a repeat cycle of contact with the system” with negative implications for desistance²⁰². Interventions which provide routes out of this cycle can prevent persistent offending. It is important that young people are supported to make positive changes in their lives through any involvement with the criminal justice system.

¹⁹⁷ Dowden, C. and Andrews, D. A., 2004. The Importance of Staff Practice in Delivering Effective Correctional Treatment: A Meta-Analytic Review of Core Correctional Practice. *International Journal of Offender Therapy and Comparative Criminology*. 48(2) p.205

¹⁹⁸ Kidson, H., 2013. *Reducing Recidivism amongst Young People in Custody through Welfare Lead Rehabilitation*. Winston Churchill Memorial Trust [PDF] Available from: <https://www.wcmt.org.uk/sites/default/files/migrated-reports/1189_1.pdf> [Accessed on 10/05/2018] p.9

¹⁹⁹ McAra, L. and McVie, S., 2013. Delivering Justice for Children and Young People: Key Messages from the Edinburgh Study of Youth Transitions and Crime in Dockley, A. (ed.) *Justice for Young People: Papers by Winners of the Research Medal 2013*. Howard League for Penal Reform. [PDF] Available from: <https://www.research.ed.ac.uk/portal/files/17725465/Justice_for_young_people_web.pdf> [Accessed on 21/05/2018] p.3

²⁰⁰ McAra, L. and McVie, S., 2013. Delivering Justice for Children and Young People: Key Messages from the Edinburgh Study of Youth Transitions and Crime in Dockley, A. (ed.) *Justice for Young People: Papers by Winners of the Research Medal 2013*. Howard League for Penal Reform. [PDF] Available from: <https://www.research.ed.ac.uk/portal/files/17725465/Justice_for_young_people_web.pdf> [Accessed on 21/05/2018] p.3

²⁰¹ McVie, S. 2018. *Research in a Nutshell: Youth Offending Study*. [Video] Available from: <http://www.law.ed.ac.uk/research/making_a_difference/research_in_a_nutshell_youth_offending_study> [Accessed on 21/05/2018]

²⁰² McAra, L. and McVie, S., 2013. Delivering Justice for Children and Young People: Key Messages from the Edinburgh Study of Youth Transitions and Crime in Dockley, A. (ed.) *Justice for Young People: Papers by Winners of the Research Medal 2013*. Howard League for Penal Reform. [PDF] Available from: <https://www.research.ed.ac.uk/portal/files/17725465/Justice_for_young_people_web.pdf> [Accessed on 21/05/2018] p.8

Desistance research has shown the labelling someone as an “offender” or “troublemaker” is harmful and can create problems for a young person in subsequently moving away from this identity²⁰³. Four “systems of shaming” of those involved in offending have been identified: the media, the criminal justice system, criminal justice institutions and communities²⁰⁴. Through the media, those involved in offending can be caricatured and the human circumstances behind offending can be ignored²⁰⁵. The criminal justice system can pursue harsh youth justice measures as a response to public demand for punitive approaches²⁰⁶. Criminal justice institutions such as prisons limit opportunities for rehabilitation because of a “pervading cultural attitude towards prisoners as failed citizens”²⁰⁷. In the community, those with a history of offending can be denied housing or employment and this marginalisation can lead them to develop an “oppositional stance to community” and engagement in further offending²⁰⁸. To address processes of shaming of those involved in offending, the Scottish Government has proposed that on release from prison, people should be referred to as a “person with convictions” or “person with an offending history” rather than “offender”²⁰⁹.

Helping young people to find something meaningful in their life is crucial in enabling desistance²¹⁰. Youth practitioners have described that when a young person finds something that motivates them, this can lead to everything else falling into place because they have the drive “to know where they want to go and who they want to be”²¹¹. Sentencing practices should prioritise interventions which facilitate a young person’s engagement with new activities that build self-confidence and allow for the forging of new identities away from offending.

While early prevention of engagement with the criminal justice system is often discussed as an ideal approach, there are several difficulties in successfully identifying “at-risk” children early on in their lives²¹². Poor criminal justice outcomes are associated with those who were identified by age five as “problem” children, indicating that their early

²⁰³ Nugent, B. and Barnes, P., 2013. Desistance and Young People: Includem’s work with children and young people and the limitations of desistance theory. *Scottish Justice Matters*, 1(2), p.22

²⁰⁴ ‘Paul’, 2017. *Shame, an effective tool for justice?* Centre for Youth & Criminal Justice, March 2017. [PDF] Available from: <<http://www.cycj.org.uk/wp-content/uploads/2017/03/Shame-an-effective-tool-for-justice.pdf>> [Accessed on 10/05/2018] p.5-10

²⁰⁵ ‘Paul’, 2017. *Shame, an effective tool for justice?* Centre for Youth & Criminal Justice, March 2017. [PDF] Available from: <<http://www.cycj.org.uk/wp-content/uploads/2017/03/Shame-an-effective-tool-for-justice.pdf>> [Accessed on 10/05/2018] p.6

²⁰⁶ ‘Paul’, 2017. *Shame, an effective tool for justice?* Centre for Youth & Criminal Justice, March 2017. [PDF] Available from: <<http://www.cycj.org.uk/wp-content/uploads/2017/03/Shame-an-effective-tool-for-justice.pdf>> [Accessed on 10/05/2018] p.7

²⁰⁷ ‘Paul’, 2017. *Shame, an effective tool for justice?* Centre for Youth & Criminal Justice, March 2017. [PDF] Available from: <<http://www.cycj.org.uk/wp-content/uploads/2017/03/Shame-an-effective-tool-for-justice.pdf>> [Accessed on 10/05/2018] p.9

²⁰⁸ Tangney, J. P., Stuewig, J., Mashek, D., & Hastings, M., 2011. Assessing Jail Inmates’ Proneness To Shame and Guilt: Feeling Bad About the Behaviour or the Self? *Criminal Justice and Behavior*, 38(7). Cited in ‘Paul’, 2017. *Shame, an effective tool for justice?* Centre for Youth & Criminal Justice, March 2017. [PDF] Available from: <<http://www.cycj.org.uk/wp-content/uploads/2017/03/Shame-an-effective-tool-for-justice.pdf>> [Accessed on 10/05/2018] p.11-12

²⁰⁹ ‘Paul’, 2017. *Shame, an effective tool for justice?* Centre for Youth & Criminal Justice, March 2017. [PDF] Available from: <<http://www.cycj.org.uk/wp-content/uploads/2017/03/Shame-an-effective-tool-for-justice.pdf>> [Accessed on 10/05/2018] p.7-8

²¹⁰ Nugent, B. and Barnes, P., 2013. Desistance and Young People: Includem’s work with children and young people and the limitations of desistance theory. *Scottish Justice Matters*, 1(2), p.23

²¹¹ Nugent, B. and Barnes, P., 2013. Desistance and Young People: Includem’s work with children and young people and the limitations of desistance theory. *Scottish Justice Matters*, 1(2), p.23

²¹² McAra, L. and McVie, S., 2013. Delivering Justice for Children and Young People: Key Messages from the Edinburgh Study of Youth Transitions and Crime in Dockley, A. (ed.) *Justice for Young People: Papers by Winners of the Research Medal 2013*. Howard League for Penal Reform. [PDF] Available from: <https://www.research.ed.ac.uk/portal/files/17725465/Justice_for_young_people_web.pdf> [Accessed on 21/05/2018] p.4

contact with services had done little to “stem” involvement in offending²¹³. This reinforces the case for avoiding interventions which can stigmatise young offenders.

4.4 Custodial sentences

The appropriateness and utility of custodial settings for both young people and offenders more broadly is continuously debated. Weaver and McNeill offer eight principles for supporting desistance including “use prisons sparingly”²¹⁴. They state that “imprisonment frustrates desistance” as:

“Stopping offending is much easier where people maintain strong and positive social ties, where they can see beyond their label as a prisoner or an ‘offender’ and where they can reduce or avoid contacts with other ‘offenders’, rather than being forced to live alongside them.”

Beth Weaver and Fergus McNeill, SCCCJ²¹⁵

In Scotland in 2015-16, 95 young people aged 16 and 17 were sentenced to custody, and the most frequent main crimes leading to this sentence were serious assault, common assault, common assault of an emergency worker and theft by housebreaking²¹⁶. Any time spent in custody disrupts a young person’s relationships, education, training or employment, financial stability, often accommodation status, and inclusion in mainstream society²¹⁷. Beyond disruption, risks of self-harm and assault exist for young people in custodial settings. Young people’s experience of custody can be “extremely frightening” and they can end up coping by using “violence, self-harm or indifference”²¹⁸. Statistics published for England and Wales show a rise in the use of restraint, number of assaults and levels of self-harm among young people in custody²¹⁹. Amongst the general prison population in Scotland, there were 506 incidents of self-harm in prisons in 2016 to 2017, compared to 282 incidents in 2013 to 2014²²⁰. Within custodial settings, measures must be taken to address mental health difficulties faced by young people to prevent

²¹³ McAra, L. and McVie, S., 2013. Delivering Justice for Children and Young People: Key Messages from the Edinburgh Study of Youth Transitions and Crime in Dockley, A. (ed.) *Justice for Young People: Papers by Winners of the Research Medal 2013*. Howard League for Penal Reform. [PDF] Available from: <https://www.research.ed.ac.uk/portal/files/17725465/Justice_for_young_people_web.pdf> [Accessed on 21/05/2018] p.5

²¹⁴ Weaver, B. and McNeill, F., 2008. *Giving Up Crime: Directions for Policy*. [PDF] Available from: <http://www.sccj.ac.uk/wp-content/uploads/2008/11/Giving_Up_Crime_tcm8-2569.pdf> [Accessed on: 04/05/2018] p.1

²¹⁵ Weaver, B. and McNeill, F., 2008. *Giving Up Crime: Directions for Policy*. [PDF] Available from: <http://www.sccj.ac.uk/wp-content/uploads/2008/11/Giving_Up_Crime_tcm8-2569.pdf> [Accessed on: 04/05/2018] p.1

²¹⁶ Youth Justice Improvement Board, 2017. *Children and Young People in Custody in Scotland: Looking Behind the Data*. October 2017. [PDF] Available from: <<http://www.cycj.org.uk/wp-content/uploads/2017/10/Young-People-in-Custody-October-2017.pdf>> [Accessed on 03/05/2018] p.12-13

²¹⁷ Youth Justice Improvement Board, 2017. *Children and Young People in Custody in Scotland: Looking Behind the Data*. October 2017. [PDF] Available from: <<http://www.cycj.org.uk/wp-content/uploads/2017/10/Young-People-in-Custody-October-2017.pdf>> [Accessed on 03/05/2018] p.17

²¹⁸ Kidson, H., 2013. *Reducing Recidivism amongst Young People in Custody through Welfare Lead Rehabilitation*. Winston Churchill Memorial Trust [PDF] Available from: <https://www.wcmt.org.uk/sites/default/files/migrated-reports/1189_1.pdf> [Accessed on 10/05/2018] p.18

²¹⁹ Puffett, N. and Lepper, J., 2018. *Violence and self-harm in youth custody rise to record high*. Children and Young People Now, 26 January 2018. [online] Available from: <<https://www.cypnow.co.uk/cyp/news/2004797/violence-and-self-harm-in-youth-custody-rise-to-record-high>> [Accessed on 11/05/2018]

²²⁰ Peterkin, T., 2018. *Concern grows over rise in self-harming by prisoners*. The Scotsman, 17 February 2018. [online] Available from: <<https://www.scotsman.com/news/politics/concern-grows-over-rise-in-self-harming-by-prisoners-1-4691011>> [Accessed on 11/05/2018]

incidents of self-harm. Custodial settings need to be safe environments which maximise chances of rehabilitation and positive change.

In addition, putting a child in custody does not have an impact on reducing reoffending. While “tough policies and harsh sentences” could theoretically have a “general deterrence effect by discouraging people from embarking on criminal activity”, incarceration can increase the likelihood of future offending²²¹. A comparison of reoffending rates amongst young people who were sent to more rehabilitative youth facilities versus tougher youth custody and detention centres showed that the experience of being held in “punitive incarceration facilities” can have negative long-term consequences on young offenders²²². Thus, if custodial sentences are deemed crucial, they must incorporate rehabilitative and supportive services for young people.

The Scottish Prison Service (SPS) published a “Vision for Young people in Custody” in 2014²²³. The strategy included an aim that young people would use time in custody to prepare for a “positive future”²²⁴. In an inspection of HMYOI Polmont in 2016, it was found that staff were committed to SPS’ vision, and investment had been made in the two activities areas in the institution, creating “bright, fit-for-purpose areas for learning and development”²²⁵. Despite this, engagement with the activities on offer was low with only a third of young people taking part in daily activities and a “sizeable proportion” of young men spending “extended periods of the day locked in their cells”²²⁶. There was a widespread view among staff throughout the institution that the young people could not be trusted to be responsible and high levels of control needed to be exerted over them²²⁷. It was argued that this focus on control was at the expense of opportunities to “socialise and demonstrate constructive behaviour” which could undermine preparation for a positive future²²⁸. There was evidence of “pockets” of positive work with young men in areas such as speech and language therapy and mental health, but there was not a “comprehensive and coherent framework” in the implementation of this work²²⁹.

Custody should only be used when the young person poses a significant threat to those around them and other sentencing options have been exhausted. Howard League

²²¹ Lotti, G., 2016. *Tough on young offenders: harmful or helpful?* Warwick Economics, Warwick Economics Research Papers, No: 1126, July 2016. [PDF] Available from: <https://warwick.ac.uk/fac/soc/economics/research/workingpapers/2016/twerp_1126_lotti.pdf> [Accessed on 11/05/2018] p.2

²²² Lotti, G., 2016. *Tough on young offenders: harmful or helpful?* Warwick Economics, Warwick Economics Research Papers, No: 1126, July 2016. [PDF] Available from: <https://warwick.ac.uk/fac/soc/economics/research/workingpapers/2016/twerp_1126_lotti.pdf> [Accessed on 11/05/2018] p.27

²²³ HM Inspectorate of Prisons for Scotland, 2016. *Longitudinal Inspection, HMYOI Polmont, 19-21 April 2016*. [PDF] Available from: <https://www.prisoninspectorscotland.gov.uk/sites/default/files/publication_files/j441138.pdf> [Accessed on 11/05/2018] p.2

²²⁴ HM Inspectorate of Prisons for Scotland, 2016. *Longitudinal Inspection, HMYOI Polmont, 19-21 April 2016*. [PDF] Available from: <https://www.prisoninspectorscotland.gov.uk/sites/default/files/publication_files/j441138.pdf> [Accessed on 11/05/2018] p.2

²²⁵ HM Inspectorate of Prisons for Scotland, 2016. *Longitudinal Inspection, HMYOI Polmont, 19-21 April 2016*. [PDF] Available from: <https://www.prisoninspectorscotland.gov.uk/sites/default/files/publication_files/j441138.pdf> [Accessed on 11/05/2018] p.8

²²⁶ HM Inspectorate of Prisons for Scotland, 2016. *Longitudinal Inspection, HMYOI Polmont, 19-21 April 2016*. [PDF] Available from: <https://www.prisoninspectorscotland.gov.uk/sites/default/files/publication_files/j441138.pdf> [Accessed on 11/05/2018] p.3

²²⁷ HM Inspectorate of Prisons for Scotland, 2016. *Longitudinal Inspection, HMYOI Polmont, 19-21 April 2016*. [PDF] Available from: <https://www.prisoninspectorscotland.gov.uk/sites/default/files/publication_files/j441138.pdf> [Accessed on 11/05/2018] p.3

²²⁸ HM Inspectorate of Prisons for Scotland, 2016. *Longitudinal Inspection, HMYOI Polmont, 19-21 April 2016*. [PDF] Available from: <https://www.prisoninspectorscotland.gov.uk/sites/default/files/publication_files/j441138.pdf> [Accessed on 11/05/2018] p.3

²²⁹ HM Inspectorate of Prisons for Scotland, 2016. *Longitudinal Inspection, HMYOI Polmont, 19-21 April 2016*. [PDF] Available from: <https://www.prisoninspectorscotland.gov.uk/sites/default/files/publication_files/j441138.pdf> [Accessed on 11/05/2018] p.8

Scotland believes that legislation should be created to stop sending young people under the age of 18 to prison except when “convicted of a serious, violent crime”²³⁰. In addition, they argue that the Children’s Hearing System should deal with 16 and 17 year olds, not the courts²³¹. In cases where it is deemed unavoidable that a young person must be given a custodial sentence, there are several features of custody which should be implemented to improve outcomes for young people:

- An emphasis on security and control should not outweigh the provision of care, support and learning opportunities²³²
- Staff working with young offenders should receive mandatory training in Motivational Interviewing (MI) which involves working with a young person to understand the reasons for their behaviour and motivations for change²³³
- Young people should be provided with good role models. In Sweden, Norway and Germany, staff in young offender institutions work with young people to develop necessary skills for looking after themselves and completing household tasks²³⁴
- Smooth resettlement processes for the period after release must be prioritised. Young people should undergo a “planned preparation for release that begins as early as possible during their custodial period” which helps them to find and use coping strategies for the significant change they will experience²³⁵. Preparing a young person for release can include encouraging regular contact with “as many friends and family as possible” and confirming resettlement arrangements early on²³⁶. Once released, young people should be met at the institution and provided with practical support to “minimise the trauma of transition”²³⁷.

4.5 Non-custodial or community-based sentences

Avoiding custodial sentences is widely recognised as appropriate for young people to prevent deeper and more prolonged engagement with the criminal justice system. For this reason, community-based sentences are regarded as suitable in instances where the

²³⁰ Howard League Scotland, 2018. *Young People who Offend*. [online] Available from: <<http://howardleague.scot/policy/young-people-who-offend-0>> [Accessed on 21/05/2018]

²³¹ Howard League Scotland, 2018. *Young People who Offend*. [online] Available from: <<http://howardleague.scot/policy/young-people-who-offend-0>> [Accessed on 21/05/2018]

²³² HM Inspectorate of Prisons for Scotland, 2016. *Longitudinal Inspection, HMYOI Polmont, 19-21 April 2016*. [PDF] Available from: <https://www.prisoninspectoratescotland.gov.uk/sites/default/files/publication_files/j441138.pdf> [Accessed on 11/05/2018] p.2

²³³ Kidson, H, 2013. *Reducing Recidivism amongst Young People in Custody through Welfare Lead Rehabilitation*. Winston Churchill Memorial Trust [PDF] Available from: <https://www.wcmt.org.uk/sites/default/files/migrated-reports/1189_1.pdf> [Accessed on 10/05/2018] p.18-19

²³⁴ Kidson, H, 2013. *Reducing Recidivism amongst Young People in Custody through Welfare Lead Rehabilitation*. Winston Churchill Memorial Trust [PDF] Available from: <https://www.wcmt.org.uk/sites/default/files/migrated-reports/1189_1.pdf> [Accessed on 10/05/2018] p.23-24

²³⁵ Bateman, T. and Hazel, N., 2015. *Custody to Community: How Young People Cope with Release*. Beyond Youth Custody. [PDF] Available from: <<http://www.beyondyouthcustody.net/wp-content/uploads/BYC-Custody-to-community-How-young-people-cope-with-release.pdf>> [Accessed on 11/05/2018] p.17

²³⁶ Bateman, T. and Hazel, N., 2015. *Custody to Community: How Young People Cope with Release*. Beyond Youth Custody. [PDF] Available from: <<http://www.beyondyouthcustody.net/wp-content/uploads/BYC-Custody-to-community-How-young-people-cope-with-release.pdf>> [Accessed on 11/05/2018] p.17-18

²³⁷ Bateman, T. and Hazel, N., 2015. *Custody to Community: How Young People Cope with Release*. Beyond Youth Custody. [PDF] Available from: <<http://www.beyondyouthcustody.net/wp-content/uploads/BYC-Custody-to-community-How-young-people-cope-with-release.pdf>> [Accessed on 11/05/2018] p.18

young person is perceived to not pose significant risk to themselves or others. There is “national and international evidence that community sentences are more effective at reducing re-offending than short-term prison sentences and provide better value for money”²³⁸. If a young person can engage with services and make meaningful changes to their habits or behaviours while remaining in the community, this is both generally more cost-effective and less disruptive to the life of the offender and those close to them, for example any dependants that they might have.

Community sentences have been broadly categorised into three groups: punishment sentences – usually involving unpaid work; treatment sentences – involving some form of rehabilitation; and surveillance sentences – for example using electronic monitoring²³⁹. An important benefit of community-based interventions is that they allow a young person to develop skills in the context that they will be used. Howells and Day show that the more opportunity there is for “practising skills and developing strategies in the context that they are likely to be employed, the greater the likelihood for success by community-based interventions”²⁴⁰. Preventing a young person from being excluded from the community avoids processes of readjustment that must follow on from a custodial sentence.

Non-custodial sentences must be realistic given the circumstances of the young person. Giving a person a community-based sentence is questionable in circumstances where it is deemed likely that they will not complete the obligations set out in their order, for example a set number of hours of unpaid work or engaging in detox for substance misuse. This consideration is relevant for young people as gathered data shows they are less likely to complete a sentenced Community Payback Order than older counterparts (see Chapter 2). For this reason, community-based sentences need to be adapted to ensure that they are appropriate for use with individual young people. This could involve determining which types of support or mentoring are necessary to assist a young person to successfully engage with a community-based sentence and avoid future offending.

Employing community-based sentences such as Drug Treatment and Testing Orders (DTTOs) might only be appropriate and ‘work’ for certain young people. When considering the likelihood that a DTTO will be effective, “age, maturity and motivation” are considered to be important factors, with older offenders being deemed more able to sustain the commitment required²⁴¹. For this reason, if a young person has prior

²³⁸ Bowen, P., 2017. *Community Sentences Across Borders*. Centre for Justice Innovation. [PDF] Available from: <http://justiceinnovation.org/wp-content/uploads/2017/11/CJI-COMMUNITY-SENTENCES-ACROSS_BORDERS.pdf> [Accessed on 04/05/2018] p.1

²³⁹ Department of Corrections, 2012. *Community sentence patterns in New Zealand: An international comparative analysis*. Wellington: Department of Corrections [PDF] Available from: <http://www.corrections.govt.nz/_data/assets/pdf_file/0009/672768/nz-community-sentence-patterns-april2012.pdf> [Accessed on 21/05/2018] p.6

²⁴⁰ Howells, K. and Day, A., 2003. Readiness for anger management: Clinical and theoretical issues. *Clinical Psychology Review*, 23. Cited in Moth, B. and Evans, N., 2016. *Youth offenders*. [PDF] Available from: <<http://www.hma.co.nz/wp-content/uploads/2016/01/Chapter-11-Youth-offenders.pdf>> [Accessed on 21/05/2018] p.240

²⁴¹ Scottish Government, 2011. *Drug Treatment and Testing Orders: Guidance for Schemes*. [PDF] Available from: <<http://www.gov.scot/resource/doc/353029/0118820.pdf>> [Accessed on 02/05/2018] p.30

experience of statutory supervision this may make them more suited to a rehabilitative order of this kind²⁴².

The use of Electronic Monitoring (EM) varies across jurisdictions and is seen as a way to potentially reduce imprisonment, monitor compliance and limit reoffending²⁴³. EM technology can be used as an element of several types of orders such as a Restriction of Liberty Order (RLO), or DTTO²⁴⁴. In Belgium and the Nordic countries, EM is used to execute prison sentences in the community²⁴⁵ and it has been found that while EM is experienced by offenders as “less severe” compared to imprisonment, liberty restrictions are still “painful”²⁴⁶. During 2017, 3% of RLOs were given to under 18s, 11% were given to 18 to 20 year olds and 17% were given to 21 to 25 year olds²⁴⁷. The use of EM can be stigmatising for young people²⁴⁸ so it should be employed an alternative to forms of custody rather than as an alternative to more rehabilitative interventions.

EM should be used alongside other types of support to maximise positive outcomes. In Scotland, completion rates of electronically monitored orders are “relatively high” at approximately 80%²⁴⁹. Despite this, evidence of order completion being linked with desistance from crime is mixed. A study by Renzema found that the usefulness of EM in reducing reoffending **after the end of an order** is “modest or minimal or, in some cases, non-existent or negative”²⁵⁰. Considering the experiences of young offenders who had been tagged, the reactions of offenders and their families was generally positive with most saying that “the main advantage was that it kept them out of prison”²⁵¹. As the potential harms of custodial sentences for young people are significant, EM can work as an alternative.

²⁴² Scottish Government, 2011. *Drug Treatment and Testing Orders: Guidance for Schemes*. [PDF] Available from: <<http://www.gov.scot/resource/doc/353029/0118820.pdf>> [Accessed on 02/05/2018] p.30

²⁴³ Graham, H. and McIvor, G., 2017. *Electronic Monitoring in the Criminal Justice System*. Iriss, Insight 40, 10 October 2017. [online] Available from: <<https://www.iriss.org.uk/resources/insights/electronic-monitoring-criminal-justice-system>> [Accessed on 11/05/2018]

²⁴⁴ Graham, H. and McIvor, G., 2017. *Electronic Monitoring in the Criminal Justice System*. Iriss, Insight 40, 10 October 2017. [online] Available from: <<https://www.iriss.org.uk/resources/insights/electronic-monitoring-criminal-justice-system>> [Accessed on 11/05/2018]

²⁴⁵ Graham, H. and McIvor, G., 2017. *Electronic Monitoring in the Criminal Justice System*. Iriss, Insight 40, 10 October 2017. [online] Available from: <<https://www.iriss.org.uk/resources/insights/electronic-monitoring-criminal-justice-system>> [Accessed on 11/05/2018]

²⁴⁶ De Vos, H. and Gilbert, E., 2017. Freedom, so close but yet so far: the impact of the ongoing confrontation with freedom on the perceived severity of punishment. *European Journal of Probation*. 9(2). Cited in Graham, H. and McIvor, G., 2017. *Electronic Monitoring in the Criminal Justice System*. Iriss, Insight 40, 10 October 2017. [online] Available from:

<<https://www.iriss.org.uk/resources/insights/electronic-monitoring-criminal-justice-system>> [Accessed on 11/05/2018]

²⁴⁷ Smith, A. and McNeice, V., 2018. *Statistical Bulletin, 1 January 2017-31 December 2017: Electronic Monitoring to the Criminal and Youth Justice Systems in Scotland*. G4S. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00530120.pdf>> [Accessed on 21/05/2018] p.4

²⁴⁸ Elliott, R., Airs, J., Easton, C. and Lewis, R., 2000. *Electronically monitored curfew for 10 to 15 year olds – report of the pilot*. Home Office Occasional Paper. [PDF] Available from: <<http://library.college.police.uk/docs/homisc/occ-tagging.pdf>> [Accessed on 14/05/2018] p.vii

²⁴⁹ G4S, 2017. *Electronic monitoring to the criminal and youth justice systems in Scotland: Statistical bulletin, 1 January 2016-31 December 2016*. Cited in Graham, H. and McIvor, G., 2017. *Electronic Monitoring in the Criminal Justice System*. Iriss, Insight 40, 10 October 2017. [online] Available from: <<https://www.iriss.org.uk/resources/insights/electronic-monitoring-criminal-justice-system>> [Accessed on 11/05/2018]

²⁵⁰ Renzema, M., 2013. Evaluative research on electronic monitoring. In Nellis, M., Beyens, K. and Kaminski, D. (eds.) *Electronically monitored punishment: international and critical perspectives*. London: Routledge. Cited in Graham, H. and McIvor, G., 2017. *Electronic Monitoring in the Criminal Justice System*. Iriss, Insight 40, 10 October 2017. [online] Available from: <<https://www.iriss.org.uk/resources/insights/electronic-monitoring-criminal-justice-system>> [Accessed on 11/05/2018]

²⁵¹ Elliott, R., Airs, J., Easton, C. and Lewis, R., 2000. *Electronically monitored curfew for 10 to 15 year olds – report of the pilot*. Home Office Occasional Paper. [PDF] Available from: <<http://library.college.police.uk/docs/homisc/occ-tagging.pdf>> [Accessed on 14/05/2018] p.vii

4.6 Adverse Childhood Experiences and Trauma

As previously outlined, therapeutic interventions such as counselling and mentoring have been shown to be more successful in reducing youth offending than those which are focused on punishment. This is particularly the case considering the mental health issues, Adverse Childhood Experiences (ACEs) and experiences of trauma which are prevalent amongst young people involved in the criminal justice system.

Experiencing adversity during childhood is associated with involvement in the criminal justice system. Research has shown that exposure to ACEs is associated with “an increased risk of violence, both as a victim and perpetrator”²⁵². In a study of 130 children in Scotland who were “perceived to be at risk of serious harm to other people (and to themselves) as a result of serious violent, sexual or extremist behaviours”, it was found that the levels of adversity were “very high”²⁵³. Amongst the general population, the proportion of people with four or more ACEs tends to be between 6% and 14%, however in the sample of 130 children, this figure was 59%²⁵⁴.

Specialist services for young people who present a serious risk of harm to others have been introduced through the Interventions for Vulnerable Youth (IVY) Project funded by the Scottish Government²⁵⁵. IVY is a “specialist psychological and social work service” for high risk young people aged 12 to 18, who present with “complex psychological needs and high-risk behaviour in terms of their violent conduct”²⁵⁶. IVY recognises that there are several risk factors which can increase the likelihood of youth violence such as having witnessed family violence, experience of maltreatment, parental criminality, poor housing and poverty, racial discrimination²⁵⁷. Recognition of the risk factors and adversity faced by a significant proportion of young people in the criminal justice system is essential for the provision of appropriate sentences. A sentencing decision which fails to incorporate a young person’s circumstances can frustrate desistance.

Young adults are the “most likely age group to desist and ‘grow out of crime’, and an inappropriate sentence at this time can slow desistance and therefore extend the period of time during which a young adult might commit crime.”

²⁵² Vaswani, N., 2018. *We need to talk about ACEs... But other things too*. No Knives, Better Lives, 12 February 2018. [online] Available from: <<http://noknivesbetterlives.com/practitioners/discussion/we-need-to-talk-about-acesbut-other-things-too>> [Accessed on 21/05/2018]

²⁵³ Vaswani, N., 2018. *We need to talk about ACEs... But other things too*. No Knives, Better Lives, 12 February 2018. [online] Available from: <<http://noknivesbetterlives.com/practitioners/discussion/we-need-to-talk-about-acesbut-other-things-too>> [Accessed on 21/05/2018]

²⁵⁴ Vaswani, N., 2018. *We need to talk about ACEs... But other things too*. No Knives, Better Lives, 12 February 2018. [online] Available from: <<http://noknivesbetterlives.com/practitioners/discussion/we-need-to-talk-about-acesbut-other-things-too>> [Accessed on 21/05/2018]

²⁵⁵ CYCJ, 2017. *Interventions for Vulnerable Youth (IVY Project)*. [online] Available from: <<http://www.cycj.org.uk/what-we-do/interventions-for-vulnerable-youth-ivy-project/>> [Accessed on 14/05/2018]

²⁵⁶ CYCJ, 2017. *Interventions for Vulnerable Youth (IVY Project)*. [online] Available from: <<http://www.cycj.org.uk/what-we-do/interventions-for-vulnerable-youth-ivy-project/>> [Accessed on 14/05/2018]

²⁵⁷ Johnstone, L., Dyer, F., Gregory, L., Allardyce, S. and Irving, H., 2014. *Interventions for Vulnerable Youth (IVY)*. [PPT] Available from: <<http://www.cycj.org.uk/wp-content/uploads/2014/06/Lorraine-Johnstone.pptx>> [Accessed 21/05/2018] Slide 4

Jon Collins and Gemma Lousley, Criminal Justice Alliance²⁵⁸

In the provision of advice for sentencing young adults, it has been recommended that decisions should take into account young adults' levels of "maturity", as well as the "economic, social and structural factors that specifically impact upon them"²⁵⁹. Services such as the IVY Project which can provide targeted interventions to address a young person's complex needs should be utilised in sentencing.

Seeing as most young people who commit serious crime have had "disturbing and traumatic experiences themselves", it has been recommended that those working with young offenders should implement trauma-informed practice²⁶⁰. Experience of childhood abuse or neglect is associated with, for example:

- Difficulties in tolerating and controlling negative emotions
- The development of maladaptive or self-endangering behaviour
- Compulsive sexual behaviour, binge eating, impulsive aggression, suicidality and self-mutilation²⁶¹

The implementation of trauma informed practice in a youth justice setting implies that practitioners should focus on the "underlying needs behind behaviours", they should receive training to understand "development and attachment issues from trauma" and be able to build trust with young people²⁶². Expanding trauma-related training amongst staff such as social workers, health staff and custodial staff, would improve outcomes for young people in the criminal justice system. Despite a need for trauma-informed services, this should not be a substitute for mental health services as some young people with experience of trauma will need specialist care²⁶³.

4.7 Summary

The above discussion of 'what works' and its implications for sentencing practices can be summarised as follows:

Tailoring interventions, building relationships and prioritising therapeutic approaches:

²⁵⁸ Criminal Justice Alliance, 2011. *Sentencing young adults: Getting it right*. July 2011. [PDF] Available from: <<https://www.barrowcadbury.org.uk/wp-content/uploads/2011/09/CJGettingitright1.pdf>> [Accessed on 14/05/2018] p.6

²⁵⁹ Criminal Justice Alliance, 2011. *Sentencing young adults: Getting it right*. July 2011. [PDF] Available from: <<https://www.barrowcadbury.org.uk/wp-content/uploads/2011/09/CJGettingitright1.pdf>> [Accessed on 14/05/2018] p.7

²⁶⁰ HM Inspectorate of Probation, 2017. *The Work of Youth Offending Teams to Protect the Public*. October 2017. [PDF] Available from: <https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2017/10/The-Work-of-Youth-Offending-Teams-to-Protect-the-Public_reportfinal.pdf> [Accessed on 22/05/2018]

²⁶¹ All examples taken from Wright, S. and Liddle, M., 2014. *Youth Offenders and Trauma: Experience and Impact: A Practitioner's Guide*. Beyond Youth Custody. [PDF] Available from: <www.beyondyouthcustody.net/wp-content/uploads/BYC-Trauma-experience-and-impact-practitioners-guide.pdf> [Accessed on 22/05/2018] p.4

²⁶² Youth Justice Board, 2017. *In-brief: trauma-informed youth justice*. September 2017. [PDF] Available from: <https://yjresourcehub.uk/our-community/resources-for-sharing/item/download/588_5e9a4cdcfa738eb6db35fbaaac85d872.html> [Accessed on 22/05/2018] p.1

²⁶³ Youth Justice Board, 2017. *In-brief: trauma-informed youth justice*. September 2017. [PDF] Available from: <https://yjresourcehub.uk/our-community/resources-for-sharing/item/download/588_5e9a4cdcfa738eb6db35fbaaac85d872.html> [Accessed on 22/05/2018] p.1

- Sentencing processes should consider the **individual** circumstances of the young person including their needs, and interventions should be **tailored** accordingly
- Opportunities for fostering supportive **relationships** with practitioners should be offered as these relationships can enable a young person to make positive change. Staff should be appropriately trained to ensure that they are knowledgeable and motivated when working with young people
- **Therapeutic approaches** should be prioritised including counselling, mentoring, speech and language therapy and CBT.

Fostering identities away from offending and avoiding labels

- Through participation in positive activities, young people should be provided with opportunities to create **identities** away from offending
- Efforts should be made to prevent initial involvement in offending, but this should not entail **labelling** people at a young age.

Custodial sentences

- Custody wherever possible should be avoided to prevent **disruption** and avoid **risks** of self-harm or assault for young people
- If custody is deemed necessary a series of measures should be put in place to ensure rehabilitation, learning, support and a less traumatic release.

Non-custodial or community-based sentences

- Community sentences can be suitable as they are often better **value for money** than custodial sentences and enable a young person to develop **skills** and **strategies** in the context that they will be used
- Non-custodial sentences should be **realistic** and involve the provision of extra support for young people where necessary to help them fulfil the terms of the order
- Electronic Monitoring is a useful alternative to prison; however, it can be stigmatising for young people. It should be used alongside other types of support to maximise **long-term desistance**.

ACEs and trauma

- **Adverse Childhood Experiences** and **trauma** are prevalent amongst young offenders and sentencing decisions should take this into account. **Specialist services** should support sentenced young people while addressing their often complex needs. **Trauma-informed practice** should be implemented across youth justice settings to maximise positive outcomes for young people.

5 Public perceptions of young offenders

5.1 Introduction

Public perceptions of young offenders can both directly and indirectly influence sentencing practices. In this sense, “public perceptions matter – especially as government agendas and policies are inevitably shaped by the concerns and attitudes of society”²⁶⁴. While an examination of what works in youth justice is essential, policy-makers often must also take into account the views of the public on the level of youth crime, the causes of youth crime, and which sentencing routes are appropriate and effective for young people.

5.2 Public perceptions of criminal justice and sentencing in Scotland

While most adults in Scotland feel that they know little about the criminal justice system, there is a generally high level of confidence in its operation²⁶⁵. When asked to rate their level of confidence in a range of aspects of the criminal justice system, 78% of adults felt that the system “allows all those accused of crimes to get a fair trial regardless of who they are” and 73% felt that it “makes fair, impartial decisions based on the evidence available”²⁶⁶. Considering whether the system “adequately takes into account the circumstances surrounding a crime when it hands out sentences”, 60% felt confident and 30% were not confident²⁶⁷. On the other hand, 39% felt that the criminal justice system gives punishments which “fit the crime”²⁶⁸.

While prison was seen to be useful for achieving certain aims, the public were critical of custodial sentences in some circumstances. Around three-quarters of adults in Scotland were very or fairly confident that prisons played an important role in protecting the public from crime, but over half were not confident that prison effectively deterred people from offending²⁶⁹.

Awareness about the use of Community Payback Orders was “relatively low”²⁷⁰. Two-fifths of the population were aware of CPOs and 17% were aware of them being carried

²⁶⁴ Halsey, K. and White, R., 2008. *Young people, crime and public perceptions: A review of the literature*. Local Government Association. [PDF] Available from: <<https://www.local.gov.uk/sites/default/files/documents/young-people-crime-and-pu-c9b.pdf>> [Accessed on 15/05/2018] p.1

²⁶⁵ Scottish Government, 2018a. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00533870.pdf>> [Accessed on 22/05/2018] p.74

²⁶⁶ Scottish Government, 2018a. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00533870.pdf>> [Accessed on 22/05/2018] p.75

²⁶⁷ Scottish Government, 2018a. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00533870.pdf>> [Accessed on 22/05/2018] p.75

²⁶⁸ Scottish Government, 2018a. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00533870.pdf>> [Accessed on 22/05/2018] p.75

²⁶⁹ Scottish Government, 2018a. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00533870.pdf>> [Accessed on 22/05/2018] p.76

²⁷⁰ Scottish Government, 2018a. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00533870.pdf>> [Accessed on 22/05/2018] p.76

out in their area²⁷¹. Considering community sentences more broadly, 77% believed that community sentencing was an “effective way of dealing with certain crimes”²⁷². Despite this, less than half felt that the skills learnt during community sentences stop reoffending²⁷³. Another study which used workshops to explore public opinion on criminal justice in Scotland, found that “almost all groups” expressed that there was potential value in requiring offenders to return to the scenes of their crimes to repair criminal damage in order to “provide direct compensation to the individuals and communities who had been affected by them”²⁷⁴. Participants felt that if community service was more visible, this could give it greater “credibility” as a punishment²⁷⁵.

Overall, the public have mixed views on custodial and community sentences, suggesting a preferred level of flexibility when sentencing. In addition, while it is useful to address broad public opinion on the criminal justice system and types of sentences, these findings would potentially differ if the public were asked specifically about young offenders (see Section 5.6).

5.3 The influence of news reporting and television on perceptions of crime

A large proportion of the population do not regularly have direct contact with the criminal justice system. Much of their information is provided through newspapers, television and radio news, and fictional television. In a study of perceptions of the criminal justice system in Scotland, it was found that people’s main direct contact with the justice system had been through fulfilling jury service or as a witness (often avoiding any appearance in court)²⁷⁶. In light of this, TV programmes and newspapers were cited as “main sources of knowledge”, however participants also emphasised that they were unsure about the “factual accuracy” of the content that they viewed²⁷⁷.

Evidence suggests that the information the public get from news reporting and television can lead to a misunderstanding of elements of the justice system. For example, it has

²⁷¹ Scottish Government, 2018a. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00533870.pdf>> [Accessed on 22/05/2018] p.77

²⁷² Scottish Government, 2018a. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00533870.pdf>> [Accessed on 22/05/2018] p.77

²⁷³ Scottish Government, 2018a. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [PDF] Available from: <<http://www.gov.scot/Resource/0053/00533870.pdf>> [Accessed on 22/05/2018] p.77

²⁷⁴ Skellington Orr, K., Le Masurier, P., McCoard, S. and Wilson Smith, E., 2012. *Perceptions of Summary Criminal Justice in Scotland*. Scottish Government Social Research. Available from: <<http://www.gov.scot/Resource/0040/00405883.pdf>> [Accessed on 15/05/2018] p.7

²⁷⁵ Skellington Orr, K., Le Masurier, P., McCoard, S. and Wilson Smith, E., 2012. *Perceptions of Summary Criminal Justice in Scotland*. Scottish Government Social Research. Available from: <<http://www.gov.scot/Resource/0040/00405883.pdf>> [Accessed on 15/05/2018] p.7

²⁷⁶ Skellington Orr, K., Le Masurier, P., McCoard, S. and Wilson Smith, E., 2012. *Perceptions of Summary Criminal Justice in Scotland*. Scottish Government Social Research. Available from: <<http://www.gov.scot/Resource/0040/00405883.pdf>> [Accessed on 15/05/2018] p.6

²⁷⁷ Skellington Orr, K., Le Masurier, P., McCoard, S. and Wilson Smith, E., 2012. *Perceptions of Summary Criminal Justice in Scotland*. Scottish Government Social Research. Available from: <<http://www.gov.scot/Resource/0040/00405883.pdf>> [Accessed on 15/05/2018] p.6

been demonstrated that understanding about the word ‘bail’ amongst the public is often based on its use in American films or dramas²⁷⁸.

Though it is undoubtable that the media and TV have an impact on public views, a proportion of society is cautious about the reliability of the information and messages provided and see the media as responsible for “wrongly presenting the justice system and presenting a negatively biased view of the justice process and outcomes”, crucially including the presentation of “all young people as deviant”²⁷⁹..

While crime rates across the UK are falling, this trend is “at odds” with public perceptions of crime rates and discussion of crime in the media²⁸⁰. There is a “widespread view” that the amount of crime committed by young people in Scotland has increased²⁸¹. This mismatch appears to exist in other jurisdictions as well. For example, an Australian study showed that people feel that the number of young offenders is increasing, that they are getting younger, and that they are committing more serious crimes than previously.²⁸².

According to a 2015 study, high profile and well-publicised cases such as the murder of James Bulger have increased the public’s “moral panic” and raised concern around the “moral delinquency of children and youth in general”²⁸³. This case demonstrates the potential impact of the media on sentencing practices as successive extensions to the custodial sentences of the two convicted perpetrators were inspired by the Sun newspaper “urging its readers to plead with the Home Secretary that the boys should be locked up for life”²⁸⁴. While significant, the James Bulger case is one in a sequence of panics about “depraved youth”²⁸⁵. In such media attention, young people are often portrayed as deprived of “moral standards, proper guidance, training and self-responsibility”, and are seen to be vulnerable to being corrupted unless their behaviour is controlled²⁸⁶.

5.4 Views of youth justice in other jurisdictions

Views about youth crime can impact on sentencing practices across jurisdictions. For example, in Italy judges have a “wide discretion to pardon children, deem the offence to

²⁷⁸ Skellington Orr, K., Le Masurier, P., McCoard, S. and Wilson Smith, E., 2012. *Perceptions of Summary Criminal Justice in Scotland*. Scottish Government Social Research. Available from: <<http://www.gov.scot/Resource/0040/00405883.pdf>> [Accessed on 15/05/2018] p.10

²⁷⁹ Skellington Orr, K., Le Masurier, P., McCoard, S. and Wilson Smith, E., 2012. *Perceptions of Summary Criminal Justice in Scotland*. Scottish Government Social Research. Available from: <<http://www.gov.scot/Resource/0040/00405883.pdf>> [Accessed on 15/05/2018] p.10-11

²⁸⁰ Draca, M., 2013. *Crime rates in the UK have been falling, but the reversal of policies that contributed to this trend means that ‘something will give’*. LSE British Politics and Policy. [online] Available from: <<http://blogs.lse.ac.uk/politicsandpolicy/the-riddle-of-peacefulness-what-explains-falling-crime-in-the-uk/>> [Accessed on 15/05/2018]

²⁸¹ Anderson, S., Bromley, C. and Given, L., 2005. *Public attitudes towards young people and youth crime in Scotland*. Scottish Executive, Research Findings No.7/July 2005. [PDF] Available from: <<http://www.gov.scot/Resource/Doc/55971/0015629.pdf>> [Accessed on 15/05/2018] p.1

²⁸² Australian Government, 2017. *Bail and remand for young people in Australia: A national research project*. Australian Institute of Criminology. [online] Available from: <<https://aic.gov.au/publications/rpp/rpp125/drivers-custodial-remand-young-people>> [Accessed on 15/05/2018]

²⁸³ Muncie, J., 2015. *Youth and Crime*. London: SAGE. p.3

²⁸⁴ Muncie, J., 2015. *Youth and Crime*. London: SAGE. p.6

²⁸⁵ Muncie, J., 2015. *Youth and Crime*. London: SAGE. p.8

²⁸⁶ Muncie, J., 2015. *Youth and Crime*. London: SAGE. p.9

be irrelevant on the basis that it is trivial or provide them with alternative options to custody”²⁸⁷. Levels of youth imprisonment have remained low in Italy despite public concerns about rising youth crime²⁸⁸. To explain low imprisonment, Nelken views the lack of “media hype or obsession with youth justice issues” as significant, where Italy is seen to have largely avoided the “moral panic” which has led to tougher youth justice policies across Europe²⁸⁹.

Public concern about youth crime has fuelled more punitive approaches across Europe. In a comparative study of European jurisdictions, it has been argued that while most research suggests that rates of youth crime are stable or have decreased, high profile cases can act as “triggers” to increase the severity of sentencing²⁹⁰. Thus, the principles underpinning youth justice and the practice of sentencing can be incongruous: despite many youth justice systems being “rooted in a preventative and rehabilitative ethos”, they at the same time attempt to satisfy “perceived public anxieties” with harsher sentences²⁹¹.

While violent or unusual cases can trigger punitive approaches to youth justice, the tone of public attitudes and news reporting does vary. The case of James Bulger can be contrasted with a similar murder case in Norway, where the language used by the Norwegian press and judiciary was more “conciliatory”²⁹². In Norway, the murder of a child, Silje Redergård, by other children was understood to be a “tragic and aberrant event” which has been allowed to “pass from collective memory, in part because it was never invoked to participate in any broader crisis narrative”²⁹³. To understand differences in media reporting on the two cases in England and Norway, Green has identified four explanations²⁹⁴:

1. “Cultural constructions of childhood” – While the age of criminal responsibility in Scotland is eight and in England and Wales is ten, in Norway it is 15 years old. Norwegians seem “culturally incapable of accepting that

²⁸⁷ The Howard League for Penal Reform, 2016. *Punishing children: A survey of criminal responsibility and approaches across Europe*. [PDF] Available from: <<https://howardleague.org/wp-content/uploads/2016/05/HL-Punishing-Children-Report-Print1.pdf>> [Accessed on 16/05/2018] p.10

²⁸⁸ The Howard League for Penal Reform, 2016. *Punishing children: A survey of criminal responsibility and approaches across Europe*. [PDF] Available from: <<https://howardleague.org/wp-content/uploads/2016/05/HL-Punishing-Children-Report-Print1.pdf>> [Accessed on 16/05/2018] p.10

²⁸⁹ Nelken, D. 2006. Italian Juvenile Justice: Tolerance, Leniency or Indulgence? *Youth Justice*. 6(2). Cited in The Howard League for Penal Reform, 2016. *Punishing children: A survey of criminal responsibility and approaches across Europe*. [PDF] Available from:

<<https://howardleague.org/wp-content/uploads/2016/05/HL-Punishing-Children-Report-Print1.pdf>> [Accessed on 16/05/2018] p.13

²⁹⁰ The Howard League for Penal Reform, 2016. *Punishing children: A survey of criminal responsibility and approaches across Europe*. [PDF] Available from: <<https://howardleague.org/wp-content/uploads/2016/05/HL-Punishing-Children-Report-Print1.pdf>> [Accessed on 16/05/2018] p.13

²⁹¹ The Howard League for Penal Reform, 2016. *Punishing children: A survey of criminal responsibility and approaches across Europe*. [PDF] Available from: <<https://howardleague.org/wp-content/uploads/2016/05/HL-Punishing-Children-Report-Print1.pdf>> [Accessed on 16/05/2018] p.13

²⁹² Muncie, J., 2015. *Youth and Crime*. London: SAGE. p.7

²⁹³ Green, D. A., 2008. Suitable vehicles: Framing blame and justice when children kill a child. *Crime, Media, Culture: An International Journal*. 4(2) p.199

²⁹⁴ Green, D. A., 2008. Suitable vehicles: Framing blame and justice when children kill a child. *Crime, Media, Culture: An International Journal*. 4(2) p.209-214

children under 15 should be prosecuted as adults or that any child should be in prison”

2. “The importance of legitimate claims makers” – Newspapers present the views of various groups of commentators such as experts, public, police and victims. An examination of coverage of the Bulger and Redergård cases in two British and two Norwegian newspapers showed that while British newspapers widely featured the views of the public, this was absent in Norwegian papers where views of experts were more prominent
3. “Legitimacy and trust in expertise in late modernity” – At the time of the two cases, there was a low level of general confidence in society or “pessimism about Britishness”. As the English newspaper market is more competitive than in Norway, and papers are sold at newsstands rather than by subscription, sensationalist headlines are necessary for sales
4. “Political culture and incentives to penal populism” – There are incentives in the British political system for opposition politicians to encourage perceptions of criminal justice crises to win votes. In contrast, the Norwegian system is a multi-party system where coalitions are more common and therefore “there is less to gain by using crime as a political issue”.

These four explanations have wide-reaching applicability for understanding why varying jurisdictions see issues of youth justice framed differently in the media. These variations help to explain public perceptions of young offenders and crime more broadly.

5.5 Views of young offenders and crime amongst different societal groups or ages

There are important differences in how various societal groups view young people in general and young offenders specifically. In Scotland, it has been demonstrated that individuals who know “most or all of the young people in their area are much more likely than those who know none to have positive views of young people”²⁹⁵. Adult views about young people are often contradictory with almost half feeling that young people have “no respect for older people”, and at the same time 57% seeing most young people as responsible and well-behaved²⁹⁶. Level of contact with young people is evidenced to

²⁹⁵ Anderson, S., Bromley, C. and Given, L., 2005. *Public attitudes towards young people and youth crime in Scotland*. Scottish Executive, Research Findings No.7/July 2005. [PDF] Available from: <<http://www.gov.scot/Resource/Doc/55971/0015629.pdf>> [Accessed on 15/05/2018] p.1

²⁹⁶ Anderson, S., Bromley, C. and Given, L., 2005. *Public attitudes towards young people and youth crime in Scotland*. Scottish Executive, Research Findings No.7/July 2005. [PDF] Available from: <<http://www.gov.scot/Resource/Doc/55971/0015629.pdf>> [Accessed on 15/05/2018] p.1

be a “powerful predictor” of attitudes towards young people and youth crime and for this reason intergenerational links should be nurtured²⁹⁷.

Certain groups in society have been shown to have a higher level of fear about being a victim of crime and this could have implications for their views on youth justice. If a person views the risk of victimisation to be significant, they might favour more urgent or extensive criminal justice intervention. Amongst surveyed female adults, 67% felt very or fairly safe walking alone after dark, whereas this figure was 89% for male adults²⁹⁸. A higher proportion of those aged over 60 did not feel safe compared with all other age groups²⁹⁹. Those who lived in the most deprived areas in Scotland were significantly less likely to feel safe than those living in the rest of Scotland³⁰⁰. Amongst those who had previously been a victim of crime, levels of fear when walking after dark were greater than for those who had not been a victim of crime³⁰¹. Those living in “deprived, urban areas” are most likely to have negative views about young people³⁰².

When confronted with “case scenarios” a person’s gender, socioeconomic class, education and newspaper readership all influenced their views on sentencing³⁰³. Specifically, gender: men were more punitive; socioeconomic class: non-professionals were more punitive; education: those without degrees were more punitive; and newspaper readership: broadsheet readers were less punitive³⁰⁴.

5.6 Appropriate sentences for young people

When asked directly about various youth sentencing practices, members of the public show an openness to reform. For example, a study of 2,089 individuals in England and Wales showed that almost two thirds did not support the minimum age of imprisonment (at age 10) and felt it should be increased to at least 12 years old. A similar proportion felt that for non-violent crime the minimum age should be increased to at least 14³⁰⁵. In addition, a range of measures was identified as more suitable than prison sentences for

²⁹⁷ Anderson, S., Bromley, C. and Given, L., 2005. *Public attitudes towards young people and youth crime in Scotland*. Scottish Executive, Research Findings No.7/July 2005. [PDF] Available from: <<http://www.gov.scot/Resource/Doc/55971/0015629.pdf>> [Accessed on 15/05/2018] p.3

²⁹⁸ Scottish Government, 2018b. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [online] Available from: <<https://beta.gov.scot/publications/scottish-crime-justice-survey-2016-17-main-findings/pages/10/>> [Accessed on 22/05/2018]

²⁹⁹ Scottish Government, 2018b. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [online] Available from: <<https://beta.gov.scot/publications/scottish-crime-justice-survey-2016-17-main-findings/pages/10/>> [Accessed on 22/05/2018]

³⁰⁰ Scottish Government, 2018b. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [online] Available from: <<https://beta.gov.scot/publications/scottish-crime-justice-survey-2016-17-main-findings/pages/10/>> [Accessed on 22/05/2018]

³⁰¹ Scottish Government, 2018b. *Scottish Crime and Justice Survey 2016/17: Main Findings*. [online] Available from: <<https://beta.gov.scot/publications/scottish-crime-justice-survey-2016-17-main-findings/pages/10/>> [Accessed on 22/05/2018]

³⁰² Anderson, S., Bromley, C. and Given, L., 2005. *Public attitudes towards young people and youth crime in Scotland*. Scottish Executive, Research Findings No.7/July 2005. [PDF] Available from: <<http://www.gov.scot/Resource/Doc/55971/0015629.pdf>> [Accessed on 15/05/2018] p.3

³⁰³ Hough, M., Bradford, B., Jackson, J. and Roberts, J. V., 2013. *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales*. Ministry of Justice. [PDF] Available from: <<http://eprints.bbk.ac.uk/5195/1/5195.pdf>> [Accessed on 16/05/2018] p.3

³⁰⁴ Hough, M., Bradford, B., Jackson, J. and Roberts, J. V., 2013. *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales*. Ministry of Justice. [PDF] Available from: <<http://eprints.bbk.ac.uk/5195/1/5195.pdf>> [Accessed on 16/05/2018] p.3

³⁰⁵ Jacobson, J., Bhardwa, B., Gyateng, T., Hunter, G. and Hough, M., 2010. *Punishing Disadvantage: A profile of children in custody – A summary*. Prison Reform Trust. [PDF] Available from: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Punishing_Disadvantage_Summary.pdf> [Accessed on 16/05/2018] p.2

reducing reoffending, such as better supervision by parents, treatment to tackle binge drinking and better mental health care³⁰⁶.

The public are likely to perceive different sentencing practices for young people as appropriate depending on their own experiences. In New Zealand, a comparison between the views of those who had personal experience of victimisation by youth offenders and those who did not, revealed that victims were more inclined to support crime prevention, whereas non-victims were more likely to support punitive measures³⁰⁷. An examination of public views on sentencing across “a range of studies, jurisdictions, countries and over several decades” concluded that while it is generally perceived that sentences are too lenient, the public support non-custodial sanctions when provided with information about these options³⁰⁸. In addition, public sentiment favours rehabilitation over punishment as the “primary aim of sentencing”, particularly for young offenders³⁰⁹.

5.7 Summary

- The public have mixed views of custodial and community sentences seeing them as appropriate for the achievement of some aims but not others. This suggests that a level of flexibility when sentencing is desired
- Most people do not have regular personal contact with the criminal justice system and therefore rely on television and newspapers as sources of information. While these outputs shape public opinion, a level suspicion about the accuracy or representativeness of their content is evident
- High profile cases can trigger punitive youth justice measures, however the level of media attention paid to young offenders varies across jurisdictions. This variation can be explained by the ways in which childhood is understood in a particular culture, the weight given to different stakeholders in the media, the general level of trust or optimism in society, and the extent to which the political system is competitive
- Over 65 year-olds are not necessarily the least sympathetic to young people. Instead, those living in deprived, urban areas are most likely to have negative views about young people. Fostering intergenerational links can help to create more favourable attitudes towards young people
- While perceptions of crime have an impact on public punitiveness, other factors such as gender, socioeconomic class, education and newspaper readership also have an influence

³⁰⁶ Jacobson, J., Bhardwa, B., Gyang, T., Hunter, G. and Hough, M., 2010. *Punishing Disadvantage: A profile of children in custody – A summary*. Prison Reform Trust. [PDF] Available from:

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Punishing_Disadvantage_Summary.pdf> [Accessed on 16/05/2018] p.2

³⁰⁷ Barretto, C., Miers, S. and Lambie, I., 2016. The Views of the Public on Youth Offenders and the New Zealand Criminal Justice System. *International Journal of Offender Therapy and Comparative Criminology*. 62(1) p. 129-149.

³⁰⁸ Velazquez, M. and Lincoln, R., 2009. What the public thinks about sentencing. *The National Legal Eagle*. 15(1) Autumn 2009, Article 3. p.9

³⁰⁹ Velazquez, M. and Lincoln, R., 2009. What the public thinks about sentencing. *The National Legal Eagle*. 15(1) Autumn 2009, Article 3. p.9

- When asked directly about aspects of youth sentencing, the public recognise the benefits of avoiding custodial sentences where possible and support raising the minimum age of imprisonment
- Despite viewing sentencing practices as too lenient, the public support rehabilitation over punishment, particularly when considering young offenders.

6 The impact of sentencing guidelines on the sentencing of young offenders

6.1 Sentencing guidelines for children and young adults

In England and Wales, published sentencing guidelines for children and young people detail that “for a child or young person, the sentence should focus on rehabilitation wherever possible”³¹⁰. These guidelines detail that courts must consider the following when sentencing young people:

- The principal aim of the youth justice system (to prevent re-offending by children and young people)
- The welfare of the child or young person
- The age of the child or young person (chronological, developmental and emotional)
- The seriousness of the offence
- The likelihood of further offences being committed
- The extent of harm likely to result from those further offences³¹¹.

In Canada, while there is no “formal system of sentencing guidelines”, the introduction of the Youth Criminal Justice Act (2002) was a move towards introducing sentencing guidelines into law³¹². This legislation set out that the purpose of youth sentences is to “hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public”³¹³. The legislation provides guidelines regarding the definition of illegal acts, legal procedures to be observed in “dealing with the youthful offender”, and available dispositions for the youth convicted of a crime³¹⁴.

³¹⁰ Sentencing Council, 2017. *Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery*. [PDF] Available from: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf> [Accessed on 23/05/2018] p.4

³¹¹ All taken from Sentencing Council, 2017. *Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery*. [PDF] Available from: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf> [Accessed on 23/05/2018] p.14

³¹² Machin, D., 2005. *Sentencing Guidelines Around the World*. Paper commissioned by the Sentencing Commission for Scotland. Cited in O’Connell, F., 2011. *Comparative Research into Sentencing Guidelines Mechanisms*. Northern Ireland Assembly, Research and Information Service Research Paper. [PDF] Available from:

<<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2011/justice/6611.pdf>> [Accessed on 23/05/2018] p.37

³¹³ Section 38(1) of the Youth Criminal Justice Act 2002, (S.C 2002, ch1), available from: <<http://lawslois.justice.gc.ca/eng/acts/Y-1.5/page-22.html#h-27>>. Cited in O’Connell, F., 2011. *Comparative Research into Sentencing Guidelines Mechanisms*. Northern Ireland Assembly, Research and Information Service Research Paper. [PDF] Available from:

<<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2011/justice/6611.pdf>> [Accessed on 23/05/2018] p.37-38

³¹⁴ Hoge, R. D., 2009. *Introduction to the Canadian Juvenile Justice System*. UNAFEI for the Prevention of Crime and the Treatment of Offenders, Resource Material Series, No. 78. [PDF] Available from:

<http://www.unafei.or.jp/english/pdf/RS_No78/No78_11VE_Hoge3.pdf> [Accessed on 23/05/2018] p.59

Thus, when sentencing children and young people across these jurisdictions, there is a shared focus on rehabilitation, as well as protecting the public through assessing the risk of future offending and the level of potential harm associated with this.

6.2 Existence of sentencing guidelines across jurisdictions

Recognising the limited evidence and examples available of youth specific sentencing guidelines, this section considers sentencing guidelines across jurisdictions more generally. Across jurisdictions with sentencing guidelines, there exists variation in the retained level of discretion that courts have when sentencing. On one end of the spectrum, there are “highly prescriptive systems” where those sentencing have “very little discretion”, on the other end there are systems which impose “very few constraints” on decision-makers³¹⁵:

England and Wales

In England, debate on sentencing disparities goes back to the 19th century. However, it was not until the 1990s that bodies were established to “develop and disseminate guidelines”³¹⁶. Support for guidelines arose from concern that sentencing was not consistent. Offenders convicted of similar offences might have found themselves sent to prison by a court in one part of the country and receiving a fine in another³¹⁷. However, guidelines in England and Wales sought to allow judges to retain a significant level of discretion when sentencing compared with “much stricter guidelines in some American states”³¹⁸.

The Sentencing Council in England and Wales has a statutory duty to conduct research and analysis to “monitor the impact” of its guidelines, for example the implications of sentencing in terms of resources, and the impact of guidelines on the prison population³¹⁹. Judges and magistrates at all levels “seem to have accepted the role of guidelines”, however some feel that the guidelines reduce their “autonomy” and discourage courts from passing “individualised and creative sentences”³²⁰.

United States

³¹⁵ Scottish Sentencing Council, 2015. *Sentencing Guidelines Around the World*. SSC1/20151214, Paper 3.1A. [PDF] Available from: <<https://www.scottishsentencingcouncil.org.uk/media/1109/paper-31a-sentencing-guidelines-around-the-world.pdf>> [Accessed on 23/05/2018] p.1

³¹⁶ Northern Ireland Assembly, 2016. *Sentencing Guidelines Mechanisms in Other Jurisdictions*. RaISe, NIAR 195-16. [PDF] Available from: <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/justice/7916.pdf> [Accessed on 23/05/2018] p.3

³¹⁷ Allen, R., 2016. *The Sentencing Council for England and Wales: Brake or accelerator on the use of prison?* Transform Justice, December 2016. [PDF] Available from: <www.transformjustice.org.uk/wp-content/uploads/2016/12/TJ-DEC-9.12.16.pdf> [Accessed on 23/05/2018] p.7

³¹⁸ Allen, R., 2016. *The Sentencing Council for England and Wales: Brake or accelerator on the use of prison?* Transform Justice, December 2016. [PDF] Available from: <www.transformjustice.org.uk/wp-content/uploads/2016/12/TJ-DEC-9.12.16.pdf> [Accessed on 23/05/2018] p.9

³¹⁹ Northern Ireland Assembly, 2016. *Sentencing Guidelines Mechanisms in Other Jurisdictions*. RaISe, NIAR 195-16. [PDF] Available from: <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/justice/7916.pdf> [Accessed on 23/05/2018] p.3

³²⁰ Allen, R., 2016. *The Sentencing Council for England and Wales: Brake or accelerator on the use of prison?* Transform Justice, December 2016. [PDF] Available from: <www.transformjustice.org.uk/wp-content/uploads/2016/12/TJ-DEC-9.12.16.pdf> [Accessed on 23/05/2018] p.7

In the 1970s and 1980s a bi-partisan consensus emerged that unregulated discretion when sentencing was leading to “unjustifiable differences in the treatment of similar cases”³²¹. It was decided that sentences should be based on two factors: the seriousness of the current offence, and the extent of the offender’s prior conviction record and this led to the development of the two-dimensional “sentencing grid” that most guidelines systems in the United States employ³²².

Although sentencing guidelines in the United States are founded on “similar core ideas”, the ways in which they have been implemented across jurisdictions is “extremely varied”³²³. Guideline systems differ in:

- The amount of discretion they afford judges
- The types of crimes and sentencing options they cover
- The philosophies of punishment they emphasise³²⁴

While sentencing guidelines have existed for over 40 years in the United States, these models have been assessed as unsuitable for use in other countries such as England and Wales due to the view that “sentence ranges are too narrow and the compliance requirement too restrictive”³²⁵. While the United States has introduced an “integrated set of guidelines”, the English approach has been to “proceed piecemeal” by creating guidelines for particular offences³²⁶. Within this piecemeal approach, specific guidelines for sentencing young offenders have been developed.

New Zealand

A rising prison population and public dissatisfaction led to demands to establish a sentencing commission in New Zealand³²⁷. As a result, New Zealand “travelled a considerable distance along the road of establishing a sentencing commission”; however, this has yet to be implemented³²⁸. In this jurisdiction, The Sentencing Act 2002 identifies principles which judges must take into account when deciding on a sentence and these

³²¹ Frase, R. S., 2015. *Why have U.S. State and Federal Jurisdictions Enacted Sentencing Guidelines?* University of Minnesota, Sentencing Guidelines Resource Center, 25 March 2015. [online] Available from: <<https://sentencing.umn.edu/content/why-have-us-state-and-federal-jurisdictions-enacted-sentencing-guidelines>> [Accessed on 23/05/2018]

³²² Frase, R. S., 2015. *Why have U.S. State and Federal Jurisdictions Enacted Sentencing Guidelines?* University of Minnesota, Sentencing Guidelines Resource Center, 25 March 2015. [online] Available from: <<https://sentencing.umn.edu/content/why-have-us-state-and-federal-jurisdictions-enacted-sentencing-guidelines>> [Accessed on 23/05/2018]

³²³ Criminal Justice Research, 2018. *Sentencing: Sentencing Guidelines*. [online] Available from: <<http://criminal-justice.iresearchnet.com/system/sentencing/5/>> [Accessed on 23/05/2018]

³²⁴ All examples from Criminal Justice Research, 2018. *Sentencing: Sentencing Guidelines*. [online] Available from: <<http://criminal-justice.iresearchnet.com/system/sentencing/5/>> [Accessed on 23/05/2018]

³²⁵ Ashworth, A. and Roberts, J. V., 2013. *Sentencing Guidelines: Exploring the English Model*. Oxford: Oxford University Press, p.2

³²⁶ Ashworth, A. and Roberts, J. V., 2013. *Sentencing Guidelines: Exploring the English Model*. Oxford: Oxford University Press, p.6

³²⁷ Northern Ireland Assembly, 2016. *Sentencing Guidelines Mechanisms in Other Jurisdictions*. RaSe, NIAR 195-16. [PDF] Available from: <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/justice/7916.pdf> [Accessed on 23/05/2018] p.26

³²⁸ Northern Ireland Assembly, 2016. *Sentencing Guidelines Mechanisms in Other Jurisdictions*. RaSe, NIAR 195-16. [PDF] Available from: <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/justice/7916.pdf> [Accessed on 23/05/2018] p.26-27

include the gravity of the offending, the culpability of the offender and the personal circumstances of the offender³²⁹.

South Africa

In South Africa, there are broad sentencing principles which require that judges consider three things: the gravity of the offence, the circumstance of the offender, and public interest³³⁰. These three factors must be considered equally and “one should not be heavily relied upon over the others”³³¹. In 2000, a committee was appointed to review the country’s sentencing regime and it recommended that a Sentencing Council should be established to develop and review sentencing guidelines, however the South African Parliament has yet to implement the recommendation³³².

6.3 Purpose of sentencing councils and guidelines

In recent years, several jurisdictions have moved towards a structured sentencing guidelines system administered by a sentencing council³³³. While “a diverse collection of jurisdictions” such as Belgium, New Zealand, Western Australia, Israel, South Korea and South Africa have proposed to implement guidelines, these have not all been formally adopted³³⁴. Sentencing councils exist to address issues such as a lack of public confidence in sentencing processes, disparities in sentencing, a growing prison population or a perceived lack of fairness in sentencing³³⁵. By issuing sentencing guidelines for various types of offenders, such as young offenders, councils work to achieve greater consistency in the types of sentences which are given for similar offences. Guidelines typically offer a range of sentencing options for certain offences, within which courts can decide what is appropriate for a young person.

Reflecting on the purpose of sentencing guidelines, it has been argued that councils should be considerate of trends in sentencing and provide “advice based on sound evidence” of what works to reduce re-offending³³⁶:

“No-one wants, I think, a Sentencing Council which simply endorses current practice, or one which encourages higher levels of punishment, or longer periods of imprisonment, without some very clearly articulated justifications”

³²⁹ Courts of New Zealand, 2018. *Sentencing Decisions*. [online] Available from: <<https://www.courtsofnz.govt.nz/about-the-judiciary/how-decisions-are-made/sentencing>> [Accessed on 23/05/2018]

³³⁰ Library of Congress, 2016. *Sentencing Guidelines: South Africa*. [online] Available from: <<https://www.loc.gov/law/help/sentencing-guidelines/southafrica.php>> [Accessed on 24/05/2018]

³³¹ *S v. Holder* 1979 (2) SA 70, 71. Cited in Library of Congress, 2016. *Sentencing Guidelines: South Africa*. [online] Available from: <<https://www.loc.gov/law/help/sentencing-guidelines/southafrica.php>> [Accessed on 24/05/2018]

³³² Library of Congress, 2016. *Sentencing Guidelines: South Africa*. [online] Available from: <<https://www.loc.gov/law/help/sentencing-guidelines/southafrica.php>> [Accessed on 24/05/2018]

³³³ Northern Ireland Assembly, 2016. *Sentencing Guidelines Mechanisms in Other Jurisdictions*. RaISe, NIAR 195-16. [PDF] Available from: <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/justice/7916.pdf> [Accessed on 23/05/2018] p.1

³³⁴ Ashworth, A. and Roberts, J. V., 2013. *Sentencing Guidelines: Exploring the English Model*. Oxford: Oxford University Press, p.2

³³⁵ Northern Ireland Assembly, 2016. *Sentencing Guidelines Mechanisms in Other Jurisdictions*. RaISe, NIAR 195-16. [PDF] Available from: <www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/justice/7916.pdf> [Accessed on 23/05/2018] p.1

³³⁶ Allen, R., 2016. *The Sentencing Council for England and Wales: Brake or accelerator on the use of prison?* Transform Justice, December 2016. [PDF] Available from: <www.transformjustice.org.uk/wp-content/uploads/2016/12/TJ-DEC-9.12.16.pdf> [Accessed on 23/05/2018] p.1

Nicola Padfield, Reader in Criminal and Penal Justice, University of Cambridge, 2016³³⁷

Therefore, the purpose of sentencing councils often goes beyond creating consistency in sentencing. Councils can weigh up the costs and benefits of various sentencing options and guide courts accordingly.

In addition, sentencing councils can fulfil a public outreach role to increase awareness and understanding about sentencing processes. For example, the Sentencing Council of England and Wales has a “statutory duty to consider the interests of victims”³³⁸. One Council member should have experience of the “promotion of the welfare of victims of crime”, and the Council has previously undertaken work to “promote awareness of sentencing with victims and witnesses”³³⁹. This involved the creation of a film, commissioned and developed with the Victim Support Charity in 2012, which explained types of sentences and the sentencing process³⁴⁰.

Overall, considering the purpose and increasing relevance of sentencing councils and guidelines across jurisdictions, their impact can be measured in a variety of ways. This could include whether a reduced number of young people are entering custody, whether the public have greater knowledge or confidence around the sentencing of young offenders, whether sentencing practices have become more cost effective, whether reoffending has declined, and whether any differences in sentencing based on gender, race or ethnicity have reduced.

6.4 Assessments of the impact of sentencing guidelines

The Sentencing Council for England and Wales have used the Crown Court Sentencing Survey (CCSS) to establish how judges use sentencing guidelines and whether sentencing outcomes “reflect the process and the recommended factors to take into account”³⁴¹. The survey was conducted between 2010 and 2015 and collected data directly from judges: for every new criminal case sentenced at the Crown Court the sentencing judge was expected to complete a survey form³⁴². Judges were asked about the offence category or level, the number of “recent and relevant” previous convictions of the

³³⁷ Allen, R., 2016. *The Sentencing Council for England and Wales: Brake or accelerator on the use of prison?* Transform Justice, December 2016. [PDF] Available from: <www.transformjustice.org.uk/wp-content/uploads/2016/12/TJ-DEC-9.12.16.pdf> [Accessed on 23/05/2018] p.1

³³⁸ Sentencing Council, 2018. *Sentencing Guidelines and Sentencing in England and Wales – Victims of Crime*. [PDF] Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing_Guidelines_and_Sentencing_in_England_and_Wales-Victims_of_Crime.pdf> [Accessed on 23/05/2018] p.1

³³⁹ Sentencing Council, 2018. *Sentencing Guidelines and Sentencing in England and Wales – Victims of Crime*. [PDF] Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing_Guidelines_and_Sentencing_in_England_and_Wales-Victims_of_Crime.pdf> [Accessed on 23/05/2018] p.1

³⁴⁰ Sentencing Council, 2018. *Sentencing Guidelines and Sentencing in England and Wales – Victims of Crime*. [PDF] Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing_Guidelines_and_Sentencing_in_England_and_Wales-Victims_of_Crime.pdf> [Accessed on 23/05/2018] p.1

³⁴¹ Sentencing Council, 2015. *Crown Court Sentencing Survey: Annual Publication, January to December 2014, England and Wales*. [PDF] Available from: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf>> [Accessed on 24/05/2018] p.2

³⁴² Sentencing Council, 2015. *Crown Court Sentencing Survey: Annual Publication, January to December 2014, England and Wales*. [PDF] Available from: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf>> [Accessed on 24/05/2018] p.8

offender, aggravating and mitigating factors in the case, and any reduction given for a guilty plea, where a guilty plea was entered³⁴³.

Overall, CCSS findings indicate that only in very few cases did judges give sentences which fell outside of the relevant offence range³⁴⁴. For assault offences, burglary offences and drug offences, between 97% and 98% of sentences fell within the relevant offence range³⁴⁵. Within assault offences, sentences given for causing grievous bodily harm with intent most often fell outside of the range of sentences (between three and 16 years imprisonment), with 7% of sentences falling below the range³⁴⁶. For this type of offence, sentences which fell below the offence range had “fewer aggravating” and “more mitigating” factors than those which were within or above the range³⁴⁷.

In the United States, Ostrom et al. have conducted an examination of the impact of sentencing guidelines in Minnesota (which has a relatively strict system), Michigan (whose guidelines offer more judicial discretion) and Virginia (where compliance with the recommended sentences is completely voluntary)³⁴⁸. The study offered the following key findings:

- Guidelines make sentences more predictable – Predictability is higher in Minnesota which has a more mandatory system, and lower in Virginia which has a more voluntary system
- Guidelines effectively limit “undesirable sentencing disparity” – The existence of guidelines reduces disparities due to factors that “should not play a role in sentencing decisions”. While it might be expected that Virginia’s system of wider judicial discretion could lead to increases in discrimination e.g. based on race or economic status, this does not appear to be the case
- Guidelines make sentencing patterns more transparent – The existence of guidelines helps to illuminate the extent to which sentencing practices are predictable, proportional and non-discriminatory³⁴⁹

6.5 Data collection to monitor impact

³⁴³ Sentencing Council, 2015. *Crown Court Sentencing Survey: Annual Publication, January to December 2014, England and Wales*. [PDF] Available from: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf>> [Accessed on 24/05/2018] p.9

³⁴⁴ Sentencing Council, 2015. *Crown Court Sentencing Survey: Annual Publication, January to December 2014, England and Wales*. [PDF] Available from: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf>> [Accessed on 24/05/2018] p.7

³⁴⁵ Sentencing Council, 2015. *Crown Court Sentencing Survey: Annual Publication, January to December 2014, England and Wales*. [PDF] Available from: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf>> [Accessed on 24/05/2018] p.7

³⁴⁶ Sentencing Council, 2015. *Crown Court Sentencing Survey: Annual Publication, January to December 2014, England and Wales*. [PDF] Available from: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf>> [Accessed on 24/05/2018] p.39

³⁴⁷ Sentencing Council, 2015. *Crown Court Sentencing Survey: Annual Publication, January to December 2014, England and Wales*. [PDF] Available from: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf>> [Accessed on 24/05/2018] p.40

³⁴⁸ Ostrom, B. J., Ostrom, C. W., Hanson, R. A. and Kleiman, M., 2008. *Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States*. [PDF] Available from: <<https://www.ncsc.org/~media/Microsites/Files/CSI/Assessing%20Consistency.ashx>> [Accessed on 24/05/2018] p.2

³⁴⁹ All findings from Ostrom, B. J., Ostrom, C. W., Hanson, R. A. and Kleiman, M., 2008. *Assessing Consistency and Fairness in Sentencing: A Comparative Study in Three States*. [PDF] Available from: <<https://www.ncsc.org/~media/Microsites/Files/CSI/Assessing%20Consistency.ashx>> [Accessed on 24/05/2018] p.2-3

Assessing the impact of sentencing guidelines on sentencing practices is fruitful in jurisdictions where guidelines have been implemented for various offences over a sustained period of time, for example in the United States or England and Wales. The implementation of sentencing guidelines is seen to support a number of positive youth justice outcomes such as managing the number of young people entering custody, promoting knowledge and confidence in youth sentencing amongst the public, encouraging cost-effective and rehabilitative sentences, and promoting non-discriminatory, proportional and predictable sentences. To support an assessment of whether these outcomes have been achieved, the following methods of data collection could be employed:

- Collection of monitoring data on the numbers of children and young people given custodial and non-custodial sentences over time, compared with recorded youth crime rates
- Conducting focus groups, interviews or surveys of the public to establish whether youth sentencing processes are perceived to be clear and fair following the implementation of guidelines
- Measuring adherence to guidelines by asking judges to complete information about youth offender cases including any reasons for non-adherence
- Calculating the cost implications for guideline recommended youth sentences over time
- Gathering the demographic data of sentenced young offenders to monitor any sentencing disparities associated with e.g. race, class or gender
- Conducting a Social Return on Investment (SROI) to establish the social costs and benefits of different youth sentences.

6.6 Summary

- Amongst jurisdictions with sentencing guidelines, the level of discretion retained by courts in sentencing varies depending on the prescriptiveness of developed guidelines
- Where youth-specific guidelines exist, these focus on the rehabilitation of the young offender and the prevention of future offending
- The development of sentencing guidelines can help to ensure consistency in how similar cases are considered by courts and this can increase public confidence in sentencing processes
- Sentencing councils can fulfil an outreach role to increase public knowledge or confidence around sentencing practices
- A range of data can be collected to enable the monitoring of how sentencing guidelines have impacted on sentencing processes. Outcomes such as the number of young people entering custody, the level of public confidence in youth sentencing and the cost-effectiveness of sentencing practices can be examined to demonstrate impact.

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ISBN: 978-1-912442-07-2