



Standing Committee for Youth Justice

**CRIMINAL JUSTICE AND IMMIGRATION BILL
HOUSE OF LORDS - SECOND READING**

22nd January 2008

INTRODUCTION

The Standing Committee for Youth Justice (SCYJ) welcomes the inclusion of youth justice provisions in the Criminal Justice and Immigration Bill which seek to enact a number of the legislative proposals originally set out by the Government following its consultation on *Youth Justice – The Next Steps*, a companion document to the Every Child Matters green paper published by the Department for Education and Skills in 2003.

Our aspiration for this Bill is that it provides not merely a vehicle for further piecemeal reform of the Youth Justice System but rather an opportunity to address the fundamental flaws that it believes exist as the result of three main failings:

- A poor, and worsening record of compliance with legal obligations in relation to children's human rights
- The youth justice system is insufficiently distinct from that for adults and so does not focus adequately on children's particular characteristics, needs and interests.
- Legislation and policy for children who offend is not congruent with that which deals with children and families more broadly, in respect of welfare, safeguarding, education and health.

On 4th Oct 2002, the UN Committee on the Rights of the Child published its response to the UK government's report on the implementation of the United Nations Convention on the Rights of the Child (UNCRC). Some of the most systematic criticism in the report was directed at the UK's administration of juvenile justice. In particular, the Committee recommended, *'that the State party establish throughout the State the best interests of the child as a paramount consideration in all legislation and policy affecting children, notably within the juvenile justice system'* (paragraphs 25/6).

The UN Committee on the Rights of the Child is due to examine the UK Government again this year and it is imperative to seize this opportunity to address the Committee's previous criticisms. **Children who are in trouble with the law are children first; they must be treated as such and afforded the same rights and protection as any other child.**

CUSTODY THRESHOLD

The SCYJ regards the increased use of custody for children in recent years as one of the most alarming developments within the youth justice arena. The number of children and young people under the age of 18 in prison has more than doubled (110% increase) in the past 15 years – from 1405 in 1992 to 3000 by last summer. As at October 31 2007, **2,994 children** were locked up in England and Wales. Of these, 2,518 (84 per cent) were held in young offender institutions.

In the Home Office strategy paper, which lay the groundwork for much of the content of this Bill, the Government stated, *"For too many people, prison acts as nothing more than a brief interlude in a life of crime"* (para 1.8) and *"we believe that prison should be reserved for serious, violent and dangerous offenders"* (para 2.1).¹ In relation to children it stated, *"We believe that it is important to keep children out of prison if it is at all possible"* (para 3.31).² **We are very disappointed that the Bill does nothing to advance this objective; and urge Peers to use the Bill to introduce a children's custody threshold. This threshold would have to be met before any child is sentenced to custody, in order**

¹ A Five Year Strategy for Protecting the Public and Reducing Re-offending, Home Office, February 2006: page 11, para 2.1

² *ibid.* page 7

to ensure that children are only locked up as a genuine last resort for reasons of public protection.

Children in penal custody are known to be among the most disadvantaged in our society: over a quarter have the literacy and numeracy ability of an average seven year-old or younger; 85% show signs of a personality disorder; 10% show signs of psychotic illness; over half have been in care or involved with social services; and 41% have been excluded from school.³ A report commissioned by the Youth Justice Board (YJB) shows that up to 9 out of 10 children in custody who have committed serious offences have been abused in the past or suffered severe traumatic experience, but they rarely get the help they need while locked up.⁴ Custody does not rehabilitate the vast majority of children: three-quarters reoffend within a year of release.⁵ Moreover the experience of custody is highly damaging for many. Notwithstanding the best efforts of staff who work in custodial settings to provide a safe environment, the statistical outcomes speak of failure; levels of self harm within secure training centres, which typically hold younger children, rose by 803% between 2001 and 2004, 6 children have died in custody since the UK last reported to the UNCRC in October 2002 and there have been 30 child deaths since 1990.⁶ Furthermore custody does not rehabilitate the vast majority of children: three-quarters reoffend within a year of release.⁷

We believe a custody threshold would reduce the use of custody for children in England and Wales, (bringing us into line with other similar European countries); bring the UK Government closer to international and domestic human rights standards; ensure that only children who need to be in custody for genuine reasons of public protection are so sentenced (in line with declared government objectives); satisfy the public's demand for more effective interventions; and save significant resources, which could be used both to improve locked settings for the very small minority of children that require it and increase the availability and quality of preventive services.

PART 1: YOUTH REHABILITATION ORDERS

Clauses 1 - 8 and Schedules 1- 4 provide for the Youth Rehabilitation Order (YRO), a generic community sentence for young offenders with a menu of options to meet the needs of each young person. While the SCYJ welcomes in principle the idea of a generic community sentence with a choice of requirements, for children and young people, we have a number of serious concerns about the provisions as drafted in the Bill. These points are developed below:

Intensive Supervision and Surveillance option

We welcome the proposal to make the Intensive Supervision and Surveillance Programme statutory by including it as an option with the YRO. However this crucial high-tariff sentence needs to be amended to make it a more robust option that will serve to reduce the number of children entering custody.

Clause 1(4) (b) states that the ISS option should be available only where the court is of the opinion that the offence was so serious that custody would otherwise have been appropriate. But this is highly subjective – turning on the court's opinion, which will be very difficult to gainsay in cases towards the higher end of the community sentencing range. **The Bill must be amended to prevent a standard custodial sentence – a Detention and Training Order - being imposed unless a YRO with ISS had previously been tried.** This would reflect the UK's obligation under Article 37 of the UN Convention on the Rights of the Child to ensure that custody for children is genuinely a *last resort*, an obligation that the UK currently fails manifestly to meet. It would prevent the unnecessary use of damaging short custodial sentences for children and young people in accordance with the Government's stated recognition that there are vulnerable young people in custody who should not be there.⁸

Proportionality

With young people involved in offending, not yet fully mature and often emotionally unstable, it is particularly important that the court sets realistic requirements – which take effort to meet but are not out of reach. As a community sentence the YRO is subject to sections 148 and 150 of the Criminal Justice

³ Reducing re-offending by ex-prisoners. Report of the Social Exclusion Unit (Pages156-158)

⁴ "YJB accused of burying child abuse report", Community Care, August 7 2007

⁵ Ministry of Justice Statistical Bulletin: Re-offending of juveniles: results from the 2005 cohort. (Page 10)

⁶ 'Youth justice news' in Youth Justice 5(3) February 2006

⁷ Ministry of Justice Statistical Bulletin: Re-offending of juveniles: results from the 2005 cohort. (Page 10)

⁸ See intro to *Making Sentencing Clearer*, Home Office consultation paper, 2006.

Act 2003, which place restrictions on the use of community sentences including a condition that requirements are 'suitable for the offender'. However we fear that this alone will be insufficient to prevent 'up-tariffing' which may occur as an unintended consequence of courts trying to use the YRO to tackle a wide range of problems at least some of which would be more appropriately addressed through other channels. **The Bill must be amended to require sentencers to take into account the age and circumstances of children and young people in trouble and not overload the sentence content and duration beyond their reasonable capacity to comply.**

Breach

The breach provisions in Schedule 2 cause significant concerns. Young people are prone to challenge, rebel and act on impulse; and this needs to be responded to calmly and with judgement. Yet for the first time formal action would be required whenever a young person breaches. We believe that this curtailment of professional discretion is a retrograde step. **The breach provisions must be amended to allow decisions in relation to breach proceedings to remain subject to National Standards**, rather than be governed by statute with the inflexibility that entails. **Also it is essential to retain the existing power of the court when dealing with breach, to allow the order to continue, without imposing an additional punishment, where it considers that to be the most appropriate course of action.**

Equally alarming and requiring removal is the specification that the court may impose an intensive supervision and surveillance requirement, or a custodial sentence, for breach of a youth rehabilitation order where the original offence did not warrant custody or was non-imprisonable.

Legal Representation

Schedule 1 Part 2 (19) provides for a young person to be legally represented before a local authority residence or fostering requirement can be imposed under a YRO. However no legal representation is required before any other version of the YRO can be imposed, including even the ISS (Intensive Supervision and Surveillance) option. The SCYJ holds that this is unacceptable because the particular vulnerability of children and young people means that legal representation is required for them to have a fair hearing under Article 6 ECHR. Breach of a YRO can result in loss of liberty and it is therefore particularly important for the court that the circumstances of the child or young person are fully explained to the court by a person acting on their behalf, and that all relevant factors are addressed. **The Bill should be amended to guarantee that children have access to justice.**

CLAUSE 9: PURPOSES OF SENTENCING

A coherent statement of the purposes of sentencing children is long overdue. However we are very disappointed that in its proposed form, this clause fails to put the welfare and the best interests of children at the heart of the youth justice system.

The UK's obligations under the United Nations Convention on the Rights of the Child (UNCRC) commit us to separating the system for dealing with children in trouble with the law from that for adults (Article 37), ensuring that the best interests of the child are a primary consideration in all decisions about them (Article 3) and using custody only as a measure of last resort (Article 40). However throughout the system in England and Wales these rights are being breached and there is evidence that the welfare of the child is being subordinated to the desire to deliver punishment through strictly offending-related assessments and programmes of intervention.

In order to meet our international obligations and reverse the current systemic failings we believe that:

- 'Promoting children's welfare' should not only be included within the list of purposes of sentencing but also made the primary purpose.
- The provisions of s. 44 of the Children and Young Persons Act 1933 should be modernised and strengthened to reflect more recent developments in child welfare law, as set out in the Children Act 1989. The Bill must be amended to ensure that sentencing authorities have the same duty as family courts, to have regard for the welfare of the child, as defined in s.1 of the Children Act 1989.
- The 'punishment' purpose should be omitted as unsuitable for children in trouble with the law and replaced with a requirement that sentences are a proportionate response to offending.

CLAUSES 35-37: REFERRAL ORDERS

Clauses 35-37 amend the Referral Order (RO) provisions in s.17 of the Powers of Criminal Courts (Sentencing) Act 2001, which are currently only available on first convictions. This disposal requires a young person to attend a youth offender panel, the members of which then agree a contract with them aimed at preventing re-offending.

The Government's original commitment following *Youth Justice – The Next Steps*, was to introduce a 'limited extension to Referral Orders to allow them on a later court appearance, for example where the young person has not previously received one or did so at least two years ago'. **Clauses 35 and 37**, as amended by Government in the House of Commons, go part way towards this commitment by allowing a referral order to be made on a second conviction and for an order to be extended in certain circumstances.

However the provisions do not allow a second referral order to be made in any circumstance. Given that the Referral Order has been one of the more successful youth justice sentences, based as it is on problem-solving restorative justice which also offers a role to victims, the SCYJ considers that these reforms should go further. **The Bill must be amended to allow a second Referral Order, provided a YOT or equivalent officer recommends this.** Examples of cases where a second order may be suitable would be ones in which on the first occasion there was no victim, or no victim willing to engage in the Panel process – reducing the original order's chances of success; or the offence could be several years later and different in nature and/or seriousness, e.g. a small theft compared with an earlier assault.

CLAUSE 39: YOUTH DEFAULT ORDERS

This clause makes provision for a magistrates' court to impose a Youth Default Order (YDO) if a person aged under 18 defaults on a fine imposed following a conviction, instead of taking proceedings against the parent or guardian, as is currently the case. The YDO may require the young person to undertake unpaid work (if they are aged 16 or 17), attend an attendance centre or be subject to a curfew. These orders are subject to similar breach, revocation and variation processes as the YRO (discussed above) and we have similar concerns relating to their application.

CLAUSE 98: ALTERNATIVES TO PROSECUTION FOR OFFENDERS UNDER 18

The SCYJ cautiously welcomes the introduction in **Clause 98** of a youth version of the conditional caution as a much-needed measure of flexibility in the current pre-court system for children. The current reprimand and final warning replaced unlimited cautioning with the other extreme, a two-step system that leads automatically to court if the young person offends again within two years. That is a long time for a young person to have a sword hanging over them, and does not allow for impulsiveness and immaturity within what may be an overall progression towards a more stable life. A third pre-court step would help to reduce the system's rigidity.

However we are very concerned about the Government's proposal to limit the youth conditional caution to young people aged 16 – 17 years. Excluding 10 -15 year olds would require prosecution of younger children in circumstances that would result in a conditional caution for 16 – 17 year olds. **The Bill must be amended to remove the restriction on the youth conditional caution and extend it to all those below the age of 18 years.**

We further recommend that pre-court options, including conditional cautions, should be selectively available even where a young person has previously been convicted, the totality of conditions associated with a conditional caution must be proportionate to child's age and circumstances, and that conditions are limited to the rehabilitative or restorative.

CLAUSES 123-125: STREET OFFENCES

Despite the Government's stated intention to make clear that involving children in prostitution is a form of child abuse, the law still permits the prosecution of a child over the age of ten for offences under the Street Offences Act 1959 which this clause amends. The guidance issued in 2002 by the Department of

Health *Safeguarding Children Involved in Prostitution* laid out the clear intention that children involved in prostitution should be dealt with through a specialist child protection process rather than a criminal one and this has had a positive effect of substantially reducing the use of the criminal law to punish children. In order to cement this advance the Government should commit to restating the current policy position in the revised guidance on child sexual exploitation that is currently being drafted by the Department for Children, Schools and Families and also use this Bill to **abolish the power to prosecute children under 18 for prostitution.**

PART 9: VIOLENT OFFENDER ORDERS

The proposals for VOOs were put forward in *'Rebalancing the criminal justice system in favour of the law-abiding majority: cutting crime, reducing re-offending and protecting the public'*. They were described as a means of providing courts with *'tough new powers to manage dangerous violent offenders beyond the period of their sentence with penalties of up to five years for breach of conditions'*.⁹

The need for such a measure for children and young people has not been demonstrated. Moreover, the current arrangements for young people regarded as representing a risk to others, are already stringent and there is no evidence that they are ineffective. Youth Offending Teams are required to conduct an assessment of risk of serious harm in all cases where there is any suggestion that a young person might pose a risk to others, and depending on the outcome of the assessment, are obliged to develop a risk management plan, including as necessary, Multi-Agency Public Protection Arrangements (MAPPA).

The SCYJ believes that these orders would be disproportionate and inappropriate for use on children and young people. They should be excluded, while remaining subject to the considerable existing powers of the courts.

PART 10: ANTI-SOCIAL BEHAVIOUR

Anti-social behaviour initiatives over recent years have been a reaction to a general fear of young people within our society and have drawn a large number of individual young people into the Youth Justice System. We do not support the introduction of further enforcement measures that we believe are counterproductive to the aim of reducing problematic behaviour and that have the potential to be seriously damaging to those who are subject to them.

We oppose the proposal in Clause 169 to extend premises closure orders from “crack houses” to cases of persistent antisocial behaviour. We have grave concerns that this could result in whole families being made temporarily homeless for a period because of the behaviour of one family member and the possibility of dependent children being taken into short-term care. There is also no automatic offer of rehabilitative services to help resolve problematic behaviour.

We welcome the introduction in **Clause 174** of periodic reviews of Antisocial Behaviour Orders (ASBOs) for children and young people. Allegedly designed for adults, since their introduction in 1999 46% of ASBOs have been issued against children aged 10-17 although they comprise just 13 % of the population.¹⁰ The recent move of the Government's Respect Unit into the new Department for Children, Schools and Families (DCSF) must mark the beginning of a new more constructive and child centred approach to problematic behaviour among this age group. **Reviews of ASBOs need to be taken further, by enabling them at any stage, not just after 12 months.** The Government should also require that Youth Offending Teams and where appropriate social services departments be involved in the reviews, a key purpose of which should be to assess services made available to children under s. 17 of the Children Act 1989.

The Government must also take this opportunity to reform other aspects of ASBOs:

- **Remove the option of custodial sentence for breach of an ASBO by a child.** In a recent YJB study nearly half of the 137 young people whose case files were reviewed breached their ASBOs and custodial sentences were imposed on 36 of them at some point after they had been made

⁹ Home Office (July 2006) *Rebalancing the criminal justice system in favour of the law-abiding majority. Cutting crime, reducing reoffending and protecting the public.* p. 6 <http://www.homeoffice.gov.uk/documents/CJS-review.pdf/CJS-review-english.pdf?view=Binary>

¹⁰ Children's Rights Alliance for England (2005) *State of Children's Rights in England*

subject to an ASBO.¹¹ Although they are not necessarily being brought into custody solely as result of these breaches, they are arriving in custody more quickly and spending a longer time locked up owing to sentences relating to their ASBO breach.

- **Ending the policy of ‘naming and shaming’ children who receive ASBOs:** The Antisocial Behaviour Act 2003 and Serious Organised Crime and Police Act 2005 removed the automatic reporting restrictions, which were previously contained in s.49 Children and Young Persons Act 1933, for breaches of ASBOs. This practice is not only a breach of a child’s human right to privacy¹², but is also counter-productive. For some children it becomes a ‘badge of honour’¹³, while for others who wish to make a fresh start, it prolongs the problems they have in re-engaging positively with their community. It can also make it very difficult for professionals to obtain services for their young clients and raises serious child protection concerns.
- **Reduce the minimum length of a child ASBO from two years to three months.** Two years is a completely disproportionate minimum for children and young people.
- **Require an assessment under the Common Assessment Framework** (including where appropriate an assessment under section 17 of the Children Act 1989 or a SEN assessment) prior to an order being made. This is critical to protect children who may be at risk, to ensure that those who have mental health difficulties or conditions such as autism are not overlooked and that they get the treatment they need and do not wrongfully end up with an ASBO. A Home Office Review of ASBOs in 2002 found that in 10% of the cases they looked into in detail, the young person subject to an ASBO had learning or other difficulties¹⁴. It is encouraging that recent guidance signals the Government’s commitment to multi-agency working, including a process of professional assessment and intervention for all children caught up in the ASBO process. In addition courts should be obliged to consider the child protection implications of any proposed ASBO and reject the application where the order might compromise safeguarding arrangements.

Clause 175 would allow **Individual Support Orders (ISO)**, designed to put positive interventions in place to address problematic behaviour associated with an ASBO, to be made more than once and not just at the point at which the ASBO is made; and to be attached to ASBOs obtained on conviction and in the County Court (they are currently only available in the Youth Court). Support for young people given ASBOs is often inadequate (in recent research, 20% of the Youth Offending Teams surveyed said that they were only ‘occasionally’ or ‘never’ involved when an ASBO was made on a young person¹⁵), but we are not convinced that further ISO extensions are the best remedy. ISOs place additional breachable requirements on young people, associated with their support needs hence creating more routes to failure. **We propose that instead of this statutory change, Government should guarantee to offer targeted youth support and, where an ASBO accompanies a conviction, support through the youth justice system.**

WHAT IS MISSING FROM THE BILL

Treatment of 17-Year Olds

The Bill is silent on the continued treatment of 17 year olds as adults for the purposes of bail and remand. This means that 17 year olds in police detention are not entitled to the support of an appropriate adult, and if refused bail are held at the police station rather than being transferred to local authority accommodation. At court too, children are treated as adults for remand purposes, being automatically remanded to custody where bail is denied. The Government originally intended to tackle this through *Youth Justice – The Next Steps*; we think that **assurances should now be sought that the Government will bring forward and consult on legislative proposals to treat under 17 year olds as children and young people for remand purposes.**

¹¹ YJB (2006) Anti-social Behaviour Orders

¹² As identified in Article 40 (2) (vii) of the United Nations Convention on the Rights of the Child, which says that all states should ensure the privacy of children and young people in conflict with the law is fully protected.

¹³ YJB (2006) Anti-social Behaviour Orders

¹⁴ Campbell S. (2002) ‘A Review of ASBOs, Home Office Research Series 236, London: Home Office.

¹⁵ Thomas M., Vuong K., Renshaw J. (2004) ‘ASBOs and Young People’, research commissioned by the Association of YOT Managers.

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*The **Standing Committee for Youth Justice (SCYJ)** is a membership body which:*

- *Provides a forum for organisations, primarily in the non-statutory sector, working to promote the welfare of children who become engaged in the youth justice system; and*
- *Advocates a child-focussed youth justice system that promotes the integration of such children into society and thus serves the best interests of the children themselves and the community at large.*

Its members are: Barnardo's, Children's Rights Alliance for England, Just for Kids Law, JUSTICE, Nacro, Association of YOT Managers, National Association for Youth Justice, National Children's Bureau, NCH, NSPCC, Prison Reform Trust, Rainer, Secure Accommodation Network, SOVA, The Children's Society, The Howard League for Penal Reform, The National Youth Agency, The Princes Trust and VOICE

The contents of this briefing do not necessarily reflect the views of all member organisations