



Labour, Building an effective criminal justice system consultation

JUSTICE consultation response

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. We are pleased to provide this response to the consultation on Building an Effective Criminal Justice System.
3. JUSTICE has worked for 62 years to improve the criminal justice system and has produced a number of reports in recent years that make recommendations on early intervention, courts and offender management. In particular, the following working party reports are particularly relevant to this consultation:
 - a. *Legal Assistance in the Police station*, chaired by the Right Honourable Lord Eassie;¹
 - b. *Mental Health and Fair Trial*, chaired by Sir David Latham;²
 - c. *Understanding Courts*, chaired by Sir Nicholas Blake;³ and
 - d. *Prosecuting Sexual Offences*, chaired by His Honour Peter Rook QC.⁴
4. We consider that the criminal justice system must refocus its efforts to reduce offending, by placing special emphasis on:
 - a. Diversion from the criminal justice system;
 - b. Effective participation; and
 - c. Effective rehabilitation.

¹ JUSTICE, *Legal Assistance in the Police Station*, (2018), available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/JUSTICE-Scotland-Legal-Assistance-in-the-Police-Station.pdf>

² JUSTICE, *Mental Health and Fair Trial* (2017), available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/11/JUSTICE-Mental-Health-and-Fair-Trial-Report-2.pdf>

³ JUSTICE, *Understanding Courts*, (2019), available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Understanding-Courts.pdf>

⁴ JUSTICE, *Prosecuting Sexual Offences* (2019), available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/06/Prosecuting-Sexual-Offences-Report.pdf>

5. In this response we provide an overview of these areas and would welcome the chance to discuss them in more depth.

Diversion from the Criminal Justice System

6. Diversion schemes work by identifying individuals that come into contact with the justice system who have specific needs that may have caused or contributed to their offending. Traditional prosecution in such cases may not address these underlying causes, and could damage the individual, increasing the risk of reoffending. Diversion seeks to reduce reoffending through targeted interventions, tailored to the individual.
7. JUSTICE Working Party reports *Mental Health and Fair Trial* and *Prosecuting Sexual Offences* both recommend the use of diversion as a method for addressing the causes of criminal behaviour.
8. For instance, we recommend that Liaison and Diversion practitioners should screen every suspect who comes into custody. This will ensure that the accurate identification of vulnerability is not left to the police. Moreover, it will ensure that appropriate services are identified so that the individual can receive the assistance they require, rather than be prosecuted.⁵
9. With regards to viewers of indecent images of children, we have recommended a conditional diversion scheme, as we believe it will better address offending behaviour than traditional prosecution. This scheme would require participants to participate in five sessions that will address the reasons for their offending. If the individual does not complete the scheme, or do not participate fully, a decision to prosecute will be made.⁶
10. Although we have only recommended diversion in these two contexts, we were impressed by examples of diversion schemes operating across England that address other causes of offending. Schemes such as Operation Turning Point,⁷

⁵ *Mental health and Fair Trial*, pp. 63-66.

⁶ *Prosecuting Sexual Offences*, p. 39-45.

⁷ 'Operation Turning Point', University of Cambridge, available at https://whatworks.college.police.uk/Research/Research-Map/Documents/TP_Storyboard.pdf The data showed

Operation Checkpoint⁸ and CARA (Cautioning and Relationship Abuse)⁹ have shown positive results. We consider that an approach which seeks to address criminal-causing behaviour – whatever that cause may be – rather than criminalise it, is the most effective way to reduce offending.

11. Linked to diversion is early intervention, which uses the same principles without waiting for an individual to come into contact with the criminal justice system. Research demonstrates that children continue to develop, with the brain not thought to reach maturity until at least 25 years old. Until a brain is fully matured, an individual will have a greater desire to take risks and a reduced ability to problem solve, both of which can contribute to criminal behaviour.¹⁰ It is vital that our criminal justice system understands this so that appropriate interventions and, if necessary, sentences, can be developed so that children are not needlessly criminalised. It is likely that the risk of multiple reoffending increases once a child is imprisoned for the first time.¹¹

12. We consider that the increased understanding now available of the developing brain adds to the evidence that calls for the age of criminal responsibility to be increased. At 10 years old in England, Wales and Northern Ireland, this is currently the lowest in Europe, with Scotland recently voting to increase its minimum age to 12. The United Nations recommends a minimum age of criminal responsibility of

that for low-risk individuals, there is relatively little difference between those who are traditionally prosecuted compared with those on Turning Point. However, for violent individuals only, those on Turning Point were 35% less likely to be rearrested. We understand that Checkpoint will soon be publishing its results, which are thought to show improved outcomes for those on Checkpoint compared with those who are traditionally prosecuted.

⁸ 'Checkpoint', Durham Constabulary, available at <https://www.durham.police.uk/Information-and-advice/Pages/Checkpoint.aspx>

⁹ 'CARA', The Hampton Trust, available at <https://www.hamptontrust.org.uk/program/cara-2/>

¹⁰ See: Howard League for Penal Reform, 'Sentencing Young Adults: Making the case for sentencing principles for young adults,' (2018), available at <https://howardleague.org/wp-content/uploads/2019/01/Sentencing-Young-Adults.pdf>

¹¹ See: Scottish Government, *What Works to Reduce Reoffending: A summary of the Evidence*, (2015), available at: <https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/pages/3/>; G. Lotti, 'Tough on young offenders: harmful or helpful?', *Warwick Economic Research Papers* (2016), available at https://warwick.ac.uk/fac/soc/economics/research/workingpapers/2016/twerp_1126_lotti.pdf; and Prison Reform Trust, *Out for Good*, available at http://www.prisonreformtrust.org.uk/Portals/0/Documents/Out_for_GoodKP0405.pdf

at least 14.¹² Treating children as criminally responsible when it is clear that they cannot understand the consequences of their actions (both the consequences to the victim and the consequences to themselves) is plainly wrong. However, it also means that the welfare needs of the child are often overlooked, especially as children who commit crimes are often themselves vulnerable. This is particularly worrying as addressing these welfare needs will go some way to addressing criminal behaviour.

13. This problem is rare in Scotland, due to its Children's Hearing system.¹³ This is a system whereby the vast majority of children aged 16 and under who commit a crime are sent to a panel which will have the welfare of the child at the heart of their decision-making. This avoids criminalising the child and reduces the risk of reoffending. Even if the age of criminal responsibility is not increased in England and Wales, instituting a system similar to the Children's Hearing should be a priority for lawmakers when designing an effective criminal justice system.

14. As well as the age of criminal responsibility being far too low, it has been suggested that over 80% of men in prison have suffered an "adverse childhood experience" (ACE).¹⁴ An ACE can include divorce, domestic abuse, school exclusion or bereavement. What connects ACEs is that the child suffered trauma. This does not necessarily lead to criminality but without the child receiving adequate support for the ACE, the likelihood of offending increases. We consider that when a child suffers an ACE, social agencies, the police and the local authority should be alert to the vulnerable position the child is in and work together to offer the support that is needed.

15. We would like to highlight two initiatives that demonstrate what such support can look like:

¹² United Nations, Committee on the Rights of the Child, *Draft revised General Comment No. 10 (2007) on children's rights in juvenile justice*, 2019, available at <https://ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx>

¹³ Children's Hearing Scotland, available at <http://www.chscotland.gov.uk/>

¹⁴ See for example: K. Ford and others, *Understanding the prevalence of adverse childhood experiences (ACEs) in a male offender population in Wales: The Prisoner ACE Survey*, (2019), available at <https://www.bangor.ac.uk/news/documents/PHW-Prisoner-ACE-Survey-Report-E.pdf>

- a. Durham Constabulary's "Mini Police"; and
- b. Football Beyond Borders.

16. The Mini Police¹⁵ is a community engagement initiative run by Durham Constabulary. It is a volunteer scheme for 9 to 11 year olds, allowing them to participate in community engagement events. This programme seeks to help children develop a confident voice and create ownership of and pride in community issues. In addition to this approach, the Constabulary tries to engage children who they believe to be at risk of going on to offend. By engaging early with children, the hope to develop a positive identity and reduce the risk of reoffending. We understand that many of the children that they identify to participate in the programme continue their engagement with the Constabulary beyond 11 and have gone on to become police officers themselves, or have gone to university.

17. Football Beyond Borders¹⁶ takes a similar approach to children who they identify as being at risk of going on to offend. They go into schools and use football as a way of creating structure and mentoring children to reduce the chances of them committing criminal behaviour. They do this without the child knowing that they are being mentored for this reason as they have open trials and select both children who are and who are not at risk of offending. They believe that this reduces at risk children seeing themselves as separate from other children, which can entrench a criminal identity.

18. Both initiatives work with schools and other social services to identify at risk children, showing the value of information sharing and multi-agency working.

Effective Participation

19. Our working party reports *Legal Assistance in the Police Station, Mental Health and Fair Trial, Understanding Courts and Prosecuting Sexual Offences* all make recommendations concerning effective participation in trials. At the heart of these recommendations is the belief that it is impossible to have a fair trial, or access to justice, without being able to fully understand and participate in legal proceedings.

¹⁵ Durham Constabulary, Mini Police, available at <https://www.durham.police.uk/Pages/Mini-Police.aspx>

¹⁶ Football beyond Borders, available at <https://footballbeyondborders.org/#>

This requires not only information to be presented in a clear, understandable way, but for courts to understand the needs of its users and to adapt to address these needs. Moreover, adaptations should not only be made for those with identifiable vulnerabilities but for all court users, as legal processes are complex and different people will have different issues when navigating them. Being open to and understanding these differences will create a more effective court system.

20. Not only will such an approach improve the experience of those within the justice system, but it is also likely to save time and costs and reduce the risk of miscarriage of justice.

21. Our reports make a number of recommendations, including:

- a. Increased use of easy-read documents;¹⁷
- b. Familiarisation visits at court for those who may find the court room daunting;¹⁸
- c. Ensuring that if children give evidence, they can give it in the morning and do not have to wait for hours at court;¹⁹
- d. The adaptation of questions asked to those who suffer from comprehension difficulties;²⁰
- e. Clear rules for the method and length of questioning, as well as whether breaks will be necessary;²¹ and
- f. Increased training for practitioners with regard to vulnerability.²²

22. We are pleased to note that there appears to be a willingness within the profession to implement such changes. One vital area that is not improving, however, is the use of intermediaries.

¹⁷ *Understanding Courts*, pp. 19-20 and *Legal Assistance in the police station*, pp. 35-38.

¹⁸ *Understanding Courts*, p. 42.

¹⁹ *Prosecuting Sexual Offences*, p. 57.

²⁰ *Understanding Courts*, p. 88 and *Prosecuting Sexual Offences* pp. 47-48.

²¹ *Understanding Courts*, pp. 80-85 and *Prosecuting Sexual Offences*, *ibid.*

²² *Prosecuting Sexual Offences*, pp. 59-64

23. Intermediaries are communication specialists who facilitate communication between court users such as witnesses and defendants and the court. They are able to assess the individual to establish what needs they have and how the court process will have to adapt to ensure that the individual can effectively participate.
24. A funded Ministry of Justice, Registered Intermediary scheme exists for witnesses, ensuring that an intermediary will be able to assist a witness to give their best evidence at trial. However, no such scheme exists for defendants, leaving them at risk of unregistered intermediaries.²³
25. Moreover, the value of an intermediary is not universally accepted by those in the profession.²⁴ This means that intermediaries often have to attempt to convince a judge of the defendant's need for an intermediary throughout the whole trial. Due to Criminal Procedure Rules and case law, many judges are reluctant to agree to the use of an intermediary other than when the defendant is giving evidence. This means that a defendant will sit throughout the whole trial without anyone skilled at translating the court proceedings into easily understandable information. This clearly calls into question the effective participation of a defendant, as they will not be able to understand the case against them and raise issues that may assist with their defence. Ensuring defendants have access to registered intermediaries for the duration of their trial is therefore vital for them to receive a fair trial and should be prioritised.
26. In addition to ensuring that individuals can effectively participate in their trial, there should be opportunities for diversion throughout the court process. Liaison & Diversion services should be available at every court centre and should be able to assess an individual at any stage of the trial, though preferably before it begins.

²³ There is a large cross-over between registered intermediaries and intermediaries who do work for defendants. However, there are some intermediaries who are not registered and solely do defence work, without any formal evaluation of their skill.

²⁴ See: *Mental Health and Fair Trial*.

This creates a safety net should diversion opportunities be missed at an earlier stage.²⁵

27. The continued use of the dock also risks a fair trial, as it may infringe the presumption of innocence, effective participation in a trial and the defendant's right to dignified treatment. Placing an individual in a dock before they have been found guilty can, among other things, make the defendant seem more guilty to a jury. The case law of the European Court of Human Rights suggests that the use of a glass dock violates the European Convention on Human Rights.²⁶

28. Moreover, sitting behind a glass screen greatly undermines the ability of a defendant to effectively participate in their trial. They are often placed at the back of a court, making it difficult for defendants to communicate with their legal representation. In addition, the location of the dock and the fact that it is a glass box makes it very difficult for the defendant to follow proceedings and hear what is taking place. This makes it difficult for them to challenge what is being said and also increases the risk of miscarriage of justice.

Effective rehabilitation

29. It is our belief that the primary aim of the justice system should be to reduce reoffending. It is clear that the best way to reduce reoffending is through rehabilitation that seeks to address the reasons for criminal behaviour and attempts to improve the life skills of individuals, so that they develop a more positive identity and are better equipped to contribute to society at the end of their sentence. An approach that focusses on punishment fails to do this and increases the risk of reoffending. As such, we believe that any punitive approach to offending is in fact soft on crime and the causes of crime, making our society less safe.

²⁵ In the first 48 months of the service, there was 82% coverage of Liaison and Diversion services within England and Wales, with a plan for 100% coverage by 2019/2020. However, Liaison and Diversion remains an ad hoc service in the 77 Crown Courts in England and Wales. See *Mental Health and Fair Trial* for more information.

²⁶ See: *Mariya Alekhina and Others v Russia* (app. no 38004/12), 17 July 2018, which found the use of a glass dock without evidence of a security risk was a violation of the article 3 (inhuman and degrading treatment) and article 6 (right to a fair trial – due to a lack of effective participation) of the European Convention on Human Rights, available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-184666%22%5D%7D>; *Yaroslav Belousov v. Russia*, (app. nos. 2653/13 and 60980/14) 4 October 2016, which found a breach of article 6; and *Svinarenko and Slyadnev v Russia* (app. nos 32541/08 and 43441/08), 17 July 2014, which found the use of a metal cage violated Article 3.

30. We welcome the acknowledgement that short prison sentences are not in the interests of society as they can make reoffending more likely. However, this acknowledgement should not result in longer prison sentences being passed instead of short sentences. Rather, it should be used as the stepping off point to review sentencing practice and sentencing options, in general.
31. As we said earlier, it is now thought that adolescence does not end until at least 25 years old. There is now also a greater acknowledgment from the judiciary that turning 18 does not immediately mean a defendant is an adult, and that youth sentencing guidelines can therefore still apply. We consider that a review should be undertaken to see how far it is possible to extend the youth sentencing guidelines to those aged between 18 and 25. If so extended, the number of defendants unnecessarily sent to prison should reduce. Related to this, there is also a greater understanding that mental health conditions should be taken into account when sentencing, with the Sentencing Council consulting on its new draft Mental Health Sentencing Guideline, which JUSTICE is responding to.²⁷
32. Alternatives to prison sentences must coincide with improved rehabilitation programmes in the community, to allow for the greater use of community orders. These programmes should all have the welfare of the individual at their heart, work to create a positive identity and help the individual integrate and contribute to society. We consider that rehabilitation programmes within custody must follow the same philosophy. Those that focus on guilt, shame and empathy for the victim are no longer considered effective.²⁸
33. In the community, a multi-agency approach is required to ensure an individual's needs are all met. This requires greater information sharing and offender managers who are able to signpost the individual to the appropriate services. In some cases,

²⁷ Sentencing Council, *Sentencing Offenders with Mental Health Conditions or Disorders – for consultation only*, available at <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/sentencing-offenders-with-mental-health-conditions-or-disorders-for-consultation-only/>

²⁸ See *Prosecuting Sexual Offences*, p. 31.

such as where someone has mental health issues, clinical commissioning groups should take responsibility for the individual's treatment.²⁹

34. In order to ensure that community orders command the confidence of the public, we consider that judges should be able to keep the sentence under review to ensure that the person is both receiving appropriate assistance and engaging in the programme. To this end, the conditions within the order must be achievable and understandable to the individual.³⁰
35. Improved options for community orders, together with an understanding of the harm that prison sentences can cause, should create a presumption against imprisonment for non-violent offences. This should apply to all individuals within the justice system regardless of sex, ethnicity or religious identity and go some way to reducing any groups that are overrepresented within prison.
36. Beyond this, the reasons for minority groups being more likely to receive custodial sentences for first time offences, or longer prison sentences, must be fully understood in order to recommend appropriate changes to the system. JUSTICE's next working party will investigate this very issue in relation to the youth justice system.

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²⁹ *Mental Health and Fair Trial*, p. 93.

³⁰ *Mental Health and Fair Trial*, pp. 87-91.