

**JUSTICE AND
GOOD GOVERNANCE ISSUES**

TOWARDS GOOD PRACTICE IN JUVENILE JUSTICE POLICY IN THE COMMONWEALTH

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EXECUTIVE SUMMARY

1. Introduction

1. The purpose of this review is to examine juvenile justice policy in different Commonwealth countries to help identify what might constitute good practice. This review does not suggest that there is, or should be, only one way of 'doing' juvenile justice. Rather it seeks to identify a number of key issues which all juvenile justice systems have to address, and to review, through legislation and practice, the range of options available within a small number of Commonwealth countries. Also 'good practice' itself is not self-evident, value-free or unequivocal. Thus, this review represents only the beginning of debates about what this might constitute within the Commonwealth.

2. Methodology

2. In identifying the key issues for juvenile justice policy we examined, first, various United Nations documents. For the purposes of this paper, we have focused on the Standard Minimum Rules for the Administration of Justice (the Beijing Rules) and the Convention on the Rights of the Child (UNROC). We also examined the resolution of the Economic and Social Council of the United Nations on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. The number of jurisdictions discussed is necessarily limited within the time-frame available to us. We chose jurisdictions we were relatively familiar with and/or which had recently reviewed their legislative provision for juvenile offenders. Specifically, we examined legislation in Australia, Canada, England, Ghana, New Zealand, Northern Ireland and Scotland and draft legislation in South Africa. Juvenile justice legislation in some Commonwealth jurisdictions is long, complex and covers a wide range of topics. At this stage of our work, we have been necessarily selective in what we discuss. We have also consulted literature which reviewed practice and recent empirical research in these jurisdictions, where available, and any recent policy documents relating to juvenile justice.

3. Key Issues

3.1 Ages of criminal responsibility, prosecution and adulthood

3. There are differences in the age of criminal responsibility and the age at which juvenile justice jurisdiction ends in the Commonwealth countries reviewed. These reflect their diverse social, economic, cultural and political systems. However, there is merit in some common standards and, at the very least, it seems appropriate, in line with the UNROC, for offenders to be treated as 'juveniles' until the age of 18. The age of criminal responsibility was traditionally viewed as the age at which societies were willing to punish child offenders and so 'higher' ages were seen as protective. Given the shifts in emphasis in the aims of juvenile justice, there may be less reason to protect children

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from restorative or rehabilitative intervention and so 'lower' ages of criminal responsibility may be more acceptable. A good compromise could be to distinguish between the age of criminal responsibility (which could be low) and the age of prosecution (which could be high).

4. Because of public and media concerns in some of the Commonwealth countries reviewed, serious juvenile offenders can be dealt with as adults. However, we may need to distinguish here between trial procedures and penalties. Young children are unlikely to be capable of understanding and participating in court proceedings. Changes to procedures are possible, as has been done in some countries with respect to child victims. But the issues are somewhat different with respect to child offenders and trials for children are relatively rare. Consideration could, therefore, be given to legislating for a higher age of prosecution, even for offences of murder and manslaughter (children below this age who committed serious offences could still be dealt with under care and protection mechanisms). An alternative approach is to treat all individuals under the age of 18 as juveniles for criminal justice matters, as the UNROC suggests. Treating only child offenders who commit certain offences as vulnerable and in need of special protection has little logic. Age should continue to be a major mitigating factor with respect to penalties.

3.2 Dealing with antisocial behaviour

5. Paragraph 3 of the Beijing Rules states that the Rules should apply not only to children who have committed criminal offences, but also to children who have committed what would conventionally be described as 'status offences' – acts which would not be punishable if committed by an adult. However, the restrictive orders introduced in some jurisdictions to regulate such behaviour have failed to provide adequate safeguards and, as such, are in breach of the Beijing Rules. Steps should be taken either to ensure compliance with these Rules or to abolish these orders.

3.3 The aims of juvenile justice

6. Taking some steps to set out what the juvenile justice system is trying to accomplish is an important preliminary task for legislatures as these aims, values and principles can then be relied on to guide practice and to measure the system's effectiveness in meeting its objectives. Most of the Commonwealth jurisdictions reviewed have done this. However, these aims, values and principles should be tied together in a coherent framework and should not lead decision makers in conflicting directions. Examples of the values and principles which could be endorsed are: recognition of children's vulnerability and developmental stages; restoration and reintegration; diversion from court and custody; fairness; due process; and the accommodation of diversity. They should be clear in their purpose and transparent.

3.4 Restorative justice processes and juvenile justice

7. Research on restorative conferencing shows that, to a large extent, it has achieved the key restorative aims of involving offenders, victims and supporter; achieving agreement about a co-operative and constructive response to offending; healing victims' hurt; and holding offenders accountable. Research also shows that offenders, their victims and their supporters generally have positive experiences in conferences. Compared to offenders and victims in youth or juvenile courts, those in conferences perceive the processes as fair and they are generally more satisfied with outcomes. This suggests that there is merit in exploring ways in which restorative justice processes can be made a major part of youth justice systems. There will continue to be debate about the best mechanisms for translating restorative justice values into practice, but research will continue to be a helpful tool here.

3.5 Diversion from court

8. Every jurisdiction examined accepts the value of diversion from court and so the issue is how best to achieve this. This review suggests that it is necessary to restrict police discretion though there are different ways of doing this. Also, despite legislative (or other policy) intentions, diversion does not always occur and so attempts to encourage it require careful monitoring to ensure that this objective is being realised.

3.6 Diversion from custody

9. This review shows that all of the jurisdictions examined wished to reduce the use of custody for juvenile offenders. However, jurisdictions differed in the extent to which they had been able to achieve this. It appears that, in some jurisdictions, whilst there is political will to reduce the use of custody, the independence of those sentencing can still undermine these intentions. This alerts us to the importance of the commitment of all juvenile justice professionals to the values underlying whatever legislation is implemented and to the need for tight and rigidly applied criteria to restrict the use of custody.

3.7 The range of dispositions available

10. This review has shown that most jurisdictions examined have a range of dispositions available to the courts from discharges to custody. However, those sentencing may need guidance to prevent idiosyncratic, inconsistent and discriminatory sentencing. The jurisdictions reviewed offer a number of alternative ways of achieving this. Clear and consistent guidelines that reflect the overall objects and principles of the jurisdiction's juvenile justice system are an important starting point in the achievement of fair and non-discriminatory sentencing that is consistent in its approach.

3.8 Protecting young offenders' rights

11. In recognition of the special nature of juvenile justice, it is clear that there should be 'specialist' lawyers for children: they should be selected for their skills in the law with respect to children and for their knowledge about children. Given the vulnerability of children and the recognition of their distinctive status, consideration should be given to the provision of legal advice, if not legal representation, at all stages of any proceedings against children, as the UNROC suggests. Given the resources of the children and parents most likely to come into the juvenile justice system, this should be provided at state expense. There are, of course, cost implications here, but a dramatic reduction in the use of custody (as every jurisdiction wishes to achieve) should lead to the release of funds that could be used to offset the cost of legal advice (if the cost of legal representation is not viable).

3.9 Time taken to process cases

12. This review has shown that most jurisdictions examined accepted the importance of dealing with young offenders in a time-frame which is consistent with their sense of time. It also showed a range of ways of trying to achieve this.

3.10 Preventing discrimination

13. Research has consistently shown that different ethnic groups and sexes experience different outcomes in many juvenile justice systems though it is less clear-cut that this is explained by discrimination on the grounds of ethnicity and sex. Sometimes these differences are explained by different patterns of offending. However, the possibility of discrimination remains and steps can be taken to safeguard against this: for example, by setting out criteria for and reviewing decisions. Of

special note here is the provision of custody for girls. In many of the Commonwealth countries reviewed, girls are held with adult female prisoners. Holding girls with adults is in breach of Article 37 of the UNROC that children should be held separately from adults unless it is in their best interest not to do so. It would be difficult to argue that holding girls with adult female offenders is in their best interests.

3.11 Recognition of cultural diversity

14. The inclusion of indigenous processes in juvenile justice systems where possible reflects good practice as it ensures greater legitimacy to these systems and is consistent with the endorsement of restorative justice procedures. At the very least, jurisdictions should demonstrate in the practice of juvenile justice some awareness of and sensitivity to cultural differences.

3.12 Encouraging parental responsibility

15. There is little to suggest that there are significant benefits to be gained from the penalisation of parents for the wrongdoing of their children. Measures to support parents and to encourage them to accept responsibility in a constructive way is preferable.

3.13 Dealing with serious or persistent offenders

16. Given the rarity of serious offending by juvenile offenders and given the difficulty of identifying persistent offenders, care needs to be taken against excessive penalisation of such children to meet media and popular demands. Questions have been raised about the need to deal with these children in the adult criminal justice system. Where a wide range of sanctions are available in the juvenile courts and guidelines are adopted it should be possible to accommodate both the needs of most such children and the need to protect society.

3.14 Risk assessment

17. There are dangers in risk assessment tools. Put crudely, prediction techniques usually get it wrong twice as often as they get in right and there are problems with both over- and under-predicting. Thus, children may be selected for special measures who do not require them and children who may require them remain unselected. If such tools are to be developed, they must be age appropriate and culturally specific and they need to be carefully monitored to ensure their effectiveness.

3.15 Other issues

18. There are a number of other issues that are pertinent to the identification and development of good practice. One of these concerns **multi-agency juvenile justice structures**. It is important, however, to pose questions about which agencies should be involved in such structures and what impact they might have; for example, there may be variation in their aims and in the delivery of services, depending on which is the 'lead' agency. There are also questions about the optimum size for multi-agency teams, how best to establish protocols in relation to the exchange of information, and how best to promote team work when staff from different agencies may well be operating under different terms and conditions and have received training which leads to very different perspectives on how best to proceed.

19. A further key issue concerns **monitoring and evaluation**. Increasingly, monitoring and evaluation is cited as an important way of informing policy-makers on the outcomes of initiatives. An evidence-based approach to effective interventions would involve a conscientious and judicious analysis of interventions (policies, programmes and practices) to achieve positive outcomes with

regard to juvenile justice, but this would also require political, organisational and professional commitment to ensure that legislation, policy and practice reflect the best available evidence. Whilst this remains an ideal, it is not yet clear that all Commonwealth countries have usable data sets. The establishment of comprehensive data sets in terms of offences, prosecutions and other interventions, and their outcomes and impact on offending is a critical step towards evidence-based practice.

4. Concluding comments

20. This review has identified a diversity of juvenile justice policy and practice in the Commonwealth jurisdictions reviewed with respect to a number of key issues. While some of this is understandable in light of the different social, economic, political and cultural systems that exist therein, there is also a case for Commonwealth juvenile justice policy to reflect good practice, so far as this is possible. It is recognised also that some Commonwealth countries are only now developing juvenile justice systems and it may be helpful for them to learn from the experience of other jurisdictions. All Commonwealth countries have ratified the UNROC. As such, they are required to prepare compliance reports and to take heed of any resulting comments from the UN. Law Ministers may wish to consider the role the Commonwealth Secretariat could play in:

- critically examining the issues identified within this short review in more depth;
- critically examining the juvenile justice policy of all Commonwealth countries;
- reviewing compliance reports from Commonwealth countries to assess the extent of compliance with the UNROC and to offer advice where appropriate.

21. The Commonwealth Secretariat is strategically poised to play a critical role both in further advancing progress towards good practice and in aiding those jurisdictions which are at the early stages in their development of juvenile justice policy.

TOWARDS GOOD PRACTICE IN JUVENILE JUSTICE POLICY IN THE COMMONWEALTH

1. Introduction

1. The purpose of this review is to examine juvenile justice policy in different Commonwealth countries to help identify what might constitute good practice. Traditionally, juvenile justice systems have reflected an empirical amalgam of justice, welfare, crime control (punishment) and diversion. However, because these approaches have rather different philosophic bases, the resulting tensions may be resolved differently in different countries. As a result, there is a diversity of juvenile justice policy within Commonwealth countries. There is little consensus on what their juvenile justice systems are trying to achieve or on their core values. This review does not suggest that there is, or should be, only one way of 'doing' juvenile justice. Rather it seeks to identify a number of key issues which all juvenile justice systems have to address, and to review, through legislation and practice, the range of options available within a small number of Commonwealth countries. Also 'good practice' itself is not self-evident, value-free or unequivocal. Thus, this review represents only the beginning of debates about what this might constitute within the Commonwealth.

2. Methodology

2. In identifying the key issues for juvenile justice policy we examined, first, various United Nations documents: the Standard Minimum Rules for the Administration of Justice (United Nations, 1986); the Convention on the Rights of the Child (United Nations, 1989); the Rules for the Protection of Juveniles Deprived of their Liberty (United Nations, 1990); and Guidelines for the Prevention of Delinquency (United Nations, 1990). For the purposes of this Report, we have focused on the Standard Minimum Rules for the Administration of Justice (the Beijing Rules) and the Convention on the Rights of the Child (UNROC). While these United Nations documents can provide a useful starting point, they are, in some respects, dated: juvenile justice policy in the Commonwealth countries reviewed has changed over the past 15 or so years. We next examined the resolution of the Economic and Social Council of the United Nations on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (www.restorativejustice.org/rj3/Undocuments). Although its primary focus is on adult offenders, it seems highly relevant for future directions in juvenile justice policy given, as we will see, that some Commonwealth countries have taken the lead in developing restorative justice processes for juvenile offenders.

3. The number of jurisdictions discussed is necessarily limited within the time-frame available to us. We chose jurisdictions we were relatively familiar with and/or which had relatively recently reviewed their legislative provision for juvenile offenders. Specifically, we examined legislation (listed in Appendix 1) in Australia, Canada, England, Ghana, New Zealand, Northern Ireland and Scotland and draft legislation in South Africa.¹ Juvenile justice legislation in some Commonwealth jurisdictions is long, complex and covers a wide range of topics: for example, the objectives and principles of juvenile justice, the rights of children in their interactions with the police and in courts, custody and bail, standard of proof, restorative conferences, the establishment of juvenile courts and its procedures and powers, sentencing orders, dealing with young offenders as adults, and appeals. At this stage of our work, we have been necessarily selective in what we discuss.

¹ We tried to find out the current status of this Bill. In an email on 31 May 2005 from the Parliamentary Office of the South African Government to the Librarian at the Institute of Criminology, Cambridge, we were informed that the Bill is still going through the parliamentary process. We received no response to follow-up emails on 5 July 2005.

4. Because juvenile justice in action may differ from juvenile justice legislation in some respects, we have also consulted literature that reviewed practice and recent empirical research in these jurisdictions, where available. In some jurisdictions, too, there are recent policy documents relating to juvenile justice. We used these to indicate current concerns and future trends. However, in this task, we were limited by the amount of time we had and by what was readily available to us at the library of the Institute of Criminology, University of Cambridge, in our personal libraries and through internet sources.

5. Within the framework of a short paper, we have chosen not to describe the detail of the juvenile justice systems of the various Commonwealth jurisdictions reviewed, but to provide examples of how they have addressed certain key issues. This review is designed to explore the merit (or otherwise) of examining Commonwealth juvenile justice policy in more depth in the future with a view to drafting model legislation that reflects good practice.

6. One further introductory comment: we have used the terms 'child' or 'children' throughout this paper (except when citing legislation) to be consistent with the Convention, though some legal systems differentiate in their legal provisions between children and young persons or young people in terms of age. Also, some jurisdictions have preferred to describe their systems as 'youth' justice rather than 'juvenile' justice (reflecting the fact that many of the children who come into the system are older). However, we have used the term 'juvenile justice' throughout, except where the context demands otherwise.

3. Key Issues

3.1 Ages of criminal responsibility, prosecution and adulthood

7. Paragraph 2 of the Beijing Rules defines a juvenile as 'a child or young person who under the respective legal system may be dealt with for an offence which is different from an adult'. Thus the Beijing Rules do not apply where children are treated as adults (as, in most Commonwealth jurisdictions reviewed, when they have committed serious offences). As Van Bueren (1995, 171) points out, this is both circular and runs counter to 'logic and common sense' as 'the reason for the special protections and entitlements of children is because of their age and vulnerability not because of the system of trial.' Paragraph 4.1 of the Beijing Rules advocates setting an age of criminal responsibility that is not 'too low ... bearing in mind the facts of emotional, mental and intellectual maturity'. For the purposes of the UNROC, a child 'means every human being under the age of eighteen...unless majority is attained earlier' (Article 1) and Article 40.3 (a) calls for 'the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.'

8. There is within Commonwealth countries considerable variation in the age of criminal responsibility, the age of prosecution and the age at which juvenile justice jurisdiction ends. Table 1 in Appendix 2 presents these ages for the countries reviewed. However, it is important to acknowledge that these ages have changed over time to reflect 'modern' considerations and can, no doubt, change again if appropriate. All the Commonwealth countries reviewed have now moved (or intend to move) from the common law age of criminal responsibility of 7 yrs (though it still remains 7 yrs in other Commonwealth countries). However, there is another trend apparent in some of the Commonwealth jurisdictions reviewed to which attention should be drawn: mechanisms for dealing with offences by children under the age of criminal responsibility. Two examples are: in England and Wales, under section 11 of the Crime and Disorder Act 1998, a child under 10 yrs who has committed an act for which s/he might have been prosecuted if over the age of 10 can be made the subject of a 'child safety order' (imposed by a magistrates' family proceedings court). In the Australian Capital Territory (ACT), the police may apprehend children under 10 yrs whose behaviour has the 'physical elements' of an offence (section 72, Children and Young People Act

1999). It has always been possible in some jurisdictions to deal with offending by children under the age of criminal responsibility as a 'care and protection' matter. However, these provisions seek to go further: in effect, they diminish the age of criminal responsibility and in doing so they breach the UNROC.

9. The age of criminal responsibility in Scotland - at 8 yrs - is the lowest in the Commonwealth jurisdictions reviewed.² In both Ghana and Canada, the age of criminal responsibility is now 12 yrs – the highest in the Commonwealth jurisdictions reviewed. The most common age of criminal responsibility seems to be 10 yrs (as in England and Wales and all Australian jurisdictions). However, this can be modified by the use of a (rebuttable) presumption that children between the ages of 10 and 14 are not criminally liable since they do not have the capacity to distinguish between right and wrong (*doli incapax*). This rebuttable presumption used to be applied in England and Wales, but was repealed by section 34 of the Crime and Disorder Act 1998. However, it is still entrenched in common law in some Australian jurisdictions and in statute in others. Generally speaking, the prosecution has to show that the child can distinguish between what is 'right' and 'wrong'. The courts decide this on a case-by-case basis since a child's level of understanding will vary according to his or her background, education and maturity. Case law has said that there must be evidence that the child knew that what s/he was doing was 'seriously' wrong or that the act was wrong 'according to the ordinary standards of reasonable people'. The most common form of evidence used by prosecutors to rebut the presumption is statements made by the child to the police. It cannot be presumed from the mere commission of the act. However, there are slight differences in the statutory formulations between Australian jurisdictions: in some, there must be evidence that the child actually knows that his or her conduct is wrong. In others, the presumption is phrased in terms of the child's 'capacity to know' – 'a broader evidentiary test (e-mail communication, Director, Children/s and Youth Law Centre, Sydney, Australia, 31.08.5).

10. The Child Justice Bill 2002 in South Africa (which will raise the age of criminal responsibility from 7 to 10 yrs) introduces the presumption and seems to go further than the previous practice in England and Wales and the current practice in Australia by insisting that, if the prosecutor intends to prosecute a child below the age of 14 yrs, defence counsel must be appointed and s/he can have the child tested (at state expense) to assess his or her state of emotional, cognitive, social or psychological development.

11. New Zealand takes a slightly different approach to achieve the same aim: it distinguishes between the age of criminal responsibility (10 yrs) and the age of prosecution (14 yrs). As a result, those aged 10 to 14 who commit offences cannot be prosecuted (except for murder or manslaughter) though, from 10 yrs, they are viewed as criminally responsible for their offending (and can be dealt with through care and protection proceedings, police warning and police diversion and, in certain circumstances, youth justice family group conferences).

12. Juvenile justice jurisdiction ends in Scotland at 16 yrs – again the lowest in the Commonwealth countries reviewed. Children who come into the system before this age may remain until the age of 18. In practice, however, most offenders after the age of 16 are dealt with in the adult criminal courts (McAra, 2002, 454-456). Offenders in New Zealand are treated as adults at 17 yrs. In most jurisdictions in Australia, juvenile justice jurisdiction also ends at 17 yrs, except in Victoria and Queensland where jurisdiction ends at 16 yrs. The juvenile justice systems of these jurisdictions, arguably, breach the UNROC. In line with the UNROC, juvenile justice jurisdiction normally ends in Canada, England and Wales, Ghana and South Africa when the offender reaches 18 yrs.

13. These differences in the age of criminal responsibility and the age at which juvenile justice jurisdiction ends are only to be expected: Commonwealth countries reflect diverse social, economic,

² The Advisory Group on Youth Crime has recommended that this be increased to 12 yrs (Scottish Executive, 2000).

cultural and political systems. However, there is also merit in some common standards and, at the very least, it seems appropriate, in line with the UNROC, for offenders to be treated as 'juveniles' until the age of 18 yrs.³ The age of criminal responsibility was traditionally viewed as the age at which societies were willing to punish child offenders and so 'higher' ages were seen as protective. Given the shifts in emphasis in the aims of juvenile justice (discussed in section 3.3), there may be less reason to protect children from restorative or rehabilitative intervention and so 'lower' ages of criminal responsibility may be more acceptable. A good compromise is offered by distinguishing between the age of criminal responsibility (which could be low) and the age of prosecution (which could be high).

14. Because of public and media concerns in some of the Commonwealth countries reviewed, serious offenders can be dealt with as adults. We deal with this further in section 3.13. However, we want to make a particular point here: we need to distinguish between trial procedures and penalties. Young children are unlikely to be capable of understanding and participating in court proceedings. This was the test used by the European Court of Human Rights in *T v. United Kingdom* (2000) 30 EHRR 121 which held that two boys convicted of the abduction and murder of a small boy had been denied a fair trial. It held that procedures put in place to aid their understanding and participation were inadequate. Changes to procedures are possible, as has been done in some countries with respect to child victims (to make trial processes more bearable). But the issues are perceived somewhat differently with respect to child offenders; they do not receive the same sympathy or understanding. However, trials in adult courts for children are relatively rare and questions can be raised about their value. Consideration could, therefore, be given to legislating for a higher age of prosecution, even for offences of murder and manslaughter (children below this age who committed serious or persistent offences could still be dealt with under care and protection mechanisms). An alternative approach is to treat all individuals under the age of 18 yrs as juveniles for criminal justice matters, as the UNROC suggests. With respect to the imposition of 'adult' penalties, age should continue to be a major mitigating factor. Treating only child offenders who commit certain offences as vulnerable and in need of special protection has little logic. The reason for introducing exceptions to the juvenile justice system and for treating child offenders as adults is the re-assertion of public protection as a priority in juvenile justice policy. We consider this further in section 3.3 where we discuss the aims of the juvenile justice. But first we want to elaborate on the point made above about new ways of dealing with anti-social, but non-criminal, behaviour.

3.2 Dealing with antisocial behaviour

15. Paragraph 3 of the Beijing Rules states that the Rule should apply not only to children who have committed criminal offences, but also to children who have committed what would conventionally be described as 'status offences' – acts which would not be punishable if committed by an adult. Many jurisdictions took steps in the 1970s to remove the regulation of status offences from their juvenile justice systems. However, there has been a revival of sorts in some of the Commonwealth jurisdictions reviewed and we provide one example here.

16. Under section 14 of the Crime and Disorder Act 1998, children under 10 yrs in England and Wales can be made the subject of a 'local child curfew' which involves placing a ban on unsupervised children between 9 pm and 6 am within specified public areas for up to 90 days. This power was extended in the Criminal Justice and Police Act 2001 to children under 16 yrs. Also, in England and Wales, the local authority and police in consultation with each other can apply for a civil court order - an anti-social behaviour order - against an individual (aged 10 yrs and above) whose behaviour is

³ In countries where records of birth are not always kept, a child's age can be an issue and guidance should be provided to help juvenile justice agencies determine this: see, for example, section 19 of the Juvenile Justice Act 2003 (Ghana), section 24 of the Child Justice Bill (South Africa), section 57 of the Young Offenders Act 1993 (South Australia) and section 6 of the Youth Justice Act 1997 (Tasmania).

anti-social (section 1(1), Crime and Disorder Act 1998).⁴ It has effect for a minimum of two years (with breach being punishable by imprisonment or age-related alternatives). However, restrictive orders such as these, which need only be proved to the civil standard of proof, and breach of which may result in significant sanctions, have been challenged both in principle and in practice: for example, they blur the boundaries between criminal and civil proceedings, their scope is wide and their penalties are disproportionate to the behaviour (Burney, 1999; Padfield, 1998). Because of this failure to provide adequate safeguards, such orders are in breach of the Beijing Rules. Steps should be taken either to ensure compliance with these Rules or to abolish these orders.

3.3 The aims of juvenile justice

17. As noted in the introduction, most juvenile justice systems are an empirical amalgam of justice, welfare, crime control and diversion. The emphasis given to these different approaches can vary from jurisdiction to jurisdiction and across time in particular jurisdictions. Paragraph 5.1 of the Beijing Rules emphasises the well-being of the juvenile and also refers to 'any reaction' being 'in proportion to the circumstances of both the offenders and the offences.' Paragraph 17 expands on these statements and refers to reactions being in proportion 'not only to the circumstances and gravity of the offence but also to the circumstances and needs of the juvenile as well as the needs of society.' Article 3 of the UNROC echoes these sentiments: it states that in all actions concerning children, the best interests of the child should be a primary consideration; and Article 40 states, among other requirements, that children who have committed offences should be treated with dignity, should be reintegrated into society, and should be dealt with so far as possible without resorting to judicial proceedings provided their rights are safeguarded.⁵ It also states that children should be dealt with 'in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.' The United Nations Guidelines for the Prevention of Delinquency (the Riyadh Guidelines) further promote ways in which children can be integrated into society.

18. There are three main problems with these international documents. First, the Beijing Rules complicate matters by introducing ideas about public protection without clear guidance about how to prioritise competing claims (though it does assert that the well-being of the juvenile should be the 'guiding factor'). Second, proportionality of sentences with respect to offences is a recognised component of a justice or just deserts approach (see, for example, von Hirsch and Ashworth, 1998; von Hirsch, 2001). However, coupling this with proportionality with respect to the circumstances of the offender is a further complication and it is difficult to see how this can be translated into practice (if, for example, the offence is minor but the offender's circumstances are grave). Third, the primacy of 'best interests' of the child is now widely questioned. Indeed, some years prior to the UNROC, commentators (Allen, 1964; Goldstein et al., 1973) were already questioning the objectivity of this notion and described it rather as hypocritical and as concealing the real reasons for state intervention. It seems to mean that, under the UNROC, children who offend could be dealt with (including being placed in custody) for welfare reasons. Some of the Commonwealth countries reviewed (for example, New Zealand and Canada) explicitly prohibit this (although other jurisdictions - for example, Scotland and Ghana - continue to see 'best interests as a primary consideration in matters relating to juvenile offenders).

19. The Commonwealth jurisdictions reviewed all pay some regard to the content of these UN documents with respect to the aims of juvenile justice policy, but language and emphases have also changed over the last 15 years so that reconciliation, reparation and restoration are stressed now, as

⁴ Scotland has also expressed the intention to introduce anti-social behaviour orders.

⁵ In addition, it states that all children should be presumed innocent until proven guilty, should be informed of the charges against them, should appear before competent authorities, should not be compelled to incriminate themselves, should be able to have decisions involving them reviewed, should have free access to interpreters and should have their privacy respected. We have not commented on these as they are not contentious and, in the main, the Commonwealth jurisdictions reviewed endorsed them.

well. Most Commonwealth jurisdictions reviewed have also now separated procedures for dealing with abused and neglected children and children who offend (some have quite separate legislation dealing with the two groups while others deal with them in different parts of the same legislation). Scotland is an exception here. Scotland has taken a completely different direction from juvenile justice policy elsewhere: it introduced a welfare-based juvenile justice system in the Social Work (Scotland) Act 1968 and this was implemented in 1971. This involved abolishing the existing juvenile courts and creating children's hearings which deal not only with children who offend, but also abused or neglected children, and children who have truanted or are beyond parental control. The critical test is whether or not the child is in need of compulsory measures of care. The juvenile justice system in Scotland has remained largely unchanged since then, but it was given a new statutory framework in the Children (Scotland) Act 1995. Section 16[1] affirmed that hearings and courts are to deal with the child who offends in such a way that 'the welfare of that child throughout his childhood shall be...[the] paramount consideration' (though it also said that the primary role of welfare could be reduced if it was necessary for the protection of the public from serious harm). Other jurisdictions, as noted earlier, have also continued to assert the best interests of the child as the paramount consideration (for example, the ACT and Ghana).

20. Taking some steps to set out what the juvenile justice system is trying to accomplish is an important preliminary task for legislatures as these objectives and principles can then be relied on to guide practice and to measure the system's effectiveness in meeting its objectives. Most of the Commonwealth jurisdictions reviewed have done this. A few examples are provided here.

21. The Children, Young Persons and Their Families Act 1989 in New Zealand was the first example of legislation which set out a number of general objects and principles for dealing with children. Section 4, for example, refers to promoting the well-being of children by having culturally sensitive and appropriate procedures and services and to assisting families and specifically states that young offenders should be dealt with in a way that 'acknowledges their needs' and that gives them the opportunity to develop in 'responsible, beneficial and socially acceptable ways'; and section 5 refers to the principle that consideration should be given to the wishes of the child. The Act also sets out, in section 208, a number of principles that relate specifically to youth justice: it refers to the principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child if there is an alternative means of dealing with the matter; it refers to the principle that a child who commits an offence should be kept in the community as far as practicable; it refers to having due regard to the interests of any victims; and it states that any sanctions imposed should take the least restrictive form that is appropriate in the circumstances.

22. The Youth Criminal Justice Act 2002 in Canada states that its aims are: to prevent crime by addressing the circumstances underlying offending; to rehabilitate and reintegrate the offender and to ensure the young offender is subject to meaningful consequences 'in order to promote the protection of the public' (section 3[1]). These sentiments, as we will see, are echoed in the sections relating to the purposes of sentencing. Section 3[1] also distinguishes between the treatment of young and adult offenders by emphasising the importance of rehabilitation and reintegration, fair and proportionate accountability, young offenders' rights and timely interventions; it advocates measures which reinforce respect for social values, which encourage the repair of harm to victims and the community and which respect gender, ethnic and other differences; it stresses that victims should be treated with dignity and compassion, provided with information and given the opportunity to participate; and it advocates encouraging parents to support their children in addressing their offending.

23. As Doob and Sprott (2004, 226) note, although the words 'protection of the public' appear in the Canadian legislation, the emphasis is not on incapacitation and deterrence, but on rehabilitation, reintegration and accountability. This is an important change as setting out objectives does not necessarily make practice easier if these objectives themselves reflect different directions. We take some examples here from Australian legislation which generally endorses many of the

'restorative' principles already mentioned but include other conflicting values too: for example, section 3 of the Young Offenders Act 1993 (South Australia) refers to public protection and deterrence as well as 'the care, correction and guidance necessary for their development into responsible and useful members of the community.' Section 4 of the Youth Justice Act 1997 in Tasmania includes among its main objectives ensuring that young offenders are given 'appropriate treatment, punishment and rehabilitation'. Section 5 then includes as 'general principles of youth justice' protecting the public and punishment appropriate to the offender's previous offence history alongside encouraging acceptance of responsibility, involving victims and offenders' families, and the use of custody as a last resort. In Western Australia, section 6 of the Young Offenders Act 1994 refers to the main objectives of the Act as rehabilitating, punishing and managing young offenders; section 7 lists the general principles of juvenile justice and this includes protecting the community. Unless restricted in meaning, references to public protection and punishment allow traditional criminal justice values to retain their hold.

24. In England and Wales, section 37 of the Crime and Disorder Act 1998 provides that the principal aim of the youth justice system is to prevent offending by children and that, in addition to any other duty to which they are subject, 'it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim'. However, this was introduced without section 44 of the Children and Young Persons Act 1933 being repealed and, in that legislation, it is stated that the 'courts should have regard to the welfare of the child or young person, and [they] shall in a proper case take steps...for securing that proper provision is made for his education and training.' Thus those sentencing must now have regard to the new aim, but they are given no guidance as to how, in individual cases, they should balance the potentially conflicting aims of having regard to the welfare of the child and the prevention of offending. To help resolve this matter, the Government has outlined the need for a single main sentencing purpose of 'preventing offending' (Home Office, 2004). This has not been settled yet, but the debate around this serves to highlight both the difficulty of identifying the main aims of juvenile justice and the problem of legislating conflicting aims. The notion of 'preventing offending' as a sole aim is problematic as it does not provide guidance on how this is to be achieved: whether through rehabilitation, punishment, reconciliation or some other mechanism.

25. Setting out in legislation the juvenile justice system's aims, values and principles is good practice.⁶ These can then be relied on to guide practice and to measure the system's effectiveness in meeting its objectives. However, these aims, values and principles should be tied together in a coherent framework and should not lead decision makers in conflicting directions. Examples of the values and principles which could be endorsed are: recognition of children's vulnerability and developmental stages; restoration and reintegration; diversion from court and custody; fairness; due process; and the accommodation of diversity. They should be clear in their purpose and transparent.

3.4 Restorative justice processes and juvenile justice

26. The resolution of the Economic and Social Council of the United Nations says that restorative justice should be available at all stages of the criminal justice process (Principle 6); they should be used only with consent of the parties, parties should be able to withdraw consent at any time during the process, the agreements arrived at should be voluntary and agreements should

⁶ For other example, see also, in the ACT, sections 10-14 and 68 of Children and Young People Act 1999; in Queensland, section 2 of the Juvenile Justice Act sets out the principal objectives of the Act; and Schedule 1 sets out a charter of juvenile justice principles; in South Australia, section 3 of the Young Offenders Act 1993 sets out the objects of the Act; in Tasmania section 4 of the Youth Justice Act 1997 sets out the main objectives of the Act and section 5 then sets out 'general principles of youth justice'; in Western Australia, section 6 of the Young Offenders Act 1994 sets out the main objectives of the Act and section 7 sets out the general principles of juvenile justice; in NSW, section 3 of the Young Offenders Act 1997 sets out the objects of the Act, section 7 sets out the principles underlying warning, cautions and youth justice conferences and section 34 sets out the principles and purposes of conferences. For South Africa, see sections 2 and 3 of Child Justice Bill.

contain only reasonable and proportionate obligations (Principle 7); all parties should acknowledge the basic facts of a case as a basis for participation and participation should not be used as evidence of admission of guilt in subsequent legal proceedings (Principle 8); disparities with respect to power imbalances, age, maturity or intellectual capacity should be taken into consideration in referring a case to and in conducting a restorative process (Principle 9); the parties should have the right to legal advice before and after the restorative process and to translation and/or interpretation, minors should have the right to parental assistance, before agreeing to participate, the parties should be fully informed of their rights, the nature of the process, and the possible consequences of their decision and neither the victim nor the offender should be induced to participate in restorative processes or outcomes (Principle 12); discussions in restorative processes should be confidential and should not be disclosed subsequently, except with the agreement of the parties (Principle 13); where no agreement, case should be referred back and decision as to how to proceed taken without delay; a lack of agreement should not be used as justification for a more severe sentence in subsequent criminal justice proceedings (Principle 15); failure to implement an agreement made should be referred back and a decision as to how to proceed should be taken without delay and failure to implement the agreement should not be used as justification for a more severe sentence in subsequent criminal justice proceedings (Principle 16).

27. Most of these principles are not controversial (though some commentators question the relevance of proportionality in restorative agreements), but, perhaps surprisingly, the principles seem to advocate against using restorative processes for young offenders who have adult victims because of potential power imbalances (Principle 9 above). However, some of the Commonwealth countries reviewed have taken the lead here and have now incorporated restorative justice processes into their juvenile justice systems. These processes also give good effect to another requirement of the UNROC. Article 12 advocates taking account of children's views in any judicial or administrative hearing affecting them.

28. Van Ness et al. (2001, 6) described as the 'hallmarks' of restorative justice practice victim-offender mediation, conferencing, and sentencing circles. Only restorative conferencing is discussed here as this is the most common example of restorative justice processes in the Commonwealth countries reviewed.⁷ Such processes share the values of empowering young offenders, families, and victims by giving them a role in the decisions about how best to respond to offending and thereby reducing the powers of professionals who must take these parties' views into account. However, not all examples of restorative conferencing operate the same way. For example, in some jurisdictions, variants of restorative conferencing are primarily managed by the police (as in parts of England); in some, they are managed by the youth courts (as in South Australia); in some, they are managed by social welfare agencies (as in New Zealand); and, in some, they are managed by organisations which rely on facilitators or convenors recruited from the community (as in Queensland). In some jurisdictions, restorative conferencing has a statutory basis (as in New Zealand and most Australian states and territories); in others, it does not (as in Victoria and the ACT).⁸ In some jurisdictions, restorative conferencing deals with minor to medium serious and/or first offenders (in Western Australia, for example, Schedules 1 and 2 of the Young Offenders Act 1994 lists offences which cannot be cautioned or referred to a juvenile justice team (for consideration of a conference). These are the more serious offences.); in other jurisdictions, restorative conferencing deals with the more serious and repeat offenders (as in New Zealand and South Australia). In some jurisdictions, restorative conferencing can be used to restrict the police referring cases directly to court (as in New Zealand), as part of police diversion (as in most Australian states and Canada) or as an aid to judges' decision making (as in New Zealand, most Australian states and Canada though only in New Zealand is it mandatory to do so). In Victoria, restorative conferences are only used as an alternative to a supervised order for more serious offenders with prior offences. Restorative conferences also differ

⁷ For more information on sentencing circles in Canada, see Lilles, 2001; and for information on victim-offender mediation, see Marshall and Merry, 1990 and Umbreit et al., 1998.

⁸ There is provision in the ACT legislation for family group conferences in care and protection matters.

in various jurisdictions in the limits on the types of outcomes permitted⁹ and in who has to agree to the outcome.¹⁰

29. Having highlighted some differences, restorative conferences nevertheless tend to operate in similar ways. The young offender (who must admit the offence), his or her parents or other supporters, any victim who wishes to attend and his or her supporters, a police officer (s/he need not be present in some jurisdictions) and a conference convenor meet to discuss the reasons for the offence, its impact and how best to deal with it. These agreements may involve apologies, reparation, and community work or service for the victim. Where the conference is used as a diversion from court, this agreement is a legally binding document. Where the conference has resulted from a referral by a judge, the agreements are advisory only, but (certainly in New Zealand) are usually followed.¹¹

30. Research on restorative conferencing shows that, to a large extent, it has achieved the key restorative aims of involving offenders, victims and supporters, achieving agreement about a co-operative and constructive response to offending, healing victims' hurt and holding offenders accountable (Weitekamp and Kerner, 2003). Research also shows that offenders, their victims and their supporters generally have positive experiences in conferences. Compared to offenders and victims dealt with solely in juvenile courts, those who participated in restorative conferences tend to perceive the processes as fair and they are generally more satisfied with their outcomes (Maxwell et al., 2004).

31. Included here is a brief discussion of attempts to introduce restorative justice in England and Wales. First, the Crime and Disorder Act 1998 introduced local multi-agency youth offending teams (YOTS) where young offenders could be offered a range of restorative interventions including direct or indirect mediation, family group conferences or restorative conferencing. Holdaway et al.'s (2001) evaluation of these teams found that not all were offering the full range of restorative interventions; consultation with victims was sometimes overridden by the need for speedy justice; and the compulsory nature of reparation under the 1998 Act means that reparation had become 'routine' rather than 'meaningful'. The nature of some of the activities organised as part of reparation orders has also raised some disquiet. Holdaway et al. (2001) found a strong emphasis on practical tasks such as litter collection or conservation work. Some of those interviewed for the evaluation of the pilot reparation projects described such activities as 'a form of junior community service with minimal reparative benefits' (Dignan 2000, 24).¹²

32. Second, referral orders, introduced in the Youth Justice and Criminal Evidence Act 1999 were a further attempt to provide elements of restorative justice as a mainstream response to offending in England and Wales. Young offenders coming before the youth court for the first time and who plead guilty to their offence have to be referred by magistrates to youth offender panels (YOPs) unless either an absolute discharge or a custodial sentence is considered appropriate. The purpose of these panels is to agree a contract (designed to emphasise responsibility for offending, to prevent re-offending, to achieve reintegration and to make reparation). The panels, established by

⁹ For example, outcomes are fairly limited in Western Australia whereas, in South Australia, the conference can impose up to 300 hours of community service.

¹⁰ For example, in South Australia, the young person and the police officer must, at a minimum, agree; in NSW, the young person and victim (if present) must agree and in Queensland, the young person, the police officer and the victim (if present) must agree.

¹¹ There seems to be a shift occurring with respect to the role of family group conferences in New Zealand. The youth offending strategy states that family group conferences "are particularly appropriate for those youth who need to be held accountable for their offending, but who are succeeding in other parts of their lives and have few other problems that require any intervention" (Ministry of Justice and Ministry of Social Development 2002, 35). Only time will tell whether or not this, in reality, signifies a return to reliance on decision-making by professionals on how to deal with offending and a change in the role and influence of family group conferences.

¹² See also the critical comments of Morris and Gelsthorpe (2000) and Gelsthorpe and Morris (2002).

YOTs, consist of three members - one from the YOT and two from a pool of community volunteers, as well as a parent or guardian, the young offender and the victim. The referral to the panel (the referral order) is the only sentence imposed by the magistrates and the offender can only be taken back to court if s/he fails to comply with the agreed contract. Most panel meetings end in agreements with reparative elements and most contracts are successfully completed (Newburn et al. 2001). The referral orders were piloted in 11 areas, but became nationwide in 2002. However, some commentators continue to question the extent to which these orders fully reflect restorative justice values (Ball, 2000; Morris and Gelsthorpe, 2000).

33. According to Bottoms and Dignan (2004, 164), restorative justice initiatives have barely taken off in Scotland (though there are plans to encourage the police to administer restorative cautions). Even though some commentators have suggested that children's hearings could be adapted to meet restorative objectives, the system would, in our view, need considerable changes: the ethos is strongly oriented to the welfare of the child, there is no right for victims to attend children's hearings and current dispositions are limited and do not encompass restorative outcomes.

34. In Ghana, Mensa-Bonsu (2005) writes that there were attempts to replicate traditional victim/offender mediation practices by setting up a system of child panels to operate in both civil and criminal matters in an extra-judicial manner. However, according to her (2005, 17) 'no firm steps have been taken to actualise the legal intent'. The main reasons given for this were a lack of funding and restrictive statutory requirements (for example, that the panels meet once in three months). This example can serve as a cautionary tale.

35. This review of restorative practice suggests that there is merit in exploring ways in which restorative justice processes can be made a major part of juvenile justice systems though different jurisdictions may well have different motivations for doing this. Receptivity to restorative justice ideas may be contingent on other political developments. In South Africa, for example, it is arguably the context of political transition and the strong theme of reconciliation that has fuelled the desire to include restorative justice principles in the proposed new system of dealing with child offenders (Skelton, 2002). A similar point can be made about the interest in restorative justice in Northern Ireland (McEvoy and Mika, 2002). In England and Wales, it seems that it was the growing emphasis on victims' interests that provided a fertile ground for debates about and moves towards the incorporation of elements of restorative justice (Zedner, 2004). Restorative justice processes are, of course, not without their critics. However, many of their concerns can be addressed (see Morris, 2002, Weitekamp and Kerner, 2003 and Zehr and Toews, 2004 for more information). There will also continue to be debate about the best mechanisms for translating restorative justice values into practice,¹³ but research will be a helpful tool here.

3.5 Diversion from court

36. Paragraph 11 of the Beijing Rules advocates that consideration should be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal hearings and, in particular, identifies the importance of the role of the police and prosecutors in disposing of cases in this way. It also alerts us to the dangers of such agencies putting undue pressure or coercion on children to consent to diversion and the need to have procedures to prevent this (for example, a review of the decisions made). Article 37 of the UNROC states that children should be arrested only as a measure of last resort and Article 40.3(b) advocates, wherever appropriate and desirable, dealing with children without resorting to judicial proceedings provided their legal rights are fully respected. The documents are premised on the need to protect children from stigma and contamination and

¹³ It appears, for example, that restorative conferences in some jurisdictions are relatively successful at reflecting a victims' perspective (see, for example, Strang, 2001; Maxwell et al., 2004). In contrast, Newburn et al. (2001) noted the very low level of attendance by victims at youth offender panels (only 6 per cent had victims present) and that, in a significant minority of panel meetings (25 per cent), no mention was made at all of the victim's perspective.

diversion is widely accepted as a key part of modern juvenile justice policy generally and in the Commonwealth jurisdictions reviewed in particular. However, there are concerns: for example, net-widening, discriminatory practices, a lack of procedural safeguards (Pratt,1986; Davis et al., 1989; Skelton, 2001; Muncie, 2004). Legislation can attempt to address these.

37. The potential role of restorative conferences, in the Commonwealth jurisdictions reviewed, in keeping young offenders out of courts has already been mentioned. The Commonwealth jurisdictions reviewed have also encouraged the use of police warnings (both formal and informal) to keep young offenders out of courts though their approach to achieving this differs somewhat. Some jurisdictions have allowed the police simply to exercise their discretion in this matter; other jurisdictions have set out the requirements for a police caution or warning in legislation, but, even there, the language and criteria referred to differ, as do the mechanisms for controlling this discretion.

38. For example, in Ghana, the police may caution or warn a juvenile if it is in the best interests of the juvenile to do so (section 12 of the Juvenile Justice Act 2003). Section 25 also provides that juveniles can be dealt with outside the criminal justice system if it is in the best interests of the child to do so, but, significantly here, it is the courts that make this decision. Section 26 specifies the purposes of diversion and these include: encouraging the offender's accountability, promoting the offender's reintegration, providing the person or community affected by the harm with the opportunity to express their views on the impact of the harm, promoting reconciliation between the offender and the person or community harmed and preventing stigmatisation. These purposes are clearly as much restorative in intent as diversionary. Section 27 sets out minimum standards for diversion programmes. They should not be harmful or interfere with schooling and they should give the offender useful skills, be age appropriate and promote the offender's well-being.

39. In the ACT, under section 81 of the Children and Young People Act 1999, a police officer cannot institute a prosecution unless an 'authorised officer' (an officer not involved in the investigation of the alleged offence) has consented in writing and, in deciding whether or not to consent to a prosecution, s/he must take into account a range of factors, for example, the seriousness of the offence, any previous court findings or police warnings, the child's age, maturity and mental capacity, parental attitudes, and the prevalence of such offences. In New South Wales, section 14 of the Young Offenders Act 1997 says that children may be entitled to be dealt with by a police warning, but not if the offence is a violent one and the police officer feels it more appropriate, 'in the interests of justice', to deal with the offence in a different way. Section 20 refers to the entitlement to a police caution in similar terms, but, this time, the police officer must consider: the seriousness of the offence, the degree of violence involved, the harm to the victim, the child's previous offence history, and any other matter thought appropriate. If a warning or caution is not considered appropriate, the officer must refer the child to a specialist police officer for consideration of a restorative conference. Section 37 sets out similar conditions for entitlement to be dealt with by a restorative conference. Police in Queensland must also consider dealing with children in ways other than by starting proceedings if it is 'more appropriate' and if the offence is not 'serious' (section 11 of Juvenile Justice Act 1992). The officer must consider here the circumstances of the offence and the child's prior history.

40. In Canada, though the Young Offenders Act had encouraged the police to keep young offenders out of the courts, in practice this did not always happen. As a result, the Youth Criminal Justice Act 2002 introduces much firmer guidelines that have to be followed. Section 4[d] states that measures outside of formal referral to court such as warnings and referrals to community programmes are presumed adequate to hold young offenders accountable for their offending if they have committed a non-violent offence and have not previously been found guilty of an offence; it also states that having been found guilty before or having experienced extra-judicial measures before should not preclude such measures again if they are adequate to hold the young offender accountable.

Thus the police are required to consider non-court approaches to holding young offenders accountable for their offences in all cases before starting judicial proceedings (section 6[1]).

41. In New Zealand, police actions are also controlled, in part by guidelines, but also through the family group conference which restricts direct access to courts. Frontline police there determine whether to deal with the young offender informally, by warning, by arrest,¹⁴ or by referral to police youth aid (a branch of the police who specialise in working with children) who will in turn decide whether to warn, to divert (this involves some action in addition to a warning), or to refer the young offender to a family group conference. This means that the police cannot refer young offenders who have not been arrested to the youth court without first having a family group conference; most of these conferences end in an agreement that does not involve a court appearance.

42. The Child Justice Bill 2002 in South Africa introduces the notion of a preliminary inquiry to establish whether or not the child can be diverted and, if so, which diversion option should be followed (section 25).¹⁵ Prior to this inquiry, a probation officer will assess the young offender and s/he may recommend that the child should be diverted (sections 19-24). The preliminary inquiry involves a discussion presided over by a magistrate and the child, his or her parents and the probation officer must attend. The police and the child's legal representative may attend the inquiry. It is, however, the prosecutor who has the final say on whether or not the matter can be diverted (section 39). The purposes of and criteria for diversion are covered in Chapter 6 of the Bill (sections 43 and 44). Section 45 sets out the minimum standards applicable to diversion (such as it should promote the child's dignity and well-being, impart useful skills, contain restorative justice elements and not be harmful); and section 47 introduces a range of innovative diversion options. These options include: apology, compensation, a formal caution, a compulsory school attendance order, a family time order (which requires the child to spend a specified number of hours with his or her family), a positive peer association order, and a good behaviour order. Options are set out in three levels (level one is the least onerous and level three is the most onerous) and this determines also the length of time the order is in force. Referral to appear at a family group conference or victim-offender mediation is a level two diversion option (sections 42 and 43 provide the detail here). Level three diversion options are only available for children over 14 where the court is likely to impose a sentence of imprisonment not exceeding six months and, consequently, are more 'severe' than diversionary outcomes possible in any other Commonwealth jurisdiction reviewed: for example, referral to a programme for a period not exceeding six months including a residential element which does not exceed 35 days in total and 21 consecutive days during the operation of the programme is a level 3 diversion option.

43. In England and Wales, although the police make the preliminary decisions about how to proceed, there is an attempt there now to involve others. Formal police action results either in a reprimand or a final warning (section 65 (1) of the Crime and Disorder Act 1998). A final warning initiates a referral to the local YOT for an assessment of what intervention may be required to reduce the likelihood of offending. The YOT (comprising of at least a social worker, a probation officer, a police officer, a person nominated by the local health authority, a person nominated by the local education authority and a YOT manager) then provides such programmes of rehabilitative intervention as are required. The Criminal Justice Act 2000 removed the requirement that a police reprimand or warning had to be given at a police station and this opened up the possibility of 'restorative conferences' at which parents, victims and others could attend (Young and Goold, 1999). However, to date there is little conclusive evidence to suggest either that the new system is

¹⁴ A child or young person may only be arrested in New Zealand in certain statutorily defined situations: to ensure their appearance at the youth court, to prevent the commission of other offences, to prevent the loss or destruction of evidence or interference with witnesses, when it is required in the public interest, and when the offence is "purely indictable." Only juvenile offenders who are arrested will appear in the youth court and this is usually under a fifth of those who come to police attention.

¹⁵ It also enables the prosecutor to assess whether or not the case should process to trial and determines the release or placement of the child prior to the court hearing.

experienced as more participative by young offenders (Holdaway et al., 2001), that it is functioning in a systematic fashion or that it is having a major impact on the number of cases referred to court. There is still evidence of relatively minor cases being sent to court there (Audit Commission, 2004).¹⁶

44. Every jurisdiction examined accepts the value of diversion from court and so the issue is how best to achieve this. This review suggests that it is necessary to restrict police discretion though there are different ways of doing this. Also, despite legislative (or other policy) intentions, diversion does not always occur and so attempts to encourage it require careful monitoring (discussed in section 3.15) to ensure that this objective is realised.

3.6 Diversion from custody

45. Paragraphs 13 and 19 of the Beijing Rules state that children should be detained or imprisoned only as a measure of last resort and for the shortest period of time. Article 37 of the UNROC also states this. Both documents further refer to alternatives to custody, holding young offenders separately from adults and providing constructive activities within custodial regimes. The reasons for encouraging diversion from custody (both pre-trial and as a sentence) are widely accepted: for example, custody is expensive (the annual cost of a place in a youth offender institution in England is over £50,000 (National Audit Office, 2004)) and it is viewed as largely ineffective (Social Exclusion Unit, 2002; NACRO, 2003; Committee of Public Accounts, 2004; Muncie, 2004). Legislation can aid efforts to reduce the number of children in custody. For example, it can set out the situations in which custody is warranted; it can impose time limits to custody; and it can demand that reasons should be given where custody is used. The Commonwealth jurisdictions reviewed provide some examples of these.

46. Canada's legislation has placed restrictions on the pre-trial detention of juvenile offenders. Courts are expected to presume that such detention is not necessary if it is unlikely that, on being found guilty, the young offender would not, in fact, be committed to custody (Youth Criminal Justice Act, section 29[2]). Section 29[1] explicitly prevents pre-trial detention on the grounds of welfare.¹⁷ In Ghana, section 23 of the Juvenile Justice Act 2003 imposes a seven-day limit on a remand warrant and the total period of remand cannot exceed three months or six months in the case of a capital offence.

47. To restrict the use of custody as a sentence, the Canadian Youth Criminal Justice Act, section 39[1] makes it clear that custody can be imposed only if certain conditions are met: if the young offender has committed a violent offence; if the young offender has previously failed to comply with more than one non-custodial sentence; if the offence is moderately serious; and if the young offender has a history of findings of guilt. In 'exceptional' cases, however, custodial sentences would also be appropriate if the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purposes and principles of sentencing. The maximum amount of custody set out in the Act is two or three years of custody and supervision for all offences except murder. Where custody is imposed, judges must give their reasons. The overall intent of these provisions, therefore, is clear: to limit the use of custody. In addition, to accomplish the aim of reintegration, one third of any custodial sentence is normally to be served in the community and the Act provides possibilities for additional non-custodial sanctions (though it will be up to provinces which of these, if any, they provide).

¹⁶ See also Young and Hoyle's (2002) critical evaluation of the restorative cautions and conferences in the Thames Valley Police Authority.

¹⁷ However, judges can refer a young offender to a child welfare agency to determine whether or not s/he is in need of their services (section 35).

48. Legislative directives, however, are not always successful. In England and Wales, for example, despite an initial decrease in the use of custody following the reform of the juvenile justice system in 1998 and the existence of criteria which magistrates (and judges) had to refer to to justify custody (basically, these were the seriousness or persistence of offending), the use of custody has risen again there (Audit Commission, 2004).¹⁸ There have also been concerns about geographical variations in the use of custody¹⁹ and about the overuse of custody for young black offenders (NACRO, 2003). Indeed, the Youth Justice Board published figures in 2002 which showed that, if there was greater consistency in sentencing practices from area to area in England and Wales, as many as 2,500 young offenders would be diverted from custodial to community sentences.²⁰

49. Again, this review shows that all of the jurisdictions examined wished to reduce the use of custody for juvenile offenders. However, jurisdictions differed in the extent to which they had been able to achieve this. It appears that, in some jurisdictions, whilst there is political will to reduce the use of custody, the independence of those sentencing can still undermine these intentions. This alerts us to the importance of the commitment of all juvenile justice professionals to the values underlying whatever legislation is implemented and of the need for tight and rigidly applied criteria to restrict the use of custody.

3.7 The range of dispositions available

50. Paragraph 18 of the Beijing Rules advocates having 'a large variety of disposition measures' available to allow flexibility and to avoid custody. Most Commonwealth jurisdictions reviewed have a wide range of sentences available for juvenile offenders.²¹ These included reprimands, discharges, bind-overs, fines, compensation, restitution, community service, probation, supervision, attendance at non-residential programmes, and custody. A major focus in most jurisdictions has been to reduce the number in custody, as mentioned in the previous section. It needs to be noted here, however, that research has consistently shown that increasing the number of alternatives to custody does not necessarily reduce the number in custody (Audit Commission, 2004). Rather, there is a tendency for alternatives to custody to become alternatives to each other. The introduction of guidelines to restrict the use of custody (discussed in the previous section) is a better approach (though this is not to suggest here any restriction in the development of non-custodial measures). Sentencing guidelines also help and a couple of examples follow.

51. Section 38[1] of the Youth Criminal Justice Act in Canada states that the purpose of sentencing is to hold the young offender accountable for an offence 'through the imposition of just sanctions that have meaningful consequences for the young offender and that promotes his or her

¹⁸ Indeed, Bateman (2001, 38) argues that practice in England and Wales is in breach of Article 37 of the UNROC. He refers to 'an explosion in the number of children locked up through the judicial process'.

¹⁹ Bateman (2001, 38) claims that, in some areas, more than one in four cases dealt with in the youth court result in a custodial outcome.

²⁰ This jurisdiction also demonstrates continuing ambiguities in thinking about the use of custody. In the document entitled Youth Justice – The Next Steps (Home Office, 2004), for example, there are proposals to remove the present restriction which prevents the youth court imposing custody on 12 to 14 year old children unless they are deemed persistent offenders, yet, at the same time, it proposes to impose a limit of 12 months custody, in the youth court, for this age group.

²¹ The exception here is Scotland. The children's hearings have much more limited powers – in part because the basis of their decision is whether or not compulsory measures of care are necessary and, as noted above, the welfare of the child is the paramount consideration here. The powers of the hearing are: to discharge the child, to place the child on non-residential supervision (here the child remains at home and may participate in some type of programme), or to place the child on residential supervision (here the child must be placed away from home, either in foster care or an institution, including a secure institution). The hearing should not make a supervision order unless it feels that it is better for the child than making no such order. The hearings have no power to fine the juvenile or his/her parents, to impose a custodial penalty, or to remit the juvenile to the Sheriff Court for sentence (Kearney, 2000; Young, 1997; Lockyer and Stone, 1998). However, the Health and Social Services and Social Security Adjudications Act (1983) enabled the children's hearings to place a child in secure accommodation if it was thought likely that s/he would '... injure other persons'.

rehabilitation and reintegration into society, thereby contributing to the long-term protection of society'. It then goes on (in section 38[2]) to say that the sentence must be 'proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence.' This section further states that the sentence must be the least restrictive sentence that is capable of holding the young offender accountable and must be the one most likely to rehabilitate the young offender and to reintegrate him or her into society and to promote a sense of responsibility and acknowledgement of the harm done. Section 38[2][b] states that the sentence must be similar to the sentences imposed in the region 'on similar young offenders found guilty of the same offence committed in similar circumstances'.

52. Section 150 of the Juvenile Justice Act 1992 in Queensland also sets out a number of sentencing principles and incorporates the juvenile justice principles contained in Schedule 1 of the Act. The sentencing principles refer, amongst other considerations, to the nature and seriousness of the offence, the child's previous offending history, any cultural considerations, the impact of the offences on the victims, the use of custody as a last resort and 'the fitting proportion between the sentence and the offence'. The juvenile justice principles include: safeguarding children's rights, promoting their well-being, accountability and responsibility, and reintegration.

53. The approach in Victoria is somewhat different. Section 137 of the Children and Young Persons Act 1989 lists the sentences available to the court and section 138 then imposes a 'sentencing hierarchy' which means that those sentencing cannot impose a sentence unless they are satisfied that it is not appropriate to impose a sentence referred to in any preceding paragraph of that section. Section 139 sets out the matters that can be taken into account. These include strengthening families, the desirability of allowing children to live at home, minimising stigma, encouraging the offender's responsibility as well as the need to protect the public and the suitability of the sentence for the child.

54. This review has shown that most jurisdictions examined have a range of dispositions available to the courts from discharges to custody. However, as section 3.10 later suggests, those sentencing may need guidance to prevent idiosyncratic, inconsistent and discriminatory sentencing. The jurisdictions reviewed offer a number of alternative ways of achieving this. Clear and consistent guidelines that reflect the overall objectives and principles of the jurisdiction's juvenile justice system are an important starting point in the achievement of fair and non-discriminatory sentencing which is consistent in its approach.

3.8 Protecting young offenders' rights

55. Paragraph 7.1 of the Beijing Rules and Article 40 of the UNROC advocate the protection of children's rights and paragraph 15.1 of the Beijing Rules and Articles 12 and 37 of the UNROC refer to the provision of legal representation (including free legal aid where it is available) to children in any judicial or administrative proceedings. In addition, paragraph 15.2 of the Beijing Rules refers to ensuring the participation of parents. In all of the Commonwealth jurisdictions reviewed, steps are taken to inform parents of police action and to interview children in the presence of a parent, guardian or other appropriate adult (for example, a social worker or probation officer). Steps are also taken to encourage parents to attend any judicial or administrative hearings (including the possibility of fining them if they do not attend). Parents, however, are not always knowledgeable enough to advise their children of their rights and may themselves be under pressure to accept certain procedures (for example, to agree to diversion rather than a court hearing) and so children's best safeguard for their rights has to be the provision of legal advice. However, the provision of legal representation in the Commonwealth jurisdictions reviewed is variable.

56. Some of the Commonwealth jurisdictions reviewed provide the right to counsel at all stages (for example, section 25 of the Youth Criminal Justice Act in Canada). Most Commonwealth

jurisdictions reviewed offer legal representation in a more modified way (for example, during interviews with the police and/or at court hearings). However, the key issue here is the extent to which this representation is funded by the state. In New Zealand, youth advocates are appointed, at state expense if need be, for all children appearing in the youth court and, in England and Wales, Bottoms and Dignan (2004, 83) state that legal representation in the youth court is normally paid for through legal aid though they note also that there are no national statistics on this point. Section 22 of the Juvenile Justice Act 2003 states that courts in Ghana must inform juvenile offenders of their right to legal representation and to legal aid. In the South African Bill, children are entitled to representation at state expense only if they are remanded in detention pending plea and trial, when there is a likelihood that a sentence involving a residential requirement will be imposed on conviction and, as stated earlier, the child is aged between 10 and 14 and the matter is to be tried in court (section 75). These rights to state funded legal representation in South Africa cannot be waived. If the child indicates that s/he does not wish legal representation, then the court must appoint a legal representative to assist (rather than represent) the child.

57. In contrast, although children appearing before the children's hearings in Scotland could have a lawyer present, until relatively recently, it was not funded by the state and so occurred quite rarely.²² However, changes were introduced in 2002. Statutory regulations then set out situations in which the children's hearings could appoint a legal representative: namely, if it appears that such representation is required to enable the child to effectively participate in the hearing or if it appears likely that a supervision with residence requirement in a secure facility will be made. These legal representatives must be drawn from a limited range of lawyers (in essence, those familiar with the ethos of the children's hearings). It remains to be seen whether or not this change withstands future challenge. In New Zealand, in court-referred conferences, the offender's legal representative (the youth advocate) can attend the family group conference and ensure the protection of his or her rights there. However, legal aid is not provided routinely for offenders in non court-referred family group conferences.²³ The same is true of restorative conferences in Australia. In response to criticisms about this, some states introduced some protections: for example, at one point South Australia introduced a free legal advice telephone hotline to provide young offenders with legal advice and New South Wales also introduced an advisory service to young offenders before agreeing to a conference and to its outcomes (though we have been unable to ascertain from relevant personnel there whether or not these services are still offered). Legal aid is also not provided for appearances at YOPs in England and Wales. It seems likely that neither restorative conferences nor YOPs are compliant with the Beijing Rules or the UNROC with respect to legal representation.

58. In recognition of the special nature of juvenile justice, it is clear that there should be 'specialist' lawyers for children who offend. That is to say, they should be selected for their skills on the law with respect to children and for their knowledge about children. This is so in New Zealand and, as noted above, in Scotland. Given the vulnerability of children and the recognition of their distinctive status, consideration should be given to the provision of legal advice, if not legal representation, at all stages of any proceedings against children, as the UNROC suggests. Given the resources of the children and parents most likely to come into the juvenile justice system, this should be provided at state expense. There are, of course, cost implications here, but a dramatic reduction in the use of custody (as every jurisdiction seems to wish to achieve) should lead to the release of funds that could be used to offset the cost of legal advice (if the cost of legal representation is not viable).

3.9 Time taken to process cases

59. Paragraph 20 of the Beijing Rules advocates that cases involving children should be handled without unnecessary delay. Most of the Commonwealth jurisdictions reviewed which specified

²² They are entitled to legal aid if they wish to deny the grounds of referral or appeal against the hearing's disposition in the sheriff's court.

²³ It may be provided on a discretionary basis if the conference facilitator feels that a legal issue is likely to arise.

objectives and principles, mentioned the importance of having time-frames for young offenders which reflected their perceptions of time. This has resulted in some jurisdictions introducing times by which certain actions have to be taken. For example, time limits may be imposed on police decisions whether or not to deal with the offence by means of a conference (as in some Australian jurisdictions) and on conference administrators to convene a conference within a certain number of days after receiving the referral (as in some Australian jurisdictions and New Zealand). Similarly, time limits may be imposed on the length of time children can be held in custody pre-trial (as in Ghana) and on the time between the child's first appearance in court and the completion of the case (again, as in Ghana). There are recent efforts in England and Wales and Scotland to fast track persistent offenders that are discussed in section 3.13. Scotland has also introduced National Standards for Scotland's Youth Justice Services (Scottish Youth Justice System Working Group, 2002) and one of these relates to reducing the time taken from the initial report on the offender to the implementation of a hearing's decision to 80 working days by 2006. Within this time-frame, there is a series of shorter time frames for actions by the police and reporters (the managers of the children's hearings' process).

60. A different approach was adopted in England and Wales. In 1997, the Government there pledged to halve the time from arrest to sentence for all persistent young offenders. This was achieved by setting staged targets and experimenting with different fast-tracking mechanisms to encourage greater speed in processing: the average time was reduced from 142 days in 1997 to 71 days by August 2001. This achievement partly reflects changes in the production of pre-sentence reports. Having identified this as the main cause for delays occurring, the Government set about encouraging the use of stand-down reports and updates, instead of adjournments for a full pre-sentence report (Audit Commission, 2004).

61. This review has shown that the jurisdictions examined accepted the importance of dealing with young offenders in a time-frame which is consistent with their sense of time. It also showed a range of ways of trying to achieve this.

3.10 Preventing discrimination

62. Paragraph 2 of the Beijing Rules states that the Standard Minimum Rules should be applied to juvenile offenders without distinction of any kind and Article 2 of the UNROC calls on states to ensure the rights set out in the Convention are applied without discrimination of any kind. Paragraph 6 of the Beijing Rules further suggests that efforts should be made to ensure the accountability of those who make decisions within the juvenile justice system. Research has consistently shown that different ethnic groups and sexes experience different outcomes in many juvenile justice systems (Kalunta-Crompton, 2005; Audit Commission, 2004; Doob and Sprott, 2004; Feilzer and Hood, 2004; Van Bueren, 1995). What this means is not clear-cut. Differential outcomes may be due to both discrimination and to different patterns of offending (Gelsthorpe, 2005; Feilzer and Hood, 2004). However, the possibility of discrimination remains and steps can be taken to safeguard against this: for example, by setting out criteria for and reviewing decisions. There is one situation that requires comment here: the provision of custody for girls. In many of the Commonwealth countries reviewed, girls are held with adult female prisoners. The reasons for this are understandable: the small number of girls who need to be held in custody and the cost of providing separate accommodation. However, the dangers of contamination must outweigh this. Holding girls with adults is in breach of Article 37 of the UNROC that children should be held separately from adults unless it is in their best interest not to do so. It would be difficult to argue that holding girls with adult female offenders is in their best interests (see, for example, the report of HM Chief Inspector of Prisons (2003) on the conditions of girls in Holloway prison in London).

3.11 Recognition of cultural diversity

63. Article 4 of the UNROC recognises children's cultural rights and the rights of indigenous peoples are recognised more generally in the work of the United Nations (see, for example, www.ohchr.org/english/issues/indigenous/declaration.htm). Some of the Commonwealth countries reviewed have included references to the provision of culturally appropriate service in their legislation. For example, one of the aims of the 1989 Children, Young Persons and Their Families Act in New Zealand was to encourage responses to young offenders to be more culturally appropriate and sensitive. Although Maxwell and Morris (1993, 186) suggested that family group conferences in the early 1990s 'often failed to respond to the spirit of Maori or to enable outcomes to be reached which are in accordance with Maori philosophy and values', they went on to say that, at times, conferences did transcend tokenism and embodied Maori kaupapa (spirit and values) and that there was 'at least, the potential for FGCs [conferences] to be more able to cope with cultural diversity than other types of tribunals' (1993, 187, emphasis in the original). Despite some critical comments, Love (2000), a respected and influential Maori commentator, agrees.

64. In Canada, the Youth Criminal Justice Act makes specific reference to the special situation of aboriginal offenders. Section 3[1][c] states 'within the limits of fair and proportionate accountability, the measures taken against young people who commit offences should...(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young people with special requirements.' Later, section 38[2][d] states 'all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons'. The ACT also explicitly mentions the needs of indigenous children (section 14 of the Children and Young People Act 1999), but section 15 of the Act, which refers to the placement of aboriginal children, expressly excludes decisions about the disposition of young offenders. Principles 13 and 14 in Schedule 1 of the Juvenile Justice Act 1992 in Queensland refers to involving the community of Aboriginal and Torres Strait Islander children and to having culturally appropriate services and programmes. Further, if an Aboriginal and Torres Strait Islander is to be cautioned, section 17 encourages the police to use a respected community member to administer the caution. Section 11 of the Youth Justice Act 1997 in Tasmania encourages this too and section 12 extends this to community representatives of other ethnic or religious groups.

65. Some Commonwealth countries have gone further and have sought to include indigenous justice processes within their juvenile justice system. For example, family group conferences in New Zealand owe their origins, at least in part, to traditional Maori methods of conflict resolution. The Child Justice Bill, 2002 in South Africa also gives weight to indigenous concepts of justice (ubuntu). The inclusion of indigenous processes in juvenile justice systems where possible reflects good practice as it ensures greater legitimacy to these processes and is consistent with the endorsement of restorative justice processes. At the very least, jurisdictions should demonstrate in the practice of juvenile justice some awareness of and sensitivity to cultural differences.

3.12 Encouraging parental responsibility

66. Article 5 of the UNROC endorses respect for the responsibilities, rights and duties of parents in the care of their children. Parental responsibility seems to have been interpreted in quite different ways within the Commonwealth jurisdictions reviewed.

67. Families clearly play a large role in restorative conferences. There, all the participants contribute to the discussions and to decisions about the eventual outcome. However, one feature - relatively distinctive to New Zealand - is that the family and the young offender are meant to be given the opportunity to discuss privately at some point how they think the offending should be dealt with. When the conference reconvenes with all the participants present, this plan is then discussed,

and everyone's agreement to it is sought, and amendments made where necessary. The Children, Young Persons and their Families Act 1989 in New Zealand also refers to providing assistance and support to parents.

68. In contrast, in some other jurisdictions, parental responsibility is encouraged through provisions that parents give security to the court when a juvenile is charged with an offence (as in section 28 of the Juvenile Justice Act 2003 in Ghana) or after conviction (as in section 29 of the Juvenile Justice Act 2003, Ghana). Parents there may also be ordered to contribute to the cost of detaining their child (section 58 of the Juvenile Justice Act 2003). In England and Wales, parents can be bound over to prevent further offending by their child. They may be required to take proper care of their child and to exercise proper control over him/her, to ensure that the child complies with the requirements of any sentence (with forfeiture of a sum of money if the young offender re-offends or does not comply with the requirements of the sentence). Parents or guardians in England and Wales can also be ordered to pay any fines and compensation imposed upon their child. Furthermore, parenting orders in England and Wales require a parent or guardian of a child who has been convicted of an offence to attend counselling or guidance sessions and to comply with certain specified requirements. The parent can be required to attend counselling sessions once a week and for up to three months. The specified requirements (for example, ensuring that the child is accompanied to school each day and is indoors by a certain hour in the evening) may remain in force for up to 12 months. Research suggests that, while a centrally funded programme of 42 parenting projects was greatly appreciated by those involved, most participants took part on a voluntary basis; only one in six were there as a result of a court order. One in three participants were also referred by a non criminal justice system agency (Ghate and Ramella, 2002). Moreover, in some YOTs, voluntary programmes and parenting orders are little used or are not supported by adequate resources. The Government recognised that parenting orders had not been used as much as they could have been and has passed further legislation to encourage their greater use. The Antisocial Behaviour Act 2003 introduces, for example, fixed penalty notices for the parents of offenders aged 10 to 16 and also increases the circumstances in which parenting orders can be made.

69. Goldson and Jamieson (2002) are highly critical of such moves in England and Wales and ground them in 'populist punitiveness' (2002, 95). That is to say, such measures are popular with the public (see the survey reported in Mattinson and Mirrlees-Black, 2000, 23-4), but the 'reasoning [behind them] is flawed' and these measures are, rather, 'graphic expressions of punitive intent'. Arthur (2005, 241-245) goes further and implies that measures to penalise parents breach the UNROC and the Beijing Rules which expect states to help and support families. He writes: 'Instead of penalising families, the state should strive to create the conditions in which families can flourish and all children have the chance to succeed' (2005, 244). Arthur also argues that such measures conflict with criminological research on youth crime (2005, 237-241). He proposes instead that resources need to be made available to fully support the provisions of the Children Act 1989 which was intended to help families to meet their responsibilities to their children and to support children at risk of offending.

70. There is little to suggest that there are significant benefits to be gained from the penalisation of parents for the wrongdoing of their children. Measures to support parents and to encourage them to accept responsibility in a constructive way are preferable.

3.13 Dealing with serious or persistent offenders

71. As we suggested earlier, the UNROC advocates dealing with all children under the age of 18 who commit offences as juveniles and within special administrative or judicial proceedings. However, there is within the Commonwealth countries reviewed a number of situations in which those under 18 are dealt with as adults, both in terms of trial procedures and penalties. Mainly, these cover serious and/or persistent offenders.

72. For example, children in Scotland from the age of 8 yrs who commit rape, serious assaults or homicide are dealt with in the adult criminal courts and not in the children's hearings. Here the protection of the public is said to take precedence. According to McAra (2002, 448), Scottish juvenile justice policy has become 'bifurcated': 'considering public protection questions in high risk (to the public) cases and the welfare needs of the child in low risk...cases.' Much the same can be said of the situation in England and Wales (Smith, 2003). In New Zealand, in contrast, most serious offenders are dealt with in the youth court, at least initially (though children who commit murder or manslaughter are dealt with in the adult courts from the age of 10 yrs). However, the youth court can transfer cases involving serious offences to the high court. There is also provision for the youth court to transfer offenders to the district court, depending on the seriousness of the offence and the previous offending history of the offender. Transfer can occur when the young offender first appears in the youth court if he or she is at least 15 years of age and the offence is either purely indictable (the most serious offences) or is punishable by imprisonment for a term exceeding three months and the young offender elects trial by jury. Second, transfer can occur at sentencing when the nature or circumstances of the offence are such that, if the young offender were an adult, s/he would be sentenced to custody, and the court is satisfied that any order of a non-custodial nature would be inadequate. The Child Justice Bill in South Africa also addressed public concerns about serious juvenile crime by allowing, as a last resort, children charged with serious violent offences to be tried in the adult criminal courts and to be imprisoned, both pre-trial and as a sentence.

73. Canada has adopted a different solution to this issue. Under the Young Offenders Act, it was possible to transfer certain young offenders into the adult criminal justice system. Under the Youth Criminal Justice Act 2002, the young offender stays within the youth court, but, for serious offences, the prosecutor can invite the court to impose a sentence normally only available in the adult court. The test to be applied is whether or not a sentence imposed in accordance with the purposes and principles of the Youth Criminal Justice Act would be of sufficient length to hold the young offender accountable for their offending. If not, then the young offender could be sentenced as an adult. Young offenders over the age of 14 yrs found guilty of a 'presumptive offence' (murder, manslaughter, attempted murder or aggravated sexual assault) or who have a history of serious violent offences can also be dealt with under adult sentencing provisions. Provinces can decide whether these provisions should come in at the age of 14, 15 or 16. Doob and Sprott (2004, 185) call these 'symbolically tough but practically inconsequential measures'. In this way, public and media concerns about youth crime (which are often unfounded anyway) appear to be addressed while continuing to protect young offenders and recognise their special status.

74. It is widely recognised that a small proportion of young offenders are responsible for a large proportion of juvenile offending (Audit Commission 1996). As a result, some of the Commonwealth jurisdictions reviewed have also begun to plan special measures for persistent offenders. For example, in late 1998, the New Zealand Government made funding available to the Department of Child, Youth and Family Services to develop a strategy (the youth services strategy) aimed at providing better ways of recognising and meeting the needs of young offenders who continue to offend and who are viewed as being at high risk of developing criminal lifestyles. There are no data, as yet, on the effectiveness of the youth services strategy in either meeting the needs of young offenders or reducing their re-offending. Also, as a result of some criticisms, the Government there published, in 2002, the youth offending strategy aimed at preventing and reducing offending and re-offending by children (Ministry of Justice and Ministry of Social Development 2002).²⁴ It made four key recommendations: a new delivery mechanism to achieve this goal of reducing offending and re-offending,²⁵ a range of measures to improve the delivery of services, the development of new comprehensive and intensive interventions for serious young offenders (such as day reporting centres that will rely on 'multi-

²⁴ This strategy should be read alongside the report of the Ministerial Taskforce on Youth Offending (2002) and The Youth Justice Plan for Child, Youth and Family Services (Department of Child, Youth and Family Services 2002).

²⁵ This will rely on local youth offending teams (comprised of key practitioners from the police, social services, health, and education), oversight by Ministers and senior public servants, and an independent advisory council.

systemic therapy') and measures to improve the quality and robustness of information about offending by children (Ministry of Justice and Ministry of Social Development 2002, pp. 38–40). This strategy also endorses the use of risk identification and assessment tools which are discussed below. The impact of the youth offending strategy will take some time to emerge.

75. Scotland has also taken special measures to deal with persistent offenders and has set a target of reducing the number of persistent offenders by 10 per cent by 2006 (Scottish Youth Justice System Working Group, 2002). Earlier, the Advisory Group on Youth Crime had identified the need for the improved handling of persistent offenders by an expansion of 'the range and availability of effective quality assessed, community-based interventions and programmes' (The Scottish Executive, 2000, 3). It also advocated a national strategic framework to define the objectives needed to address youth crime and the establishment of multidisciplinary teams (youth justice teams) to draw up and implement youth crime plans covering those under the age of 20) in each local area. A 10-point action plan to reduce youth crime was launched in June 2002 reflecting the recommendations of an ad hoc Ministerial Group on Youth Crime.²⁶ Since then, a pilot of fast-track children's hearings for persistent offenders under 16 has begun in a number of areas in Scotland and a youth court feasibility project for persistent offenders aged 16 and 17, with the flexibility to deal with 15 year olds, was also introduced in two areas of Scotland. There are also plans to introduce anti-social behaviour orders (discussed in section 3.3) and electronic monitoring for those under the age of 16 (in the Anti-social Behaviour (Scotland) Bill 2004). Bottoms and Dignan (2004, 76) describe these various measures as the politicisation of juvenile justice debates in Scotland due to devolution. That is to say, they have been introduced as a result of public and media concerns rather than empirical information indicating the need for change. Whyte (2003) describes these developments as the beginning of a shift away from the welfare principles which have determined practice in Scotland for so long.

76. In England and Wales, detention and training orders for offenders aged 12 or over but under 15 are available to courts if they are of the opinion either that the offence is so serious that only a custodial sentence is justified or, in the case of a violent or sexual offence, that only a custodial sentence will be adequate to protect the public from serious harm from the offender and unless the court is of the opinion that the child is a persistent offender. Stone (2001, 55) argues that the absence of a statutory definition of persistent (for example, a certain number of prior offences, a period over which such offences have been committed or continued offending despite some form of non-custodial penalty) has left those sentencing with 'considerable freedom and no clear basis for restraint'. He reminds us also of Hagell and Newburn's (1994) finding that, applying various definitions of persistence, 'different young offenders met their criteria at different quarters of the same year.' The Youth Justice Board there has invested £45 million into programmes involving intensive supervision and surveillance for persistent offenders. However, the same problem of identification exists.²⁷ This is an important point and is relevant for the other jurisdictions discussed here. Important too is the criminological research which indicates that many serious and persistent offenders are among the most disadvantaged children (Maxwell and Robertson, 1995; Audit Commission 1996) and this must raise questions about both dealing with them as adults and punitively.

77. Given the rarity of serious offending by juvenile offenders and given the difficulty of identifying persistent offenders, care needs to be taken against excessive penalisation of such children to meet media and popular demands. Questions have been raised earlier about the need to deal with

²⁶ It recommended: special fast tracking of persistent offenders; the possibility of youth courts for some 15 and all 16/17 year olds; restorative conferencing by the police; and national standards on reporting, timescales, the quality of intervention programmes to reduce re-offending and follow-ups on hearings' decisions.

²⁷ The Audit Commission (2004) expressed concern that these programmes had failed to reduce the use of custody and, therefore, speculated that they were likely to be drawing in young offenders who would otherwise have received less intensive community measures.

such offenders in the adult criminal justice system.²⁸ Having a wide range of sanctions available in the juvenile courts and the adoption of guidelines, as mentioned previously in section 3.7, means that jurisdictions, as well as societies should be able to accommodate the needs of most such children. It is important to stress here too the importance of the Riyadh Guidelines on the prevention of juvenile delinquency.

3.14 Risk assessment

78. In line with the broad culture of control that some jurisdictions have witnessed in the last two decades, a number of the Commonwealth juvenile justice systems reviewed have developed risk assessment strategies. Two examples follow. In England and Wales, a particular tool, Asset, was introduced in 1998.²⁹ to provide a common framework for assessment practice within the new multi-agency YOTs. It is designed to reflect the particular risks and needs of young offenders. There were concerns when the tool was first introduced, partly because it was introduced in a hurry and staff were not adequately trained to use it (Eadie and Canton (2002)) and YOT staff are said to remain somewhat confused about it. Indeed, Eadie and Canton (2002) view risk assessment more generally as a somewhat technical approach somewhat removed from the realities and difficulties of working with children. However, Asset has been shown to be useful in predicting some patterns of re-offending (though not the gravity of those offences) (Baker, 2004).

79. The youth offending strategy in New Zealand, mentioned above, seems, at least in part, to also have been captured by the promises of risk identification and assessment tools 'as a way of targeting interventions and scarce resources in the most effective and efficient manner' (Ministry of Justice and Ministry of Social Development 2002, 16). Social workers are now meant to use three screening tools. These are: CAGE - a short screen for alcohol and drug use which focuses on the negative effects of usage; the six item Kessler screening tool which is aimed at identifying psychological distress; and a suicide screen. The CAGE and Kessler screens were both developed overseas and not for this age group. However, the Department of Child, Youth and Family Services maintains that they are relevant tools. If the young offender appears suicidal, the suicide risk assessment framework is applied. If any other risks are identified, referrals are made for specialist assessment and, once the young offender's immediate needs are addressed, the well-being assessment tool is applied and a well-being plan is formulated. Depending on the results of this assessment, the social worker may access specialist family homes, one-to-one care, or specialist rehabilitation programmes. These screening and assessment tools are meant to inform discussions at family group conferences and conferences' outcomes are meant to reflect the well-being plan. This, of course, impacts on many of the aims of family group conferences and, in particular, impacts on attempts to empower families and victims.

80. There are dangers in risk assessment tools. Put crudely, prediction techniques usually get it wrong twice as often as they get in right and there are problems with both over- and under-predicting. Thus, children may be selected for special measures who do not require them and children who may require them remain unselected. If such tools are to be developed, they must be age appropriate and culturally specific and they need to be carefully monitored to ensure their effectiveness.

3.15 Other issues

81. There are a number of other issues that are pertinent to the identification and development of good practice. One of these concerns multi-agency juvenile justice structures. It is important, however, to pose questions about which agencies should be involved in such structures and what

²⁸ We also have concerns about so-called 'incorrigible' juvenile offenders being transferred from juvenile to adult institutions, as is possible in Ghana under section 50 of the Juvenile Justice Act 2003.

²⁹ An increasing number of youth justice teams in Scotland have chosen to use this instrument too.

impact they might have; for example, there may be variation in their aims and in the delivery of services, depending on which is the 'lead' agency. There are also questions about the optimum size for multi-agency teams, how best to establish protocols in relation to the exchange of information, and how best to promote team work when staff from different agencies may well be operating under different terms and conditions and have received training which leads to very different perspectives on children and their offending. We have too little detail to systematically comment on such matters in respect of most of the Commonwealth countries reviewed, but it is worth referring here to the situation in England and Wales by way of example.

82. Whilst multi-agency work with regard to juvenile offenders was not uncommon prior to the reforms of 1998 in England and Wales, the Crime and Disorder Act 1998 introduced statutory requirements regarding multi-agency partnerships that link criminal justice and children's services (such as education and health) within the context of a national framework. Thus early intervention to prevent crime was meant to be linked to later interventions to reduce crime. But an overview of these developments (Audit Commission, 2004) suggests that there is considerable variation still in the extent to which partnerships have been formed amongst agencies.³⁰ Some YOTs have chosen to combine with local crime prevention initiatives to form a single crime reduction service. While such unification has positive potential in terms of economies of scale, it risks losing the specific focus on youth offending. It is clear that in some other Commonwealth jurisdictions where there is an increasing focus on early intervention, commentators are alert to the possibility that the strategies could lead to a replay of the welfare model (and all that is associated in terms of coercive individually targeted interventions).³¹

83 A further key issue concerns monitoring and evaluation. Increasingly, monitoring and evaluation is cited as an important way of informing policy-makers on the outcomes of initiatives. The implications of the Crime and Disorder Act 1998 in England and Wales, for example, have been monitored and evaluated since their inception, not least through the national Youth Justice Board which serves as a centralising policy directorate. Monitoring continues both within and without such bodies and further monitoring of the impact of the reforms is proposed (Audit Commission, 2004). The Child Justice Bill 2002 in South Africa is to be monitored (at district, provincial and national levels) to ensure that it is workable and to identify any difficulties or loopholes, as is the Canadian Youth Criminal Justice Act in a sample of communities. But with respect to Australian juvenile justice systems, commentators suggest that there is only limited evidence that a systematic approach to 'evidence-based' practice is in place (O'Connor and Cameron, 2002). An evidence-based approach to effective interventions would, of course, involve a conscientious and judicious analysis of interventions (policies, programmes and practices) to achieve positive outcomes with regard to juvenile justice, but this would also require political, organisational and professional commitment to ensure that legislation, policy and practice reflect the best available evidence. Whilst this remains an ideal, it is not yet clear that all Commonwealth countries have usable data sets. The establishment of comprehensive data sets in terms of offences, prosecutions and other interventions, and their outcomes and impact on offending is a critical step towards evidence-based practice, although, as highlighted below, the issue of 'what works' is not straightforward and cannot be divorced from the social, political and economic context of each country.

4. Concluding comments

84. This review has identified a diversity of juvenile justice policy and practice in the Commonwealth jurisdictions reviewed with respect to a number of key issues. While some of this is understandable in light of the different social, economic, political and cultural systems that exist therein, there is also a case for Commonwealth juvenile justice policy to reflect good practice, so far as this is possible. It is recognised also that some Commonwealth countries are only now developing

³⁰ See also Holdaway et al., 2001, on the organisational difficulties of youth justice teams.

³¹ See O'Connor and Cameron, 2002, for example, who write about Australia.

juvenile justice systems and it may be helpful for them to learn from the experience of other jurisdictions.

86. Muncie (2002) offers some advice about what he calls 'policy transfers'. He argues, for example, that borrowing elements of restorative justice from Australasia has not worked in England and Wales because its implementation is 'partial and piecemeal' and that 'the dominant recurrent influence' on policy there has been 'American inspired punitive justice' (2002, 27). He challenges the agenda of identifying 'what works?' on the grounds that, for 'what works pragmatically', we need also to read 'what works politically, institutionally and economically' (2002, 33). Muncie goes on to argue that 'any serious attempt to reform youth justice...cannot afford to be seduced in to a 'what works?' ethic. The more fundamental issue is 'what principles do we want youth justice to operate within?' and 'with what desirable effects?'³² We agree with this to some extent. Jurisdictions can learn from each others' successes and failures. But care always needs to be taken to ensure that any ideas adopted are consistent with the already established core principles and objectives of the jurisdiction's juvenile justice policy. We came across many references in our research for this review to the politicisation of juvenile crime and hence to the politicisation of juvenile justice policy. As a result, some changes appear to have been made to satisfy public and media perceptions and concerns about juvenile crime rather reflecting the reality of juvenile crime. This is surely something to be resisted.

87. Finally, good practice in juvenile justice policy cannot by itself prevent offending or reduce re-offending. This requires 'good practice' in, for example, social, economic, health and education policy. However, juvenile justice policy can, as we have demonstrated, reflect certain key values such as the recognition of children's vulnerability and developmental stages, restoration and reintegration, diversion from court and custody, fairness, due process, and the accommodation of diversity. We must remember here that we are dealing with children. And not only this: research shows that so many juvenile offenders (particularly serious and persistent offenders) have experienced high levels of victimisation and deprivation. This must always be at the forefront of our minds in the development of good practice in juvenile justice policy.

88. All Commonwealth countries have ratified the UNROC. As such, they are required to prepare compliance reports and to take heed of any resulting comments from the United Nations. Law Ministers may wish to consider the role the Commonwealth Secretariat could play in:

- critically examining the issues identified within this short review in more depth;
- critically examining the juvenile justice policy of all Commonwealth countries;
- reviewing compliance reports from Commonwealth countries to assess the extent of compliance with the UNROC and to offer advice where appropriate.

The Commonwealth Secretariat is strategically poised to play a critical role both in further advancing progress towards good practice and in aiding those jurisdictions which are at the early stages in their development of juvenile justice policy.

³² Contrast here the views of Earle et al. (2003, 141) who describe the introduction of the referral order in England and Wales as a 'positive example of policy transfer'.

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Legislation examined

Australia

Children (Criminal Proceedings) Act 1989 (New South Wales)
Children and Young Persons Act 1989 (Victoria, Sections 16A, B, C and D)
Juvenile Justice Act 1992 (Queensland)
Young Offenders Act 1993 (South Australia)
Young Offenders Act 1994 (Western Australia)
Young Offenders Act 1997 (New South Wales)
Youth Justice Act 1997 (Tasmania)
Children and Young People Act 1999 (ACT)

Canada

Youth Criminal Justice Act 2002

England and Wales

Children and Young Persons Act 1933
Children Act 1989
Crime and Disorder Act 1998
Criminal Justice Act 2000
Criminal Justice and Police Act 2001
Anti-Social Behaviour Act 2003

Ghana

Juvenile Justice Act 2003

New Zealand

Children, Young Persons and Their Families Act 1989

Scotland

Social work (Scotland) Act 1968
Children (Scotland) Act 1995
Anti-Social Behaviour (Scotland) Bill 2004

South Africa

Child Justice Bill 2002

TABLE 1: AGE DIFFERENCES IN SELECTED COMMONWEALTH JURISDICTIONS

	Canada	England and Wales	Ghana	Scotland	South Africa	New Zealand	Australian States & Territories
Age of criminal responsibility	12	10	12	8	10	10	10
Age of prosecution	12	10	12	8	14 ³³	14	14 ³⁴
Age of termination of juvenile jurisdiction	18	18	18	16 (18)	18	17	17 ³⁵

³³ The presumption of doli incapax applies from the age of 10 to 14 and so capacity must be proved.

³⁴ The presumption of doli incapax applies from the age of 10 to 14 and so capacity must be proved

³⁵ In Victoria and Queensland, it is 16.