



# ALTERNATIVES TO CUSTODY FOR YOUNG OFFENDERS

NATIONAL REPORT ON JUVENILE JUSTICE TRENDS

Netherlands



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# The Netherlands



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## A. Juvenile Justice in the Netherlands

### A.1 Legal framework and the main characteristics of the juvenile justice system in the Netherlands

The Dutch juvenile justice system stems from 1905. In this year a special juvenile justice Act entered into force, the penal Children's Act, together with two other Children's Acts; one on child protection and one on the administration of youth care services. The penal Children's Act introduced special criminal procedural and penal provisions for children to be included in the general Code of Criminal Procedure (hereinafter CCP) and Criminal Code (hereinafter CC), respectively. Special procedural safeguards included a court appointed lawyer, a special role for parents, a trial behind closed doors and special attention to the personal circumstances of juvenile offender. These safeguards have been upheld ever since and are still part of the Dutch juvenile justice system anno 2014. In addition, the penal Children's Act introduced special sentences for juveniles, including separate custodial sentences. In 1922, the juvenile judge was introduced. The penal Children's Act introduced what could be referred to as the pedagogical character of the juvenile justice system, which favours (re-)education over retribution and aims to support the juvenile's development and reintegration. This pedagogical character still is a prominent feature of juvenile justice in the Netherlands, recognisable throughout the system, including sentences, procedures and institutions.<sup>1</sup>

<sup>1</sup> See Doek & Vlaardingerbroek 2009, p. 426-435; Weijers & Liefwaard 2007; Policy Directive 'Effective Settlement Juvenile Justice Case (Aanwijzing effectieve afdoening strafzaken jeugdigen), *Government*

In the 1980s, a diversion programme at the level of the police was introduced called HALT (acronym for ‘Het Alternatief’, i.e. the alternative). In 1995, alternative sentences, such as community service and learning projects (i.e. alternatives for deprivation of liberty) were introduced, as part of a large revision of the Criminal Code and Code of Criminal Procedures concerning the position of juveniles. The revised juvenile justice provisions aimed at safeguarding the legal position of the juveniles in the juvenile justice system and at modernizing and simplifying the penal justice system. The introduction of alternative sentences can be regarded as part of the modernization. The simplification resulted in a decrease of the number of juvenile sentences, including youth imprisonment (i.e. ‘jeugd detentie’) and the custodial treatment order (i.e. ‘plaatsing in een inrichting voor jeugdigen’). Since 1995, some additional adjustments have been made in the special juvenile justice provisions of the CC and CCP. One adjustment concerned the introduction of a non-custodial treatment order (‘gedragsbeïnvloedende maatregel’, hereinafter non-custodial treatment order or behavioural order) in 2008.<sup>2</sup>

Thus, the Dutch juvenile justice system does not have a special act for juveniles in conflict with the law. Instead, both the CC and CCP include special provisions for juveniles, who were between 12 and 18 at the time of committing the (alleged) offence.<sup>3</sup> In addition, there is one special act regulating the legal position of juvenile in youth custodial institutions, the 2001 Youth Custodial Institutions Act, and a number of lower regulations and policy instruments relevant for the enforcement of sentences, the use of diversion mechanisms (also at the level of the public prosecutions office), legal representation during police interrogations, etc.

In conclusion, the Dutch juvenile justice system and its pedagogical character have developed throughout the 20<sup>th</sup> Century and finds support in article 40 of the UN Convention on the rights of the Child (hereinafter CRC). Anno 2014, the system includes both diversion programmes as well as formal, specialized justice proceedings, which stretches out to specialized dispositions. In addition, it is important to note that there has always been – and there still is – a strong link between the juvenile justice system and child protection system.<sup>4</sup> In the following paragraphs the special features of the juvenile justice system will be clarified.

## A.2. Minimum Age of Criminal Responsibility (MACR)

The minimum age of criminal responsibility (hereinafter MACR) in the Netherlands is twelve (Art. 486 CCP). Juveniles under the age of twelve fall outside the scope of the

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*Gazette* 2011/10941, introduction.

<sup>2</sup> Doek & Vlaardingerbroek 2009, p. 426-435.

<sup>3</sup> We will primarily speak of ‘juveniles’ as persons under the age of 18 years. Occasionally, we refer to children or minors as well.

<sup>4</sup> Policy Directive ‘Effective Settlement Juvenile Justice Case (Aanwijzing effectieve afdoening strafzaken jeugdigen)’, *Government Gazette* 2011/10941, introduction.

juvenile justice system and cannot be prosecuted (Art. 486 CCP). They can, however, be subjected to some investigative or coercive measures, including stop and search of body and clothing, arrest and police interrogation (for a maximum of 6 hours; Art. 487 CCP). All other juveniles – aged 12 to 18 years at the time of the alleged offence – can be prosecuted for the offences described in the Criminal Code (Art. 77a CC) and fall under the jurisdiction of the youth court (Art. 488 ff CCP).<sup>5</sup>

The MACR is absolute. Dutch law does not provide for exceptions to this age limit; an age limit which corresponds with the minimum standard set by the UN Committee on the Rights of the Child in its General Comment on ‘Children’s Rights in juvenile justice’.<sup>6</sup> The upper age limit is 18 years, which corresponds with the definition of minority as laid down in Art. 1:233 of the Dutch Civil Code (i.e. every person under the age of 18 is considered a minor; in conformity with Art. 1 CRC). If a juvenile were under the age of eighteen when he committed the (alleged) offence, he falls within the scope of the Dutch juvenile justice system.

Dutch law does provide two exceptions to the upper age limit. First, it allows that juveniles aged 16 or 17 years can be sentenced under adult penal law in case of a serious offence or if the court finds reason to do so in the personality of the offender or the circumstances of the case (Art. 77b CC). These juveniles will, however, be tried within the juvenile justice system. Research indicates that this form of transferring juveniles to the adult penal system is not widely used (i.e. in 2012, 123 times a year on average during the past years) and that its use decreases (i.e. in 2002, 2,6 per cent of the juvenile cases were ‘transferred’ to the adult justice system; in 2008 this was only 1,2 per cent).<sup>7</sup> In addition, application of Article 77b CC does not seem to result in significant heavier sentences compared to the maximum sentences under the juvenile justice system (see also under par. 1.4). Moreover, it remains unclear why the courts use this option, since they generally do not clarify specifically why they use it. The UN Committee on the Rights of the Child has repeatedly criticised this legal provision.<sup>8</sup>

With regard to young adults, a similar exception applies the other way around. According to Article 77c CC, young adults aged 18 to 21 (from 1 April 2014: 18 to 23) can be sentenced under the juvenile justice system by the (general) criminal court, if it finds reason to do so in the personality of the offender (e.g. retardation) or the circumstances of the case. Again, this legal possibility is hardly used in practice. During 2002-2008, 25 cases were

5 In addition, juveniles can also be sanctioned for truancy, either through the juvenile justice system or administrative procedure; see article 26 par. 2 the law on compulsory education (leerplichtwet) and Policy Directive on criminal justice approach to absence from school and truancy (Aanwijzing strafrechtelijke aanpak schoolverzuim), *Government Gazette* 2011/1386.

6 UN Doc. CRC/C/GC/10, para. 33.

7 *Parliamentary Documents II* 2012/13, 33 498, no. 3, p. 18; Uit Beijerse 2013, p. 55.

8 See UN Doc. CRC/C/NLD/CO/3, para. 77-78. See also UN Doc. CRC/C/GC/10, para. 38.

‘transferred’ to the juvenile justice system, that is: 0,2 per cent of all court cases regarding 18 to 21 year olds.<sup>9</sup> It might be expected that Art. 77c CC will be used more frequently in the future, since there has been an increased attention for the position of young adults in the criminal justice system, which among others resulted in the Act on adolescents in juvenile justice increasing the age limit of this provision to 23.

### A.3 Procedural Safeguards

As a principle, juvenile suspects or juveniles accused of committing a crime are entitled to the same procedural safeguards as adults. However, some additional procedural safeguards are being provided for. These include for example the right to have a legal or other appropriate assistant present during police interrogations,<sup>10</sup> the right to a court appointed lawyer free of charge (Art. 489 CC), the right to be tried before a youth court and behind closed doors (the verdict will always be public; Art. 121 Dutch Constitution), the right to have one’s parents present during trial and maintain contact with family while being deprived of their liberty (Art. 496a CCP). In addition, there are provisions safeguarding or fostering of the juvenile’s presence in court, such as the involvement of the Child Care and Protection Board (‘Raad voor de Kinderbescherming’) to report on the personal circumstances concerning the juvenile involved (Art. 495b (1) CCP) and the use of pre-trial detention as a last resort (Art. 493 CCP).

### 1.4 Juvenile justice authorities responsible for reactions to juvenile offending

Several authorities are involved in the juvenile justice system. The most important ones are the police, the public prosecutor, juvenile judge or youth court, Youth Care Agency (youth probation services; Bureau jeugdzorg) and the Child Care and Protection Board. The latter has an advisory role during the juvenile justice proceedings. It investigates the juvenile’s personality and background. When responding to the juvenile’s delinquent behaviour, this report and the Board’s advice have to be taken into account.<sup>11</sup> In addition, it is involved in the enforcement of diversion programmes as well as sentences. In this regard, youth probation services play a central role as well, particularly when it comes to supervision of suspended pre-trial measures or (suspended) sentences, such as community service orders, suspended custodial sentences or non-custodial treatment programmes. In addition, the juvenile’s lawyer and authorities responsible for the enforcement of custodial sentences, youth custodial institutions, should be mentioned here.

<sup>9</sup> *Parliamentary Documents II* 2012/13, 33 498, no. 3, p. 18.

<sup>10</sup> Dutch Supreme Court, 30 June 2009, ECLI:NL:HR:2009:BH3079.

<sup>11</sup> See e.g. article 494 CCP and Policy Directive ‘Effective Settlement Juvenile Justice Case (Aanwijzing effectieve afdoening strafzaken jeugdigen)’, *Government Gazette* 2011/10941, para. 5.

Below, particular attention will be paid to the police, public prosecutor and youth court and their roles, particularly with regard to diversion and/or sentencing of juveniles.

## **Police**

The police, generally, are the first authority a juvenile is confronted with in the juvenile justice system. The police are involved in the criminal investigation and can subject the juvenile to interrogations, under the supervision of the public prosecutor. In addition, the police have some discretion in responding to the (alleged) criminal behaviour of the juvenile. These responses include a warning, diverting the juvenile to the HALT programme or forwarding the police file or report to the public prosecutor for further investigation and potentially prosecution.<sup>12</sup> In case of a warning, no police report will be made up, although the offense and suspect will be registered. Parents will be warned and the police can demand that damages have to be compensated. The relatively young age of the juvenile, his mental state, the position of family and his school are relevant factors to be taken into account by the police when assessing the appropriateness of a warning, rather than resorting to further criminal procedures.<sup>13</sup>

The police can also divert juveniles to ‘HALT’ (Art. 77e CC), which could prevent prosecution. This diversion programme is at the discretion of the police, but formally falls under the responsibility of the public prosecutor. Policy directives of the public prosecutions services regulate the use of HALT.<sup>14</sup> Art. 77e CC provides that the maximum duration of a HALT programme is 20 hours.

In HALT, key is the pedagogical notion that juveniles should understand and deal with their responsibility themselves; as part of this a juvenile has to consent with HALT, so do his parents if the juvenile is under the age of 16. The HALT programme can consist of a dialogue with the juvenile and his parent(s), an apology to the victim, compensation of damages, an assignment related to the committed offense and any other pedagogical activity.<sup>15</sup> Children under the age of 14 cannot be invited to offer financial compensation, because there are not liable under civil law (Art. 6:162 Dutch Civil Code).

Although the aim of HALT is to divert juveniles from the formal criminal justice system, it is only an option in less severe cases, such as theft of a maximum value of 150 € (Art. 310 CC), calling the emergency number for no reason (Art. 142 (2) CC), vandalism with a damage that does not exceed 900 € per offender and in total 4,500 € (Art. 350 CC).<sup>16</sup> The programme is only applicable if there is no significant societal unrest or disorder, if the culpability of the offender can be determined easily and if a mere pedagogical approach

12 The police can also offer a fine as (police) transaction for misdemeanors.

13 Policy Directive ‘Effective Settlement Juvenile Justice Case (Aanwijzing effectieve afdoening strafzaken jeugdigen), *Government Gazette* 2011/10941, para. 4.1.

14 Decree HALT-offences (Besluit aanwijzing Halt-feiten), *Bulletin of Acts and Decrees* 1995, 62; Policy Directive HALT-settlement (Aanwijzing Halt-afdoening), *Government Gazette* 2009/19365.

15 Policy Directive HALT-settlement, para. 10.

16 De Jonge & Van der Linden 2013, p. 93.

is regarded appropriate.<sup>17</sup> Generally, the HALT-programme is available to first offenders only and will only be offered once. In some cases, it can be offered for a second time. In case of recidivism, the police will have to send the police report to the public prosecutor. This is also true, if the project has not been completed or has not been carried out well (unless there are severe reasons not to do so). If the minor has completed the project in a satisfactory way, the public prosecutions service will lose its right to prosecute. In 2012, 17.606 minors were referred to HALT, which is 6,5 per cent more than in 2011, but significantly less than the years before, which is related to the decline of the number of juveniles involved in the juvenile justice system.<sup>18</sup> In 2012, 16.153 of the 18.083 HALT-projects were completed successfully.<sup>19</sup>

The final option for the police is to make up a police report and send it to the public prosecutor.<sup>20</sup> This report will be discussed in a special stakeholders meeting called the 'jusititeel casuoverleg (JCO)'. In this meeting relevant stakeholders, including the police (juvenile specialist), the public prosecution (youth prosecutor and youth secretary), the Child Care and Protection Board and Youth Care Services (Youth Probation Services), discuss individual cases and assess the most appropriate and tailored response in light of all the circumstances of the case, including the personality of the juvenile and his family situation. This stakeholders meeting has the aim to foster the dialogue between the relevant stakeholders and to get a better understanding of each other's position and expertise. Both the outcome of the meeting and the recommendations of the Child Care and Protection Board will affect the decision of the public prosecutor to either divert the case or press charges or summon the juvenile to appear before the youth court.

### **Public prosecutor**

The public prosecutor has the discretion to decide whether to prosecute or not; this has been acknowledged as the 'principle of prosecutorial discretion'.<sup>21</sup> The prosecutor is free not to prosecute, for example if no sufficient evidence is available, in case it concerns an old or petty crime or if a child protection measure is deemed more appropriate.

The public prosecutor also has the competence to divert the case through a conditional dismissal, also known as a transaction (Art. 77f and 74 CC) concerning offenses which can lead to a sentence of imprisonment for no more than six years.<sup>22</sup> The public prosecutor is free to decide under which conditions he offers the transaction. Examples are a fine (with a maximum of 3,900 €), community service or learning project (with a maximum of 40 hours within three months) or the obligation to follow the instructions of the

<sup>17</sup> Art. 2 Decree HALT-offences.

<sup>18</sup> Halt 2012, p. 2.

<sup>19</sup> The higher number of projects is related to a number of projects from 2011 that still had to be completed; Halt 2012, p. 3.

<sup>20</sup> Art. 74c CC.

<sup>21</sup> Art.167a (2) CCP.

<sup>22</sup> Art. 74 and 77f CC.

youth probation services.<sup>23</sup> The juvenile is free from prosecution if he complies with the conditions set. In case of non-compliance other conditions can be set or prosecution will follow nonetheless.

If the public prosecutor summons the juvenile, the case will be dealt with by the youth court, which will be addressed below. It is up to the public prosecutor to demand for a certain sentence, if he considers the juvenile guilty of committing a criminal offence. The public prosecutions service has drawn up policy regulations which provide a framework to determine the sentence that can be demanded.

### **Youth Court**

As mentioned in the first paragraph, the juvenile judge was introduced in 1922. Since then juvenile cases have been dealt with by either a single juvenile judge (unus) or a youth court consisting of three professional judges, including at least one juvenile judge (Art. 495 CCP). If the youth court finds the juvenile guilty of committing one or more criminal offences, it can impose one or more special youth sentences. It is worthwhile to take a closer look into the different sentences, which can roughly be divided into penalties and penal measures.<sup>24</sup>

### **Youth sentences**

The youth court (or single juvenile judge; hereinafter referred to as youth court) has a variety of special youth sentences at its disposal (Art. 77g ff CC); these sentences can be imposed separately or combined (Art. 77g CC). The youth court has the discretion to determine an appropriate and fair sentence which is proportionate to the offence.<sup>25</sup> Above all, it has to bear in mind the pedagogical notion of the Dutch juvenile justice system. The three main penalties: youth imprisonment, community service or learning project and a fine. Separately or on top of these main penalty or measures, two forms of additional penalties can be imposed.<sup>26</sup>

Youth imprisonment is the penalty that deprives a juvenile of his liberty. It will be enforced in a youth custodial institution.<sup>27</sup> It can only be imposed if the juvenile committed a serious crime (felony), not in case of a misdemeanour.<sup>28</sup> Depending on the juvenile's age, the maximum length is 12 months if the juvenile is under the age of 16 years, and 24 months, if he or she is 16 or 17 of age (Art. 77i CC).<sup>29</sup>

23 De Jonge & Van der Linden 2013, p. 102-104.

24 A juvenile can be found guilty without imposing further sanctions or measures: the 'judicial pardon' (Art. 9a CC).

25 *Parliamentary Documents II*, 2005/06, 30 332, no. 3, p. 19.

26 Art. 77g CC and Art. 77a jo. 9 (5) CC; The first one is the confiscation. The second possible additional penalty is the withdrawal of one's driver's license.

27 Art. 8 of the Youth Custodial Institutions Act (YCIA). For more on this see e.g. Liefwaard 2008.

28 Art. 77s par. 1 sub a CC.

29 The length of the pre-trial detention has to be deducted from the sentence (Art. 27 CC).

Youth custodial institutions can be divided into privately run (not for profit) and State run institutions.<sup>30</sup> These institutions are meant for the execution of pre-trial detention and custodial sentences: youth imprisonment and the custodial treatment order (see below).<sup>31</sup> At the moment, the maximum capacity of these institutions altogether is around 650 places.

In 2012, 1.869 juveniles were deprived of their liberty in these institutions. Since 2008, this number has decreased with 23 per cent. Of these 1.869 juvenile, 1.581 were pre-trial detained. 231 juveniles were sentenced to youth imprisonment by the court; 53 juveniles were placed on the basis of custodial treatment order.<sup>32</sup>

The second main penalty, the community service order or learning penalty (project), can endure for a maximum of 240 hours (Art. 77m CC). From April 1<sup>st</sup> 2014, the community service order cannot be imposed without the additional ordering of a custodial sentence in case of certain serious offenses (i.e. with a possible sentence of six years or more and which infringes upon one's personal integrity or certain specific offenses such as child pornography).<sup>33</sup> The Child Care and Protection Board supervises the execution of the community sentence and remains contact with the public prosecutor.<sup>34</sup> The Youth Probation Services are responsible for the enforcement of the sentences. If the juvenile does not complete the community service (properly), the public prosecutor can change the conditions of the sentence or order alternative detention, without the involvement of the youth court. A juvenile can, however, lodge a complaint against the enforcement of the alternative detention (Art. 77n and 77p CC). The Child Care and Protection Board has to be involved in the execution of the alternative detention. In 2012, the Child Care and Protection Board coordinated 14.462 community services.<sup>35</sup>

The final main sentence for juveniles is the fine, which has a minimum of 3 € and a maximum of 4,050 €. If the juvenile fails to pay the fine, the judge can order his alternative detention (with a maximum of three months) or a community service for the part that has not been paid (Art. 77i CC).

### **Penal measures**

The youth court can also impose penal measures to meet the pedagogical objectives of the juvenile justice system, which focus primarily on education and special prevention (i.e. recidivism reduction). Article 77h par. 4 CC sums up the measures the youth court can impose. First, there is the custodial treatment order through which a juvenile is being placed in a custodial treatment centre, generally a youth custodial institution. It leads to

<sup>30</sup> Art. 3a (2) YCIA.

<sup>31</sup> Art. 8 YCIA.

<sup>32</sup> See further Afman & Valstar 2013.

<sup>33</sup> Art. 77ma (new) CC; *Parliamentary Documents II* 201213, 33 498, no. 3, p. 26.

<sup>34</sup> Art. 77o CC.

<sup>35</sup> See Raad voor de Kinderbescherming 2012.

deprivation of liberty and can endure for three to seven years; the last year will be used for compulsory after care. For this penal measure, three requirements have to be met: it must concern a crime for which pre-trial detention is allowed (i.e. a more or less serious crime), the safety of others or society must require the measure and the measure must be in the interest of the suspect's most favourable development (Art. 77s CC). Mental illness or a disruptive development is no requirement, although this will change in April 2014. Furthermore, the youth court must consult report(s) of two independent behavioural experts, one of which has to be a psychiatrist of the juvenile suffered from a mental illness or problematic development (a compulsory requirement as of the 1<sup>st</sup> of April 2014).

In principle, the measure will be imposed for the length of three years with a possible extension up to five years in case of violent or sexual offences (or seven in case of a disruptive development or a mental illness). The measure will conditionally after two (resp. four or six) years in order to enable compulsory aftercare by (youth) probation services.

The number of custodial treatment orders imposed each year has declined significantly during the past decade; in 2005 it was imposed 286 times; in 2011 only 115 times, which is a decrease of more than 50 per cent.<sup>36</sup> Research indicates that custodial treatment order is far from being an effective intervention. Evaluation reports covering the period 2006-2011 had worrisome outcomes. Some conclusions were that:

- There is very little known at country level about the treatment and the behaviour change after completion of the measure.
- It is unclear how much the order contributes to a decrease of recidivism.

young persons sentenced to a custodial treatment order tend have a higher recidivism risk, although the offenses generally become less severe than before.<sup>37</sup>

The second relevant penal measure is the non-custodial treatment order or behavioural order introduced in 2008 (gedragsbeïnvloedende maatregel; Art. 77w ff CC). This measure has been introduced to fill the gap between the suspended youth imprisonment and community service order on the one hand and the custodial treatment order on the other. The non-custodial treatment order aims to positively influence the juvenile's behaviour and to offer him or her structure and education, without resorting to deprivation of liberty. This would stimulate the juvenile's reintegration and acceptance of a role in society.<sup>38</sup> It can only be imposed by the youth court, if the severity of the crime or the frequency of the (previously) committed crimes require to do so, and if the measure is in the interest of the juvenile's development. It is up to the youth court to define the programme and

<sup>36</sup> Van Rosmalen e.a. 2012, table 6.22.

<sup>37</sup> De Jonge & van der Linden 2013, p. 141, see Kempes 2012, p. 77

<sup>38</sup> See De Jonge & Van der Linden 2013, p. 142.

its initial duration (max. six to twelve months). The behavioural order can be prolonged with six or twelve months (Art. 77wd CC). The youth court orders the juvenile alternative detention in case the programme has not been completed successfully (Art. 77wc CC). The non-custodial treatment order is not used that much (far less the 750 times per year as expected by the legislator). In 2011, it was imposed 71 times; in 2012 84 times.<sup>39</sup>

<sup>39</sup> UNICEF / Defence for Children International 2013, p. 26.

## B. Restorative approach within the Dutch juvenile justice system

### B.1 Forms of restorative justice in the Netherlands

Since the 1990s, the Netherlands has experimented with restorative justice in the form of victim-offender mediation and family group conferencing.

#### **Victim-offender conversations**

After a number of pilots, the Dutch Ministry of Justice decided to roll out victim offender conversations nationwide in 2006.<sup>40</sup> This is a form of victim-offender mediation. The objective of victim offender conversations is to give the victim the opportunity to ask questions to the offender and to confront the offender with the consequences of his or her offence. The conversations are moderated by a professional mediator. This mediator discusses the needs of both parties and structures the conversation. In the victim-offender conversations, the victim as well as the offender can take the initiative.<sup>41</sup> There is no legal basis for this type of restorative justice.

#### **Family group conferencing**

Another form is family group conferencing (Eigen Kracht conferences). This means that offender and victim, accompanied by their social network, come together with three aims: recovery for the victim, inclusion of the offender/person with deviant behaviour and a satisfactory outcome for society. This form of conferencing takes place after an incident that has caused damage or distress and recovery is needed and possible. The 'incident' can be a criminal offence, but that is not a requirement. Often, it is also used in the context of the civil system, including child protection and youth care. In addition, family group conferences are also held for students in schools.<sup>42</sup>

There is no explicit legal basis for this form of restorative justice either.<sup>43</sup> This kind of conferencing is not often used in the criminal justice system, although some claim that it would fit in well and that a clear political choice in this matter is lacking.<sup>44</sup>

40 Wolthuis 2011, p. 290; see Van Pagée, Van Lieshout & Wolthuis 2012, p. 218. See earlier Boutellier *et al.* 2006.

41 Wolthuis 2011, p. 290.

42 Van Pagée, Van Lieshout & Wolthuis 2012, p. 217.

43 Wolthuis 2011, p. 281.

44 Van Pagée, Van Lieshout & Wolthuis 2012, p. 228. See also Weijers 2012 taking a different position.

## B.2 The role of restorative justice in the juvenile justice system and the (sentence) practice

Restorative justice – including victim-offender mediation and family group conferencing – does not play a large role in the Dutch juvenile justice system in practice, certainly not at the level of the youth courts.<sup>45</sup> However, it seems that the notion of restorative justice gains attention. An example is the recently modified Article 51h (1) CCP, which introduces the possibility of victim-offender mediations, although it merely states that the public prosecutor should encourage the police to inform the victim and offender about the possibilities of mediation. The opportunities for restorative justice seem to be locally explored by various pilots.<sup>46</sup> Currently, the police, public prosecution and court have the following possibilities to use restorative measures within the juvenile justice system.

### Police

As just mentioned, the police, encouraged by the public prosecutor, must inform the offender and the victim of the possibilities for restorative justice.<sup>47</sup> However, in practice this does not mean that the offender will cooperate if he or she for instance does not plea guilty or does not want to participate. Another problem might arise if the victim does not want to start the mediation.

The police can also refer a juvenile offender to HALT (see under A).<sup>48</sup> As part of the programme the offender could offer his or her apologies to the victim.<sup>49</sup>

Finally, the police have a duty to care according article 3 of the Law of the Police, to lend assistance and to encourage a conversation between civilians. However, it is still unclear to what extent this is stipulating a form of restorative justice as part of the police competences. Research indicates that the police often use mediation in a pragmatic way: short and non-formal.<sup>50</sup>

### Public prosecutor

The public prosecutor has the task to foster mediation between the victim and the offender, if the victim agreed to mediation.<sup>51</sup> Again, the offender should be willing as well. The public prosecutor will be informed about the outcomes of the victim-offender

45 See e.g. Wolthuis 2011, p. 363.

46 The probation services has conducted some pilots concerning restorative justice - also for juveniles - and there are some initiatives that are focusing on experiments with victim-offender mediation during the execution of community service orders; Wolthuis, 2011, p. 310.

47 Art. 51h (1) CCP.

48 Van Pagée, Van Lieshout & Wolthuis 2012, p. 219.

49 Bruning *et al.* 2013, p. 72.

50 Wolthuis 2011, p. 301.

51 Article 51h (3) CCP.

conversations.<sup>52</sup> Depending on the seriousness of the offense, the public prosecutor can take the outcome into consideration when demanding a sentence.

Furthermore, if the public prosecutor decides to offer a transaction (as explained under A), there is room to order the offender's cooperation to the restorative justice mechanisms such as mediation.<sup>53</sup> In 2000, this formed part of a pilot in Utrecht, but the project turned out to be too costly and labour intensive.<sup>54</sup>

### **Youth Court**

The youth court does not have a legal basis to use restorative justice. However, it could use restorative mediation as a special condition to suspend pre-trial detention or youth imprisonment, or as part of a non-custodial or custodial treatment order.<sup>55</sup> In practice, youth courts do not often refer to restorative justice projects.<sup>56</sup>

Restorative initiatives play - to a certain extent - a role in the sentencing practice; the judge and the public prosecutor are informed about the outcome of the mediation, which should be taken into consideration with the sentence or penal measure according article 51h (2) CCP.

### **The role of the victim**

The victim has been awarded a significantly stronger legal position within the Dutch criminal justice system. Previously, he only played a rather limited role.<sup>57</sup> The victim has the following rights: the opportunity to join as the injured party (Art. 51f CCP) and the right to speak during the trial (Art. 51e CCP).<sup>58</sup> This means that the victim can inform the judge, the public prosecutor and the accused of the damages he or she has suffered. If the victim does not want to be present, he or she can prepare a written victim-declaration, which can be read during the trial. The victim can also choose to exercise the right to speak and to write a victim-declaration, additionally. It should be noted that the right to speak is a right and not an obligation. Moreover, the defendant's lawyer is not allowed to ask any direct questions to the victim.<sup>59</sup>

In 2013, the State Secretary of Security and Justice announced that the position of victims will be safeguarded even more in the future.<sup>60</sup> He has defined five policy objectives for

52 Bruning *et al.* 2013, p. 77.

53 Art. 77 (f) CC; Wolhuis 2011, p. 303-304.

54 Wolhuis 2011, p. 305.

55 Wolhuis 2011, p. 307.

56 Wolhuis, 2011, p. 306

57 Bijlsma 2011, p. 18-19; Arts. 44, 56 en 92(3) Judiciary Organisation Act.

58 Art. 51e CCP (introduced by the law of 21 July 2004, *Stb.* 2004, 382 and [extended] by the law of 12 July 2012, *Stb.* 2012, 345). See also <http://www.slachtofferhulp.nl/Algemeen/Strafproces/Spreekrecht/>.

59 Victim Support Netherlands 2012.

60 Letter of State Secretary of Security and Justice to Parliament, 'Recht doen aan Slachtoffers', 22 February 2013.

the next four years.<sup>61</sup> In October 2013, a new Bill was proposed to expand and clarify the right of victims to speak in court.<sup>62</sup> Also, it is worthwhile to note that besides victims themselves, parents of young victims have the right to speak on behalf of their children.<sup>63</sup>

### **Other actors**

Apart from the police, public prosecution and youth court, there are other actors that conduct forms of restorative justice, including probation services, detention centres<sup>64</sup> and schools. Schools use Eigen Kracht conferences to solve conflicts between students or between school and students and their parents. This takes place outside the juvenile justice system. Schools can therefore have a role in juveniles' diversion from the juvenile justice system by offering a form of conferencing rather than reporting delinquent behaviour to the police.<sup>65</sup> There is one other actor that should be mentioned here: Slachtoffer in Beeld (Victim in focus).

Slachtoffer in Beeld is an independent institution connected to the victim support organization in the Netherlands (Slachtofferhulp Nederland). Since 2007, this organization has been known for its victim-offender mediations. It has occasionally carried out family group conferencing.<sup>66</sup> In 2007, 366 cases were completed and this number increased to 1.211 completed cases in 2011 and 1286 in 2012. However, it must be noted that in 2012, 36 per cent of the cases resulted in a conversation, letter exchange, mediation meeting or other form of restorative action; 2011 this percentage was 42. These percentages can be explained by different (practical) reasons, such as not reaching a party, withdrawal of the initiator (generally, the offender) or termination of the attempt to mediate by the mediator. In 2011, 31 per cent of the participants were under the age of 18.<sup>67</sup>

## **B.3 Developments within the field of restorative justice**

The question if and how restorative justice can be integrated in the juvenile justice system, either entirely embedded in the juvenile justice system or more outside the juvenile justice system, still is subject of debate.<sup>68</sup> In 2012, the State Secretary of Security and Justice initiated five pilots on restorative mediation (herstelbemiddeling) with the aim to provide a larger role for the victim in the (juvenile) criminal justice system and

61 Ministry of Security and Justice 2013.

62 See for critique on the position of victims: Kwakman 2013 and Fernhout & Sprongon 2005, p. 150-156.

63 See e.g. Amsterdam Court of Appeal, 26 April 2013, ECLI:NL:GHAMS:2013:BZ8885.

64 Wolthuis & Vandenbroucke 2009.

65 Wolthuis 2011 p. 300.

66 Van Pagée, Van Lieshout & Wolthuis 2012, p. 217.

67 Kinderombudsman 2013, p. 77.

68 De Jonge & Van der Linden 2013, p. 242-243.

to embed restorative justice projects better in the (juvenile) criminal justice system.<sup>69</sup> One of these pilots takes place in Utrecht, where the context of the project Peaceful Neighbourhoods and a Safe Public Task (Vreedzame Wijken en Veilige Publieke Taak), juveniles are referred to mediation in case of less severe offenses.<sup>70</sup> The results of these pilots will be used to assess to what extent restorative mediation should be implemented nationally, on a structural basis by 2015.

Furthermore, there have been other local pilot projects, such as the pilot of the District Court of Amsterdam called ‘mediation besides criminal law’. During this pilot, the Court referred 23 cases to an official mediator, including 13 juvenile cases. Based on this experiment, six similar pilots started in November 2013, for the District Courts of Amsterdam, Rotterdam, Den Haag, Noord-Holland, Oost-Brabant en Zeeland-West-Brabant, aiming at 400 cases in total, including 100 juvenile cases. As part of these pilots, one will experiment with mediation (50% of all cases) in the initial stages of the juvenile justice system to settle the dispute as soon as possible (i.e. immediately after the arrest; ‘ZSM-jeugd’, ‘As fast as possible’ project run by the public prosecutions office). In this part of the pilot many stakeholders are involved: the police, the Child Care and Protection Board, Bureau HALT and ‘Slachtofferhulp Nederland’ are involved. The public prosecutor shall, within six hours after the arrest, decide how to reply to the offences committed. This can include a form of mediation.<sup>71</sup>

## B.4 Costs of restorative justice measures

Apart from the nationally funded pilots, most initiatives are funded locally. Many of the initiatives are taking place at the local level and are dependent on local funding. At this point there is no structural funding by the national government.<sup>72</sup> Slachtoffer in Beeld bears the costs for the nationwide victim-offender mediations (and for some of the Eigen Kracht-conferences) and is largely subsidized by the Ministry of Security and Justice and local communities.<sup>73</sup> Family group conference such as Eigen Kracht conferences are often paid by local communities, provinces or individuals who contribute themselves to these conferences.<sup>74</sup>

69 <http://www.rijksoverheid.nl/nieuws/2013/11/13/staatssecretaris-teeven-opent-pilots-herstelbemiddeling.html>.

70 Letter of State Secretary of Security and Justice to Parliament, *Herstelbemiddeling en NMI mediators*, Ref. 423462, 2 October 2013.

71 <http://www.rechtspraak.nl/Actualiteiten/Nieuws/Pages/Zes-rechtbanken-testen-mediation-naast-strafrecht.aspx> Kinderombudsman 2013, p. 77.

72 Van Pagée, van Lieshout & Wolhuis 2012p. 219.

73 Wolhuis 2011, p. 283. See also <http://www.slachtofferhulp.nl/Over-Ons/Jaarverslag-2012/>

74 Eigen Kracht, online available at <http://www.eigen-kracht.nl/nl/inhoud/hoeveel-kost-het-en-wie-betaalt>.

# C. Foster care within the Dutch juvenile justice system

## C.1 Foster care in the Dutch Juvenile Justice System

Foster care plays a limited role in the juvenile justice system in the Netherlands. There is one programme called Multidimensional Treatment Foster Care (hereinafter MTFC) that is primarily used in the context of juvenile justice. This programme aims to re-educate a juvenile through the use of foster care. MTFC is usually imposed as part of a non-custodial treatment order. In theory, MTFC could also be used as an alternative for pre-trial detention, as a learning project or as a condition for suspended custodial treatment. Besides this, MTFC and general foster care programmes can be carried out through child protection measures in the context of civil law.

## C.2 The application of foster care in the juvenile justice system

The MTFC programme is applicable to children from the age of 12 to 18 years old, with severe anti-social behavioural problems, a high risk to recidivism and an IQ of 80 or more.<sup>75</sup> The foster care family offers the juvenile a day-structure and the possibility to participate in daily family life.<sup>76</sup> Furthermore, the juvenile receives cognitive behavioural therapy and the family will be trained in (re)- education.<sup>77</sup> The basis of the programme is to stimulate positive behaviour, social abilities, problem-solving abilities and to encourage the development of relationships with adults and peers.<sup>78</sup>

Foster care in the form of MTFC could serve as an alternative to different forms of deprivation of liberty: the custodial treatment order, youth imprisonment or pre-trial detention.<sup>79</sup> In Dutch practice, however, MTFC is only used as part of a non-custodial treatment order (or behavioural order). In Amsterdam, one considers starting a pilot to with the possibilities to include forensic foster care as a condition to suspension of pre-trial detention.

75 Leger des Heils 2012, p. 6.

76 [http://www.nji.nl/nl/Kennis/Databanken/Multidimensional-Treatment-Foster-Care-\(MTFC\)](http://www.nji.nl/nl/Kennis/Databanken/Multidimensional-Treatment-Foster-Care-(MTFC)).

77 Foolen, Ince & de Baat 2012, p. 12.

78 [http://www.nji.nl/nl/Kennis/Databanken/Multidimensional-Treatment-Foster-Care-\(MTFC\)](http://www.nji.nl/nl/Kennis/Databanken/Multidimensional-Treatment-Foster-Care-(MTFC)).

79 <http://www.nji.nl/Pleeggezin-Praktijk-Erkende-interventies-Beschrijving-interventie?itemnr=122636> and [http://www.nji.nl/nl/Kennis/Databanken/Multidimensional-Treatment-Foster-Care-\(MTFC\)](http://www.nji.nl/nl/Kennis/Databanken/Multidimensional-Treatment-Foster-Care-(MTFC)).

The nature of the MTFC fits best for penal measures such as a (suspended) custodial treatment order or the non-custodial behavioural order. Both sentences are meant to further the development of the juvenile and to protect the interests of society. Furthermore, the Supreme Court ruled that a conditional suspended youth imprisonment should not be used for programmes lasting longer than six months or those which are rather intensive. A non-custodial treatment order should be used instead.<sup>80</sup>

This implies the legal framework of the non-custodial treatment order has to be favoured if the youth court considers MTFC; in practice, MTFC does not seem to be used in conjunction with a custodial treatment order.<sup>81</sup> It is up to the youth court to decide whether MTFC is appropriate for the juvenile and for how long. The duration of the programme can vary from six to twelve months and it can be extended for one year (Art. 77w CC).<sup>82</sup> In the Netherlands, the Salvation Army (Leger des Heils) is responsible for the enforcement of the MTFC programme.<sup>83</sup>

In general, MTFC is used only occasionally and there is not much research available on the impact and outcomes of the programme in the Netherlands.<sup>84</sup> Research of the Dutch Salvation Army, Youth Care Agencies and Probation Services indicates that, although MTFC would be appropriate for many more children, since 2011, only eleven MTFC-places have been financed, under a non-custodial treatment order.<sup>85</sup> Practice shows that the programme is rather bureaucratic and costly, which makes it hard to implement the programme efficiently.

### C.3 Foster care in the civil system through diversion

A juvenile in conflict with the law could be diverted to foster care programmes within the child protection system. Foster care, including MTFC, can be regarded as an alternative for closed youth care, which is the most far reaching form of alternative care in the Netherlands (i.e. child protection measure). In practice, MTFC is hardly used as part of the child protection system; 2011, only three places were available.<sup>86</sup> At the same time, regular foster care programmes are widely used in the child protection and youth care system, either as on a compulsory basis (i.e. with a court order based on Art. 1:261 Civil Code) or a voluntary basis.<sup>87</sup>

80 Dutch Supreme Court, 12 July 2011, ECLI:NL:HR:2011:BQ4676.

81 Art. 77(h)(4)(b) and 77(w) CC; Bijl, Eenhuistra & Campbell 2011, p. 3; Leger des Heils, 2012, p. 11.

82 Leger des Heils 2012, p. 6. Article 77(h)(4)(b) and 77(w) CC; Bijl, Eenhuistra & Campbell 2011, p. 3; Leger des Heils, 2012, p. 11.

83 <http://www.legerdesheils.nl/multidimensional-treatment-foster-care-mtfc>.

84 Foolen, Ince & de Baat 2012, p. 12.

85 Leger des Heils 2012, p. 11.

86 Leger des Heils 2012, p. 11.

87 Van den Bergh & Weterings 2010, p. 118.

The enforcement of foster care has been regulated by the 2005 Youth Care Act. The definition of foster parents can be found in Article 1 (x) of the Youth Care Act, that is: someone who brings up and takes care of a minor in the context of youth care, as if the juvenile belongs to his or her family, without being his or her child or step-child. Before a juvenile is placed in a foster family, the care providers shall assess whether the juvenile will match with the proposed foster family, for instance with regard to his / her age, particular issues concerning the juvenile etc. (Art. 28 (3) of the Youth Care Act).

#### **C.4 The application of foster care in the civil system as an alternative to juvenile justice**

If a juvenile has committed a less serious offence and the police and public prosecutor find that the personal situation of the juvenile requires more attention, the juvenile can be directly referred to the civil child protection system. The Child Care and Protection Board and the Youth Care Agency will be informed (or involved in that decision making) and a child protection approach, including a placement in foster care, can be considered.

The public prosecutor can also decide to offer a transaction (as discussed under part A) under the condition that the juvenile has to live up to the instructions of the Youth Care Agency (probation services), which may, ultimately, also result in a placement in foster care if regarded in the juvenile's interests (Art. 77 (f) CC).

Finally, a new phenomenon has arisen: a combination trial. This is a court session in which the competent authorities can either apply criminal law or apply child protection law.<sup>88</sup> The youth court can, for example, decide that civil measures are more appropriate for the juvenile than a juvenile justice intervention. Within that same court session, the court can shift to civil law and place the juvenile under family supervision and in a foster care family (Art. 1:254 jo. 261 Civil Code). At this point, there is little information about the combination trial in practice.<sup>89</sup> So far, no cases have been published where a combination trial has resulted in a form of foster care.<sup>90</sup> There are some examples available of combination trials in which the court combined juvenile justice interventions with civil measures such as a family supervision order with placement in alternative care<sup>91</sup> or a placement in closed youth care.<sup>92</sup>

88 See also Baas & Laemers 2009.

89 Hepping 2014.

90 No examples on [www.rechtspraak.nl](http://www.rechtspraak.nl).

91 District Court of The Hague, 8 August 2013, ECLI:NL:RBDHA:2013:11177 and District Court of Utrecht, 16 March 2010, ECLI:NL:RBUTR:2010:BL9526.

92 District Court of Rotterdam, 19 January 2012, ECLI:NL:RBROT:2012:BW5541 and District Court of Rotterdam, 19 January 2012, ECLI:NL:RBROT:2012:BW5539.

## C.5 Other alternatives to pre-trial detention or custodial confinement

There are a number of alternatives to deprivation of liberty besides the ones addressed above. These alternatives can be considered when ordering a juvenile's pre-trial detention, youth imprisonment or custodial treatment.

### Pre-trial detention

If the youth court orders a juvenile's pre-trial detention, it has to consider the (conditional) suspension of it (Art. 493 (1) CCP). The court can suspend the detention under the general conditions (such as cooperation with the authorities and no reoffending; see also Art. 80 (2) and (3) CC) and under special conditions, including the (intensive) supervision of youth probation services, specific restrictions (such as a curfew or an exclusion order) or instructions to attend school or to participate in certain programmes, trainings, learning projects etc.<sup>93</sup> The juvenile has to consent (Art. 493 (6) CCP). If the youth court decides not to suspend the pre-trial detention, the juvenile has the right to request suspension.<sup>94</sup>

Article 493 (3) CCP allows the execution of the juvenile's pre-trial detention in a less infringing setting. An example is 'night detention': the juvenile must stay in a remand home during the evening, night and weekends, but attends school, vocational training or work during the day. This form of detention is an option if the juvenile lives near a youth detention centre and has a constructive way of spending the day in the vicinity of the remand home (school, work, vocational training or internship).<sup>95</sup> Another example is 'home detention' (huisarrest), which is frequently used by some courts in the Netherlands and requires parental commitment. Home detention is a form of pre-trial detention and is different from a suspension of pre-trial detention, which will generally also imply that the juvenile stays at home. When a juvenile is detained at home, he has to stay inside the house as a principle. Another alternative might be electronic monitoring. In 2002, this was piloted in Rotterdam. However, due to the fact that this form pre-trial detention at home was only possible in stable family situations, while most children who end up in pre-trial have often an unstable family situation, the pilot concluded that this created unfair situations. At that point in time, one could not find sufficient support of the use of electronic monitoring by public prosecutors and judges. However, the policy directives on electronic monitoring from 2006 and 2010 provide the possibility to develop policy rules at district level.<sup>96</sup> Recent legislative developments indicate that electronic monitoring has been gaining attention and will most likely be used more for juveniles in the future.<sup>97</sup>

93 Art. 2 Decree Influencing Juveniles' Behaviour (Besluit gedragsbeïnvloeding jeugdigen). See also Uit Beijerse 2013, p. 143.

94 Liefwaard 2008, p. 397-398.

95 Liefwaard 2008, p. 398.

96 Uit Beijerse 2013, p. 143; see Policy Directive Electronic Monitoring (Aanwijzing elektronisch toezicht), *Government Gazette* 2005, 254, p. 12 (entered into force 1 January 2006) and Policy Directive Electronic Monitoring (Aanwijzing elektronisch toezicht), *Government Gazette* 2010, 8001 (entered into force 1 June 2010).

97 Act on the implementation of a criminal justice system for adolescents (Wet Adolescentenstrafrecht),

## **Suspended sentencing**

Article 77x (1) CC provides that the youth court can suspend (part of) the youth imprisonment or custodial treatment order. The main general condition under which the sentence will be suspended is that the juvenile does not commit any criminal offence within the operational period of a maximum of two years (Art. 77z CC). The court can also order special conditions, similar to the special conditions for the suspension of pre-trial detention.<sup>98</sup> Some special conditions in this particular phase concern the restoration or compensation of the damage done. On the first of April 2014, a new special condition will be introduced. Compulsory education will be added to the list of special conditions for suspended pre-trial detention and suspended sentences.

If the juvenile violates (one of) the conditions, the public prosecutor can demand the execution of the suspended sentence. The court has to order that execution (Art. 77dd (1) CC). In addition, the court has the opportunity to terminate a juvenile's youth imprisonment under conditions at any time (Art. 77j (4) CC).<sup>99</sup>

*Bulletin of Acts and Decrees* 2013, 485 (entry into force 1 April 2014, *Bulletin of Acts and Decrees* 2014, 33).

<sup>98</sup> Art. 3 Decree Influencing Juveniles' Behaviour (Besluit gedragsbeïnvloeding jeugdigen).

<sup>99</sup> Liefwaard 2008, p. 404.

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