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Exploring procedural justice and problem-solving practice in the Youth Court

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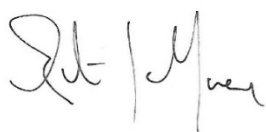
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Foreword

HM Inspectorate of Probation is committed to reviewing, developing and promoting the evidence base for high-quality probation and youth offending services. *Academic Insights* are aimed at all those with an interest in the evidence base. We commission leading academics to present their views on specific topics, assisting with informed debate and aiding understanding of what helps and what hinders probation and youth offending services.

This report was kindly produced by Gillian Hunter and Jessica Jacobson, providing an overview of procedural justice, the links to legitimacy, and the research evidence for its positive effects on engagement and cooperation. Drawing on findings from recent research, the links between procedural justice and problem-solving are explored, with a focus on the role of youth offending services in supporting and promoting these approaches in the youth court. As set out, youth offending services have a crucial role to play in: (i) supporting children's understanding and engagement; (ii) providing personalised, holistic and analytical information to the courts about children's needs and circumstances; and (iii) supporting any post-sentence judicial monitoring and reviews. Moving forward, the local experiences of developing procedural justice and problem-solving practices need to be harnessed and shared, with an ongoing commitment to further research and evaluation so that the evidence base continues to grow.



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The views expressed in this publication do not necessarily reflect the policy position of HM Inspectorate of Probation.

1. Introduction

This Academic Insight offers a brief overview of procedural justice and its role in strengthening public support for the criminal justice system. Focusing on those in close contact with the system as defendants, offenders, crime victims, or witnesses, it describes how procedural justice is applied in different criminal justice settings and reviews the research evidence for its positive effects on compliance with the law and cooperation with criminal justice agencies.

Then, using the youth justice system as a case study, it draws on research funded by the Nuffield Foundation and conducted during 2018-2019 by ICPR at Birkbeck and the Centre for Justice Innovation on problem-solving approaches in the youth court. It describes how procedural justice and problem-solving are interconnected and explores how they are being developed, with a focus on the role of youth offending services in supporting and promoting these approaches in the youth court.

Procedural justice: four key principles

VOICE



People need to have **the chance to tell their side of the story** and to feel that authority figures will listen and sincerely consider this before making a decision.

NEUTRALITY



People need to see authority figures as **neutral and principled decision-makers**, who apply rules consistently, transparently and do not base their decisions on personal opinion or bias.

RESPECT



People need to feel **respected and treated courteously** by authority figures, believe their rights are considered equal to those of others and that their issues will be taken seriously.

TRUSTWORTHY MOTIVES



People need to see authority figures as people with **trustworthy motives**, who are sincere and authentic, who listen and care and who try to do what is right for everyone involved.

2. Procedural justice and problem-solving practice

2.1 Procedural justice – a very brief overview

Historically, the concept of procedural justice has been associated with the work of Tom Tyler and his colleagues in the United States (eg. Tyler, 2001; Tyler, 2003; Tyler and Huo, 2002). Based on extensive surveys about people's first-hand experiences of the police and the courts, and residents' evaluations of police behaviour in their communities, they have identified factors which determine whether the authority exercised by a criminal justice agency is perceived as legitimate – both at an individual level and by the public more generally. Broadly, the concept of legitimacy is defined as the *'psychological property of an authority, institution or social arrangement that leads those connected to it to believe it is appropriate, proper and just'* (Tyler, 2006, p.375). In relation to the criminal justice system, this translates to an obligation to cooperate and defer to that authority's decisions.

Findings foreground the processes in delivering justice rather than outcome as being the more salient influence on compliance with the law and cooperation with criminal justice agencies. This process-based model shows the potent effect of people's subjective assessments about the fairness of procedures and decision-making, and the quality of treatment they receive from legal authorities, on their attitudes towards the criminal justice system and its agents (Tyler, 2001; Tyler and Huo, 2002).

In the UK, as elsewhere, the concept of procedural justice has been situated within wider discussions about how criminal justice institutions secure and sustain legitimacy – that is their right to exist, their authority to police, to use coercive force and to punish. Accordingly, researchers have explored how legitimacy can be strengthened by building trust and confidence in the justice system across the population (Hough, 2020; Hough et al., 2013; Hough et al., 2010; Jackson et al., 2011; Myhill and Quinton, 2011). The key interest here is in why people choose to obey the law, and procedural justice theory is advanced to highlight the interconnecting relationships between:

- the treatment people receive from the police and justice officials and the resultant trust that people have in justice institutions
- the legitimacy people confer on justice institutions as a consequence of this trust
- the authority that these institutions can then command when they are regarded as legitimate
- people's consequent preparedness to obey the police, comply with the law, and cooperate with justice institutions (Hough et al., 2010, p.204).

Procedural justice and the criminal justice system

Research exploring interactions between the public and the police – the most visible agents of the criminal justice system – has thrown further light on how 'procedural fairness' can be understood. This concludes – in broad terms – that 'treating people with respect and in an unbiased fashion' is key to assessments of fair treatment (Sunshine and Tyler, 2003, p.536). The transparency of police processes – defined as 'visible performances of competency and proper decision-making' – is an added factor according to Bradford and colleagues (2009, p.22). Conversely, studies underline the negative impact of poor interaction with the police

on future support, including how this can decrease people's willingness to engage with the police again, even if they become a victim of crime (Lagratta and Bowen, 2014).

While at the population level, attending a criminal court will not be as common an experience as interacting with a police officer, research findings suggest that the same principles of procedural justice apply. Research in both criminal and civil courts pinpoint four aspects of process that influence how witnesses and defendants assess their court experiences:

- **voice** – having the opportunity to tell their side of the story
- **neutrality** – viewing judges and magistrates as neutral and explaining clearly the rationale for their rulings and decisions
- **respect** – respectful and courteous treatment from all court practitioners
- **trust** – that their views will be listened to and considered (Tyler, 2008).

Research we conducted on lay people's experiences of the Crown Court (Jacobson, Hunter and Kirby, 2015), supported the contention of procedural justice theorists that fair and transparent decision-making and respectful treatment are important factors in shaping victims', witnesses' and defendants' sense of legitimacy of the court process. However, the outcome of a case – whether or not a defendant is found guilty, and the type of sentence passed – also played a part in assessments of court experience. Further, 'good' treatment was found to limit the impact of a disappointing outcome and vice versa.

Perceptions of fairness in court may also have a significant impact on subsequent behaviour. Research reviewed by Lagratta and Bowen (2014) indicates that taking a procedural justice approach can increase compliance with court summons (Bornstein, Tomkins and Neeley, 2011) and reduce rates of reoffending (Lee et al., 2013; Papachristos et al., 2012).

In the US, empirical research, undertaken to measure the impact of procedural justice on probation supervision (Blasko and Taxman, 2018), found that where individuals perceived that their supervising officers used practices associated with procedural fairness – agreeing with statements such as '*my probation officer listens to my side of the story...*'; '*my probation officer works with others to get the services I need*' – they were less likely to engage in criminal behaviour or to violate supervision rules.

Applying procedural justice theory to policy and practice

In sum, research on 'user' experiences across the criminal justice system highlights the significance of personal experiences and their aggregate effects on trust in the system and, ultimately, engagement and compliance. It also helps to identify aspects of professional practice that engender public support and, consequently, is an increasingly prominent theme in policy development and procedural guidance.

Recent guidance for applying procedural justice principles in probation work promotes the importance of politeness and respect in all communications (Evidence-Based Practice Team resource, 2020). In supervisory relationships and when preparing reports for the court, staff are encouraged to:

- be interested
- ask questions and encourage feedback
- be transparent about decision-making
- be clear about role and expectations.

2.2 Procedural justice and problem-solving courts

Problem-solving courts are focused on outcomes and rehabilitation. The authority of the court is harnessed to tackle the problems that underlie offending. The problem-solving approach incorporates the following:

- specialisation to ensure that cases are heard in specialised settings, by trained court professionals who have a thorough understanding of the needs, risks, and assets of the 'target group'
- collaboration with other agencies to enhance intervention and supervision opportunities
- encouraging accountability for individuals' compliance with the court's instructions via judicial monitoring, where judges can use incentives such as early termination of order to reward progress or impose sanctions for poor compliance
- focusing on longer-term outcomes by monitoring impact and continuing to innovate in response to changing circumstances (Bowen and Whitehead, 2015).

Procedural justice – understood as fair and respectful treatment of people in the criminal justice system – is a foundational principle of problem-solving and like procedural justice, a problem-solving approach seeks to increase public support in the legitimacy of the justice system (Hunter et al., 2020; Bowen and Whitehead, 2015).

A review of the research evidence on the impact of problem-solving courts, focusing on a range of 'target' populations, shows the positive effects of the approach in:

- reducing substance misuse and reoffending in adult drug courts
- reducing parental substance misuse and the numbers of children being permanently removed from their families in family drug and alcohol courts
- reducing the frequency and seriousness of perpetrator reoffending in courts focused on dealing with cases of domestic violence (Bowen and Whitehead, 2015).

While Bowen and Whitehead (2015) found less convincing international evidence for the effects of problem-solving approaches on court-involved young people, there is increasing support (see below for reference to independent reviews which draw upon evidence from practitioners, advocacy groups and academics) for the youth court in England and Wales to adopt problem-solving practice. The numbers of children going through the youth court has declined significantly (75% fewer children are being dealt with by the court compared to 10 years ago), but those who remain in the system tend to be particularly disadvantaged and vulnerable. Looked After Children are over-represented, there is a high incidence of mental health problems and learning difficulties, and factors including economic deprivation, low educational attainment, familial offending, experience of abuse and neglect, and substance misuse problems are common in the backgrounds of children appearing in court (Bateman, 2017; Bryan et al., 2015; Campbell and Abbott, 2012; Prison Reform Trust, 2016). The combination of reduced numbers with more complex welfare and other needs among children who regularly present at court has prompted interest in exploring problem-solving approaches that could offer a more holistic and longer-term response to their offending and better support their rehabilitation.

The youth court environment is favourable to problem-solving, with key aspects of the approach already in place. Hearings are heard in specialist magistrates' courts that are closed to the public and subject to adjustments intended to make them more suitable to children. The youth courtroom has a less formal layout that largely excludes raised benches

for judiciary and the use of the dock (although not all youth courts currently meet these recommended standards). There is guidance emphasising specialist training for youth court practitioners, including the judiciary and advocates, in handling youth cases. This emphasises supporting children's understanding and engagement in proceedings, and ensuring they are given a 'voice' during hearings (see, for example, The Magistrates' Association Youth Court Protocol; National standards for Youth Justice; the Bar Standards Board, Youth Proceedings Competences and Guidance; and Youth Justice Board – Youth Advisory Network Ambassadors (Collins, 2020)). The encouragement of active participation aligns with procedurally just treatment and its function of helping to secure the legitimacy of the court process amongst defendants and witnesses (Kirby, 2020).

The youth offending service (YOS), comprising statutory partners and specialist professionals, plays a critically important part in youth proceedings. More specifically, the YOS:

- provides the court with detailed information about the child to inform sentencing and supports the child through the court process
- provides collaborative intervention and supervision as part of community sentences
- with other services, focuses strongly on outcomes.

This last point underlines the principal aim of the youth justice system to prevent (re)offending by young people (Crime and Disorder Act 1998, s.37), while the courts also have a statutory duty to have regard for the welfare of children and young people (Children and Young Persons Act 1933, s.44 (1)). Sentencing guidance promotes an approach that is child rather than offence-focused and centres on rehabilitation. It recommends taking account of the background factors which contribute to offending and stipulates that sentencing must seek to avoid the 'unnecessary criminalisation' of young people and provide an opportunity for them to learn from their mistakes (Sentencing Council, 2017).

Three high-level expert reviews on the youth justice system – the Carlile Inquiry in 2014, the Taylor Review in 2016, and the Lammy Review in 2017 – have backed elements of problem-solving, including by promoting the courts' role in actively monitoring the progress of court-involved children after sentence. The Michael Sieff Foundation has sought to maintain momentum following these various recommendations, through setting up a working group and organising seminars and a conference about problem-solving in the youth court, and the Foundation continues to monitor progress in implementing changes in the youth justice system to support problem-solving practice.

2.3 An empirical study of problem-solving practice in the youth court

The growing interest in problem-solving in the youth court, bolstered by ever-wider acceptance of the importance of procedural justice, formed the context for our research. The aim was to:

- explore how problem-solving was being developed locally
- explore what opportunities – and appetite – existed to enhance practice
- identify obstacles to its wider application (Hunter et al., 2020).

Fieldwork was conducted in three sites across England, comprising five youth courts and associated YOS, during 2019. The research was largely qualitative and comprised in-depth interviews and focus groups with **56** practitioners, including YOS staff, magistrates, district judges, defence and prosecution advocates, and legal advisers, and **32** lay people who had

recent contact with the youth court, including young defendants and their family members. We also undertook observations over 20 days of youth court sittings and of youth referral order panels and youth rehabilitation order reviews. While we make no claims that our findings are representative of practices or views of youth court and YOS practitioners more widely, many of the issues that were raised chime with national discussions and the wider research literature on youth courts.

We found some very dedicated practitioners who were committed to improving support for children appearing in court, and we saw examples of creative and innovative local practice. Our findings are summarised here and described in detail in the research report (Hunter et al., 2020) and briefing on young people's views of their court experiences (De Cruz, 2020). YOS staff and magistrates noted the greater seriousness of cases and complexity of needs now being dealt with in youth court; trends linked to shifts in arrest, charge and prosecution practices, including the increased emphasis on pre-court diversion for more minor offending among children. Additionally, comments were made about changes in crime patterns, particularly with respect to increases in knife crime and gang-related activity, both national concerns.

In the following sub-sections we focus on the key role of YOS in supporting procedural justice and problem-solving practice.

YOS support children's understanding and engagement in court

The YOS used a range of strategies to help children's understanding of court. They designed 'child-friendly' leaflets outlining court processes and the role of different court professionals. In one site, a speech and language specialist had reviewed these written materials to ensure their clarity for children with communication needs. In two sites, there were YOS protocols in place for identifying first time court attendees and targeting them with information about what to expect in court; an initiative that had been introduced following a local drive to learn more about children's experiences at court, which had highlighted that many found court daunting. YOS staff were often present outside courtrooms to answer questions about proceedings from children and their families or carers.

All youth court magistrates received training on how to engage with children. This was generally thought to have improved practice in the youth court, although we observed some departures from the guidance. Supporting engagement can be difficult where children have speech, language and communication or mental health needs. YOS played a crucial role in identifying the learning and communication needs of children, including flagging to the court any speech and language difficulties that required a more tailored approach to communication.

The YOS often acted as mediator between children and court to reduce the social gulf that can exist between the magistracy and the children coming before them. A child's response to the court can create a distorted or negative impression. Apparent nonchalance can be a defence mechanism but is unlikely to be interpreted as such. For example, one magistrate we interviewed said: "*A lot of the younger ones... can seem very nervous – they can get quite giggly which may be (wrongly) seen as them not taking it seriously or as a lack of respect for the court.*"

While acknowledging the value of engagement between sentencers and children, YOS practitioners were concerned that the substantive outcome of a case could unjustly hinge on the child's 'performance' in court and saw the necessity of explaining idiosyncratic behaviour

that might otherwise be interpreted as disrespectful: As one YOS worker said: *"I've had kids slumped over with their hoodies up and I know for a fact that they're terrified but immediately I can see the magistrates going, 'can you sit up please'."*

YOS staff also reported having to plug gaps in children's – and their families' – understanding of proceedings and of sentencing outcomes by explaining after the fact what had happened in court and the implications for the child.

YOS inform the court about needs and coordinate intervention and supervision

Problem-solving courts identify treatment and support measures to effect behaviour change and respond to complex and multiple needs and risks. YOS have multi-agency teams that coordinate supervision and intervention, and they ensure that the court is given thorough information on an individual's compliance and progress (Bowen and Whitehead, 2015). Dedicated YOS court teams in the research sites ensured that YOS staff had requisite specialist skills for dealing with court-involved children. YOS staff were praised for providing detailed reports about children to support sentencing. For example, comparing YOS reports to those she had seen provided by the probation service for adults, one judge said: *"There's more analysis, there's more detail, there's more reflection on what's going on. They are much more child focused and child centric."* A legal adviser in another site stated: *"The amount of input of the YOS is incredible and the reports that they prepare are very thorough and detailed about absolutely everything."*

Pre-court meetings between legal advisers and YOS (sometimes also including defence representatives and magistrates or judges), for discussion of young defendants and their particular needs or circumstances, were considered vital to the effective running of the court. YOS officers told us: *"[Our] proposals are followed far, far more than they ever were before. I'm certainly shocked if we don't get the result that we are looking for."* Another said: *"I've never had any issue with the sentencing. Every time I've put a pre-sentence report in, I've had what I've suggested."* This appeared to be based on respect for YOS experience and expertise, and in one site it reflected a YOS pre-sentence review process which discusses and agrees the sentence recommendation before it is presented to the court.

Appointments of specialist staff to YOS were said to have improved capacity and expertise. In one site, a speech and language therapist contributed to assessments and pre-sentence reports. In another, the YOS had employed a community psychiatric nurse (CPN) to screen children for mental health needs. The CPN prepared reports for the court, highlighting any issues, including previous contact with mental health services. YOS staff also told us about a new initiative they were developing on knife crime in response to changing crime patterns among children. The YOS workers we interviewed mostly felt they had a good range of interventions to offer children, and more so than in the past. It was noted that: *"very experienced staff are willing to try new things... be flexible and creative."* Magistrates were generally very complimentary about how YOS worked with children: *"They bend over backwards.";* *"I think the YOS do sterling work trying to help the young people."*

However, there was a consensus among practitioners that while the identification of children's needs was good, the ability to respond effectively to these various issues is constrained by resource and service limitations. In the view of one interviewee, cost-cutting has meant that YOS programmes are *"covering what they have to and they're not necessarily in a position to properly implement change that would reform that young*

person." For example, while acknowledging that social service departments are struggling with reduced resources and staff retention and recruitment difficulties, our interviewees felt that the YOS – and the court – were often left to deal with the effects of deficits in social services provision. This was said to have wider implications for supporting children to successfully complete their sentence. Another common frustration concerned access to support for mental ill health, with very limited availability of external mental health services for children.

A magistrate spoke of his wish to see government commitment to reinvesting the savings made through reducing the numbers of children coming to courts, in order to deal more effectively with the needs of those children who do end up before the courts.

YOS support for judicial monitoring

Research on the effectiveness of problem-solving approaches shows that regular post-sentence reviews by sentencers can help sustain motivation to comply, thus helping to reduce risks of breach; for example, by creating opportunities to troubleshoot where an individual lacks the support that could help them adhere to an order. Reviews – whether they take place in the formal court setting or away from court – are structured so as to encourage more positive engagement between sentencer and court attendee, highlighting another important connection to the principles of procedural justice.

While there is provision in the *Criminal Justice and Immigration Act* (2008) for the Secretary of State to enable a court to review youth rehabilitation orders (YROs)¹ periodically, to date this has not been enacted. However, guidance has been issued by the Justices' Clerks Society, with the agreement of the Senior Presiding Judge, on the establishment locally of non-statutory reviews by the YOS. This emphasises that it is the YOS's decision as to whether or not to implement such review panels; that this is limited to YROs at this time; and that these are not part of a magistrate's official duties and thus involvement is undertaken in a personal capacity but '*remains subject to the expectations of judicial office holders set out in the Guide to Judicial Conduct*'.

On this basis, the YOS in one site was holding informal review hearings for children on YROs – and another site was planning to trial a similar process. Reviews take place in YOS offices, involving two magistrates, a manager from the YOS, and the supervising YOS worker. The child is invited to attend and can also bring a parent, carer or social worker to the meeting. The reviews include an assessment of how well the child is engaging and highlight progress and achievements and what further support could be offered. They have no power to amend orders or formally respond to non-compliance, but in the reviews we observed, children were always reminded by the magistrate of the requirements of their YRO, and the consequences should they not comply. On occasion, it was also made clear that decisions about 'consequences' would take place back in the court if deemed necessary – meaning the voluntary nature of the review panel was made clear and maintained.

Data provided by the YOS responsible for this review panel showed that 35 such panels were held during 2018, of which 26 were attended by the child. The practitioners we interviewed felt that the reviews helped to encourage the positive engagement of children:

¹ The YRO is an order of up to three years' duration which must include one or more requirements, such as a curfew, supervision, treatment (e.g. drug or mental health) or attendance at activities.

"... it refocusses their attitude, to a positive approach to the order because up until then, their experience of magistrates and people dictating what happens to them, which is how they see it, is people sat on a bench who are talking to them in a particular way, who are deciding what will happen to them, who are telling them what to do and then suddenly out of the blue they are sitting around a table with people who are genuinely taking a real interest in them.... Although the setting is informal it is quietly exploratory, it is quietly challenging, but it's all done at the young person's pace so they're more relaxed, they're more engaged."

The YOS had provided training to magistrates on how to talk to a child during a review, "so they're not talking to them from a dictatorial position, when they're less likely to listen to what you're saying, where they're more likely to switch off and get upset" and were generally impressed with how the magistrates were adapting their approach to the informal setting.

During reviews, we heard magistrates congratulating the YOS on their work with children, but also holding children and practitioners to account, questioning why something that had been promised had not yet been done. We observed how the continuity of contact between magistrate and child could be important. For example, at a review where a child was not engaging with the YOS as expected, the magistrate reminded him gently about the time he came to court and told her he was frightened of being sent to a Young Offender Institution. She told him that she did "not want to hear that [he is] falling back".

A child in another observed review was congratulated by the panel on his bravery in disclosing to YOS workers what was happening to him (related to safeguarding concerns) which explained why he had not been attending his supervision appointments. This meant that potential breach proceedings were avoided. There were also examples in other reviews of children being given praise about the progress they were making with education or training. Children were always encouraged to speak and to give feedback about how they were coping. Despite such efforts, however, and the informal setting, their contributions were generally minimal and most of the talking was done by the professionals. There was also a summing up of expectations at the end of each review: "Carry on taking your medication, keep your appointments." Reviews were considered helpful not only in supporting children's compliance with their sentences, but also for improving communication between the YOS and magistrates.

In the sites where informal reviews had not yet been initiated, there was interest among magistrates in hearing more from the YOS about the progress being made by children they had sentenced. However, this was qualified by concerns about capacity and resources to facilitate any routine judicial monitoring of sentences.

3. Conclusion: Enhancing problem-solving practice

The snapshot of youth court practice in 2019, provided by our research, shows there is continuing high-level support and strong operational grounds for developing problem-solving approaches to working with children attending court. It also highlights significant systemic and practical challenges that must be overcome if this is to be fully implemented. Our research found courts which were being stretched by closures and associated bench mergers, and YOS and other services that were over-burdened and working with reduced budgets and staffing. The closure of youth courts has reportedly disrupted some long-established relationships between YOS and youth magistrates and precipitated a loss of expertise among the latter who now sit less frequently in the youth court. We also found that youth court hearings were not always held in courtrooms with the recommended layout, which is intended to support communication and engagement between the bench and the child. While youth court throughput has reduced, delays to hearings continue: we were told of some cases taking up to 18 months to reach court, and that was before the impact of Covid-19.

However, we also identified factors which facilitate problem-solving practice. There is a strong emphasis on increasing understanding of court processes among children and promoting more positive engagement between court and child that adhere to the principles of procedural justice. The YOS – through its detailed reports to the court – demonstrate a thorough understanding of the needs of court-involved children. There is an appetite and interest amongst YOS and sentencers to explore such problem-solving approaches. The statutory framework for one key element of problem-solving – sentence reviews – is in place, although not yet enacted. Our research incorporated a YOS which, alongside the youth bench, had shown considerable initiative in developing a non-statutory approach to YRO reviews. This sought to duplicate the motivational impacts of judicial monitoring, outside of the formal and potentially more coercive framework of the courtroom, making them, arguably, more appropriate for children. These reviews have improved working relationships between the YOS and magistrates and provided regular opportunities to troubleshoot and address issues that might otherwise inhibit the engagement and compliance of court-involved children.

This YRO review model is promising and in line with the limited available evidence on effective practice with children but has yet to be robustly evaluated in terms of its impact on compliance, reoffending and indicators of rehabilitation, such as (re)engagement with education or training. Local experiences of developing problem-solving practice – including but not limited to post sentence reviews of progress – need to be harnessed and shared, and development of problem-solving coordinated nationally by the Youth Justice Board. Extending trials and independent evaluation of this type of judicial monitoring will be important for building the evidence base and expertise among YOS practitioners in England and Wales.

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