Youth Crime briefing

The referral order

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Introduction

This paper replaces the earlier Nacro briefing that introduced the referral order in October 1999. Since then, the referral order has been introduced, piloted, ‘rolled out’ across England and Wales and established as the standard sentencing disposal for those aged from 10 to 17. Further research has been conducted to follow up issues arising from the formal evaluation of the pilots. This has contributed to further amendments and additions to the relevant legislation and to associated regulations. In addition to government guidance to courts, youth offending teams (Yots) and youth offender panels (2002), supplementary guidance and circulars have subsequently been issued. Referral orders are also subject to the latest National Standards for Youth Justice Services (2004) together with related Standards on restorative justice and work with victims.

This briefing outlines arrangements and law that currently apply and is intended to be of value for managers, practitioners and volunteers as a source of quick reference and as an introduction to the order for those new to the youth justice system.

Nacro has also recently published a second edition of the popular good practice guide (The referral order: A good practice guide – 2nd edition, Nacro, 2004). This briefing is not intended to be a substitute for the good practice guide which, as well as describing the law and regulations in greater detail, sets the order in a wider context, focuses on the referral order in practice and provides comprehensive guidance on the day to day work of youth offender panels.

It also provides answers to many frequently asked questions about unusual, difficult or contentious matters.

The evolution of the referral order

The referral order was outlined in the final chapter of the 1997 White Paper, No More Excuses. It did not feature in the initial reforms of the youth justice system provided for in the Crime and Disorder Act 1998. It was introduced upon implementation of the Youth Justice and Criminal Evidence Act 1999 and was piloted in 11 areas from March 2000 to August 2001 and, from April 2001, it was ‘rolled out’ around England and Wales. During the piloting period, legislation relating to all sentencing in criminal courts was consolidated, for greater ease of access and clarity, in the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A). Part III of the PCC(S)A contains the primary provisions relating to referral orders. Those provisions have been amended subsequently by The Referral Order (Amendment of Referral Conditions) Regulations 2003. New powers relating to the making of parenting orders (with a referral order) have been introduced by provisions in the Criminal Justice Act 2003.

Key documents

National Standards for Youth Justice Services 2004².
Referral Orders and Youth Offender

The referral order in brief

The referral order has become the standard sentence for children and young people pleading guilty on first conviction. It transfers the matter to be dealt with away from the courtroom to the more informal atmosphere afforded by the youth offender panel hearings. Youth offending teams (Yots) are responsible for the provision of youth offender panels (recruitment, training and support of community panel members, convening meetings, keeping of records) and for the supervision of programmes of work under the terms of youth offender contracts. The referral order made by the court will specify the length of the order, the compliance period, which begins only with the signing of a contract. The Yot must convene a youth offender panel to conduct a first meeting, progress meeting(s) and a final meeting, each attended by the child or young person and certain others.

The purpose of a first meeting is to negotiate a programme of work which forms the basis of the contract to be signed. Programmes should pursue the primary aim of preventing offending and legislation lays out what programmes may or may not contain. Progress meetings and final meetings allow the panel to review progress, vary contracts and further the restorative process. The Yot is responsible for enforcement of the youth offender contract and, in the event of certain circumstances (see below) or non-compliance, may convene the youth offender panel to consider a referral back to court. In that event, the court may bring the child or young person before the court by way of a summons or arrest warrant and deal with the case by renewing (extending) the compliance period (an extension order), by revocation and re-sentence, or by discharge of the order. In some circumstances, the court may make a parenting order (see below).

The referral order in the sentencing framework

The referral order occupies a distinct position in the overall sentencing framework. It is only available on first conviction and is virtually mandatory in most cases where guilt is admitted (details of criteria below). The only options to the court where the criteria for a referral order are made out are an absolute discharge, a detention and training order or a hospital order (under mental health legislation). Thus, the referral order is made for minor offences that are not serious enough for a community sentence as well as for the more serious offences at the cusp of custody. It is not defined in statute as a community sentence. At present, the order is available in the youth court but not in the crown court (although the crown court can remit to the youth court for sentence). The order is also unique by virtue of the court being responsible for setting the length but not the conditions or requirements. The detail and oversight of the order is the business of the youth offender panel – outside of the formal court system (the Children’s Panel system in Scotland is in some ways comparable). It is intended that the panel should conduct meetings according to restorative justice principles so far as possible and that negotiated contracts contain restorative elements. Thus, the features of the order are that:

- it provides a forum in which restorative justice can be adopted outside the formal criminal court
- it allows for an informal, participatory approach, involving victims in a community context
- it allows for the order to be dynamic, with reviews and revisions to the contract as appropriate
- it does not avoid criminalisation but the conviction is spent on completion of the compliance period
- it allows for a contract that demands compliance from the child or young person and service providers (such as the Yot) and which can be independently monitored by the panel.

Establishing and managing youth offender panels

Yots are responsible for establishing a youth offender panel for each case and for arranging panel meetings. The panel must consist of at least three members for each meeting. There must be at least one member of the Yot and at least two who are not members of the Yot. These non-Yot members are volunteer members of the community. The government guidance contains details to assist with recruitment, training and management of volunteer panel members.

The legislation allows Yots to arrange for other agencies (such as voluntary agencies) to undertake these duties and a number of models are possible (see Nacro’s Good Practice Guide for detail).

The statutory requirements on Yots are to:

- recruit and provide training to panel members (according to regulations)
- convene panel meetings (on request of the panel for progress meetings)
- ensure panels are properly constituted
• notify the offender and any 'appropriate persons' of the time and place of meetings
• provide administrative staff, venues and other facilities that the panel requires
• supervise compliance with youth offender contracts
• keep records of compliance with youth offender contracts
• have regard to guidance regarding recruitment, training, assessment and reports for panels, victim contact and involvement and the conduct of meetings.

Yots are also subject to National Standards relating to referral orders.

**Evaluation of the introduction of the referral order**

After the publication of the evaluation of the piloting of referral orders, further research was conducted to follow up issues that had arisen (see footnotes 5 and 6). This resulted in some key recommendations:

• alternative sentencing options need to be available for non-imprisonable minor offences (returning an element of discretion to the court)
• consistent implementation of guidance on reprimands and final warnings needs to be reinforced, with a clear process for sending back to the police cases where there was a denial on arrest but a guilty plea at court
• the referral order should remain a mandatory sentence for serious offences, but electronic monitoring should be available
• financial compensation for victims should remain a priority task for magistrates, but youth offender panel guidance should be reviewed to include detailed guidance for panels on setting financial compensation as part of a contract
• referral orders should not be extended to young offenders convicted after a ‘not guilty’ plea
• referral orders should not be made available for repeat offenders, other than in cases where the referral order was not available to the sentencing court at their first conviction (for example, where there was a not guilty plea on first conviction)
• as well as the national initial training programme (the standard programme for youth offending teams recruiting panel members) there needs to be a continuous development programme involving specialist areas of training to enhance panel members' confidence in dealing with complex and difficult offenders.

Subsequently, the government introduced some significant changes. In particular, the concern that the referral order, with a minimum length of three months, was a disproportionate and/or inappropriate response to the more trivial offences was addressed.

The criteria for the making of a referral order can be amended by secondary legislation to an extent. Thus, the relevant regulations were altered to allow the court discretion, and access to other forms of sentences (fines, conditional discharge, reparation order etc), where the offence was non-imprisonable.

At the time of writing, electronic monitoring is not available when a referral order is made. For further discussion about the use of reprimands and final warnings in the context of the referral order, see Nacro Briefing, Out of Court: making the most of diversion for young people (2005).

The other significant change was to give the court powers to make a parenting order with a referral order and where a parent fails to attend a youth offender panel meeting if ordered to do so. These powers were introduced in the Criminal Justice Act 2003.

**In court**

The referral order is an order made by a court. It may be made without a pre-sentence or sentence specific report although the court may require a report, particularly where the offence is more serious. Where a referral order is made, the court may not also impose a community sentence, fine, reparation order, conditional discharge, deferred sentence or a bind over. It may make a compensation order and other ancillary orders (such as confiscation).

The PCC(S)A contains criteria for compulsory referrals and for discretionary referrals. Where the compulsory referral criteria are met, the court must make a referral order. Where the discretionary referral criteria are met, the court may make a referral order or may sentence by any other legal option.

**Compulsory referral conditions**

Unless the court makes an absolute discharge, a hospital order or a detention and training order, it must make a referral order if the child or young person has:

• pleaded guilty to the offence(s)
• no previous conviction (this includes conditional discharge)
• never been bound over to keep the peace or to be of good behaviour

But where the offence(s) is/are non-imprisonable, the discretionary referral conditions are deemed to be satisfied (see below).

**Discretionary referral conditions**

The key issue is whether the conviction followed a not guilty plea. The inference is that the state of denial is not always conducive to the successful application of a restorative approach and the involvement of a victim (implicit in a referral order). Where there is a not guilty plea and guilt is established by trial, a referral order may not be made. However, where
there were mixed pleas, of guilty and not guilty, it is a matter for the court to consider whether or not the case is one for which a referral order is suitable.

Thus, if the compulsory referral conditions are not made out (or are made out but the offence is one that is non-imprisonable), the court may make any available order or a referral order if the child or young person:

- has no previous conviction
- has never been bound over (detail as above)
- is being dealt with by the court for more than one connected offence and, although he or she has pleaded guilty to at least one offence, has also pleaded not guilty to at least one of the others ('connected' means any offence being dealt with at the same time).

**Making a referral order**

The court must decide on the length of the order, from a minimum of 3 months to a maximum of twelve. It should be made clear that the length of the order is effectively the length of the youth offender contract – that is, the period does not begin with the making of the order in court, but at the point when a contract is signed. The order must:

- specify the Yot responsible for its implementation
- require the child or young person to attend each of the meetings of the youth offender panel (this may be a general requirement and does not specify any dates or venues).

The court may impose referral orders for more than one offence to run concurrently or consecutively, providing that the total length does not exceed 12 months.

**Ordering attendance at panel meetings**

Apart from the requirement on the child or young person to attend panel meetings, the court may order the attendance of one ‘appropriate person’. This may be the parent or guardian and may be the local authority where the child or young person is looked after under the terms of the Children Act 1989. Where there is than one appropriate person, the court may order more than one to attend meetings.

Where the child or young person is aged from 10-15 (inclusive), the court must order the attendance of at least one appropriate person unless it is satisfied that there are circumstances which make attendance unreasonable (at one or more meetings). Where the young person is aged 16 or 17, the court has discretion as to whether to order an appropriate person to attend.

If the appropriate person is not present, the court must send a copy of the order to the person (including to the local authority).

**Making a parenting order**

The court may make a parenting order with a referral order. The procedures for this differ from the making of parenting orders with other sentences in that the court must obtain a report from the Yot (or social worker or probation officer) indicating proposed requirements to attach to the order, the reasons for such requirements and, for those under the age of 16, detail as to family circumstances.

**Preparation for a first meeting**

The preparations for the first meeting are not described in statute but are subject to National Standards for the Youth Justice System and guidance.

The first meeting of a panel should be arranged within 20 working days following sentence. During this period the Yot will be engaged in:

- allocation of tasks and case responsibility (the latter should occur before the end of the next working day after sentencing)
- setting up case records
- arranging meeting(s) with the child or young person (for assessment, preparation for first meeting, identification of significant people etc) which should occur within five working days after sentencing
- arranging meeting(s) with parents, carers and other significant people (within five working days after sentencing)
- gathering information from other agencies (education, health etc)
- completing (or updating) ASSET (Asset)
- contacting victim(s) and arranging for attendance at the first meeting where appropriate
- preparing a report for the panel to be available prior to the first meeting
- setting a meeting date, time and venue and convening the meeting
- providing the panel members with preparatory information, reports and planning time (report at least two working days prior to the first meeting).

There may be some confusion about what action can be taken if the child or young person fails to comply at this preparatory stage. The legislation does not provide for this and it is only a failure to attend the first panel meeting that is directly enforceable (see Nacro’s Good Practice Guidance for details of how to deal with enforcement and compliance issues in practice as well as involving victims).

**Panel meetings**

It is a statutory requirement that there is a minimum of a first meeting and a final meeting in each case. Progress meetings (sometimes called ‘review’ meetings and sometimes ‘enforcement’ meetings or similar) must be arranged by the Yot when the panel so requests. Strictly speaking, a meeting called in
response to non-compliance should be called by the panel, although in practice, some Yots convene a meeting without such a prior request. In addition, the child or young person may request a progress meeting for the purpose of requesting a variation of the contract. Where such a request is made by the child or young person, the Yot has no discretion and must put the request to the panel for its consideration.

Attendance at panel meetings, other than those who are required to attend according to the court order, is a matter for the panel to decide. Those who can also attend include victim(s), other significant persons (eg wider family, clergy, teachers) and an adult of the young person’s choice. Interpreters should be included as a matter of good practice. There is no right of attendance for lawyers or other advocate.

In the light of complex, and contentious, issues regarding the ‘negotiation’ and signing of a contract, Nacro’s Good Practice Guide on referral orders contains guidance to assist youth offender panels.

First meetings
The purpose of a first meeting is to seek to reach an agreement with the child or young person on a programme of behaviour, the primary aim of which is to prevent re-offending. When an agreement is reached, the panel must produce a written contract. This should lay out the terms in easily understood language and should be signed by the child or young person and a member of the panel (in practice, the person who has agreed to lead the panel, or ‘chair’, will sign the contract). The ‘appropriate person’ is not required by law to sign, but it is a matter of good practice to seek the person’s signature.

The referral order (the compliance period) begins with the signing of a contract.

If the first meeting concludes without a signed contract, the panel may arrange a further (first) meeting or may refer the case back to court. However, if (and only if) it appears to the panel that there is no prospect of reaching agreement within a reasonable period, the panel must refer the case back to court. Similarly, where agreement is reached but the child or young person fails to sign the contract without good reason, the panel must refer the case back to court.

Progress meetings
There is no prescribed number of progress meetings which may be arranged at any stage to review any part of the contract. However, a progress meeting must be convened if:

• the child or young person wishes to change the contract
• the child or young person wishes the panel to refer the case back to court (due to the contract being impractical to comply with)
• the panel believes that there is a failure to comply with any of the terms of the contract.

Thus, progress panels may agree variations to the contract (which should again be signed) or may refer the case back to court if there have been significant changes in circumstances that make the contract impractical. Where the panel is considering failure to comply with the contract, it may agree to continue the contract, with or without variations, or may refer the case back to court.

Final meetings
When the compliance period is due to expire (the legislation implies that this should be at a point close to the end of the period), the Yot must convene a final meeting. The purpose is to decide if the conditions of the contract have been met or whether the panel should refer the case back to court for non-compliance.

Where the panel decides that the conditions have been met satisfactorily, this has the effect of discharging the order. This discharge does not take effect until the actual compliance period has ended (it is not possible to discharge a referral order early).

This decision can be made in the absence of the child or young person. Whilst not being specific, the legislation can be interpreted as meaning that it is not perverse for the child or young person to be allowed to miss a final meeting (perhaps to avoid missing school or other purposeful activities).

Contents of contracts
The programme agreed in the contract may include provision for the child or young person to do any of the following:

• make financial or other reparation to the victim or someone affected by the offence(s)
• attend mediation sessions with any such victim or affected person
• carry out unpaid work in, or for, the community
• be at home at times specified
• attend school or other educational establishment or place of work
• participate in specified activities (such as those designed to address offending behaviour, educational issues, or rehabilitation from misuse of drugs or alcohol)
• present to specified persons at times and places specified in the programme
• stay away from specified places or persons or both
• comply with arrangements to enable compliance with the programme to be supervised and recorded.

This list, contained in the legislation, does not prevent other elements being included. However, there are certain elements that are not allowed under any circumstances:

• the electronic monitoring of the offender’s whereabouts
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• any physical restriction on his or her movements
• any element which involves a victim without that victim's consent.

While the above describes the statutory arrangements, the government's guidance states that the two main elements of every referral order contract should be:

i) reparation to the victim and/or the wider community, and

ii) a programme of interventions delivered or organised by the youth offending team, which addresses the factors likely to be associated with any re-offending.14

Enforcement and referral back to court

A youth offender panel may refer a case back to the court if the child or young person:

• has failed to attend a meeting
• has not reached agreement on a programme (where there seems to be no prospect of reaching an agreement the panel must refer the case back to court)
• unreasonably fails to sign a contract (in which case the panel must refer the case back to court)
• unreasonably fails to sign a varied contract (in which case the panel does not have to refer the case back to court, but does have discretion to do so – in contrast with a failure to sign an initial contract)
• appears to have failed to comply with a term of the contract
• has requested a referral back to court to seek revocation due to changed circumstances making compliance impractical
• has, in the opinion of the panel, not complied with the contract satisfactorily (in which case the panel must refer the case back to court).

There are no other legal reasons for referral back to court (for detailed guidance on reaching decisions regarding referral back to court and enforcement, see Nacro’s Good Practice Guide).

The panel must make a referral back to court by sending a report to the appropriate court explaining the reason.

With regard to a parent who has been ordered to attend by the court as the appropriate person and who fails to attend, the panel has a duty to consider referring that parent back to court (when the court may make a parenting order).

The powers of the court on referral back

Regardless of the reason for referral back, the court’s powers are the same. If the court is satisfied of the facts and believes the youth offender panel was entitled to refer back to court and exercised its power reasonably, it may:

• take no action and allow the existing contract to continue, or
• it may revoke the order.

Upon revocation, the court may sentence again for the original offence(s) for which the referral order was made. All of the options that would have been available may be used (but the current age of the person applies with regard to what is available). The court must take account of the extent to which any contract has been complied with and the circumstances under which the referral back to court was made.

Where the referral order (compliance period) has expired since the referral back to court process was commenced, the court may still revoke and re-sentence.

Dealing with further convictions during a referral order

There are different powers of the court depending on whether the (new) offence(s) occurred prior to, or during, the current referral order.

Where the offence(s) were committed before the making of the referral order, the court may make a further order extending the compliance period. This is an 'extension order'. An extension order must not take the entirety of the compliance period beyond a maximum of 12 months and, thus, an extension order may not be made where the original referral order was for 12 months. In this circumstance, however, the court may make an absolute discharge and allow the referral order to continue.

Where the offence(s) were committed after the making of the referral order, the court may still make an extension order. This requires a report from the youth offender panel which outlines exceptional circumstances and indicates that an extension order would help to prevent re-offending.

In either case, where the court decides that an extension order (or absolute discharge) is not suitable, it must revoke the existing referral order in sentencing for the new offence(s). It may also, but does not have to, re-sentence for the original offence(s) for which the referral order was made, taking account of the extent to which the contract has been complied with.
References

8. The research found that 54% of referral orders were made where there had been no previous reprimand or final warning.
9. Section 23(2)(a) Powers of Criminal Courts (Sentencing) Act 2000 specifies that one element of a contract may be for 'the offender to make financial or other reparation to any person who appears to the panel to be a victim of, or otherwise affected by, the offence, or any of the offences, for which the offender was referred to the panel'. It is also permitted for the court to make a compensation order on the making of a referral order. Thus, there are options for dealing with compensation issues. The Nacro Good Practice Guide on referral orders contains a note of caution for the panel where the court has declined to make a compensation order.
10. The amendments were contained in The Referral Orders (Amendment of Referral Conditions) Regulations 2003.
12. For detail of the hospital order in the context of the youth justice system, see Nacro Briefing Mental health legislation and the youth justice system (2005).