



Standing Committee for Youth Justice

**CRIMINAL JUSTICE AND IMMIGRATION BILL
HOUSE OF LORDS – REPORT STAGE**

March 2008

Custody of children: prior conditions relating to ISS, Intensive Fostering and age

THE AMENDMENT

**Earl of Onslow
Lord Ramsbotham
Baroness Falkner of Margravine
Baroness Miller of Chilthorne Domer**

After Clause 1 insert the following new Clause—

"Custody of children: conditions to be met

(1) A court must not pass a custodial sentence unless—

(a) the offender has already been the subject of a youth rehabilitation order, or orders, which falls within section 1(3), or

(b) the offence, or the combination of the offence and one or more offences associated with it, and the risks the offender poses to the public are so serious that, notwithstanding the age of the offender, a youth rehabilitation order which falls within section 1(3) cannot be justified for the offence.

(2) Where the court does pass a custodial sentence it shall set out in writing its reasons for doing so, both in general and with specific reference to the individual conditions set out in Section (1)

PURPOSE

To require a court intending to pass a custodial sentence on a child who has not previously received one of the top-tariff community options (ISS or Intensive Fostering) to consider whether despite their age the offence was too serious and the risk to the public too great to justify one of those options. If it decides to opt for custody it would also have to set out its reasons in writing.

BRIEFING

This amendment builds on that proposed in the JCHR scrutiny report on the Criminal Justice and Immigration Bill and tabled for debate at Lords Committee Stage.¹ It extends the conditions to be met before a custodial sentence can be imposed, by adding references to risk to the public and requires that where a decision is taken to opt for custody reasons be given in writing.

Intensive Supervision and Surveillance and Intensive Fostering

Currently an Intensive Supervision and Surveillance Programme (ISSP) is operated administratively for young offenders, running for 3 or 6 months and providing intensive supervised

¹ JCHR (2008)

daytime activities, specific requirements such as to attend school or not to associate with certain people and usually a night-time curfew to home or another, supervised place. Following public consultation on its 2003 *Youth Justice – The Next Steps* green paper, in 2004 the government announced in its follow-up proposals that *'we shall legislate to establish a new Intensive Supervision and Surveillance Order (ISSO) as a robust alternative to custody for the more serious or persistent young offenders.'*

This Bill does go some way towards honouring this commitment - introducing Intensive Supervision and Surveillance (ISS) as an **option** within in the Youth Rehabilitation Order (YRO), and sensibly enough putting Intensive Fostering on the same level. However, in law they feature as **alternatives** to custody only in the same theoretical sense that other non-custodial sentences do.

More specifically, the Bill fails to take the obvious step of establishing even an explicit presumption, let alone a requirement, that either option is used before custody is contemplated. As a result, the need to take these options very seriously is left buried and unstated within continued application to children of the weak general formula – devised essentially for adults - in s152(2) of the Criminal Justice Act 2003. *'The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.'*

Why s. 152 (2) of the Criminal Justice Act 2003 is an insufficient safeguard

Ministers have alluded to s152(2) in debate, but scrutiny shows that it leaves a great deal to court discretion and establishes no specific criterion other than offence seriousness, which is of course important but certainly with child offenders should be only part of the story. Moreover, it manifestly falls well short of making custody for children a **genuine** last resort, something required by the UNCRC and which the Government claims to subscribe to.

It also, worryingly, fails to stop the ISS option substituting not for custody but for other community sentences, which is a waste of resources as well as a major missed opportunity to deal more suitably with children. The ISSP programme which was rolled out nationally in October 2003; has been made available to courts on a significant scale, with 5568 placements in 2005-06 and 1350 places in use at any one time^{2, 3}; and has been heavily promoted to courts as an intensive and robust programme, with evaluation evidence that it successfully addresses a wide range of needs among serious or persistent young offenders.⁴ Yet, in a period when youth crime was stable the use of custody rose from 2812 in October 2003 to 3000 by autumn 2007, and now it is still around 2800.

The effect of the proposed amendment

The text proposed by the JCHR is undoubtedly an improvement on s152(2). It sets a threshold specific to children (under 18s) – a welcome and overdue change in its own right; and unless the child has already had a YRO with ISS or Intensive Fostering it requires a court contemplating custody to consider the young person's age and the two 'top-tariff' community sentence options.

We hope that this would have a restraining effect on custody but suspect it would not make a sharp difference of the kind required by the 'last resort' philosophy. The alternative version proposed by the SCYJ adds two further points designed to try and achieve this:

(a) A requirement to consider not just the offence committed but also the risks to the public. This seems entirely reasonable; a child should not be locked up just to mark what they have done, if they don't now pose a risk to the public. The risk test is really a more relevant test of need for the very serious step of locking up a child.

² YJB (2006) *Youth justice annual statistics: 2005/06*. London: YJB

³ Youth Justice Board data at <http://www.yjb.gov.uk/NR/rdonlyres/C8871E48-E135-4295-928B-C71E9B741555/0/October2007CustodyFiguresSummary.pdf>

⁴ Moore, R, Gray, E, Roberts, C, Merrington, S, Waters, I, Fernandez, R, Hayward, G and Rogers, D (2004) *ISSP: the initial report*, Youth Justice Board

(b) A requirement, if a court does choose custody, to set out its reasons not just in general but also by reference to the specific tests given in the clause. This should prompt sound and safe decisions – setting out the rationale clearly is always a good discipline, and should enable soundly-based appeals to feed into good practice while discouraging speculative ones.

For further information please contact:

Simon Hickson, Policy Adviser (Children in trouble with the law), The Children's Society

Email: simon.hickson@childrenssociety.org.uk Tel: 020 7841 4509

Katherine Hill (née Sullivan), Parliamentary Adviser, The Children's Society

E Mail: katherine.hill@childrenssociety.org.uk Tel: 020 7841 4480

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

ANNEX A: Further information

(i) Why child custody needs to be a genuine last resort

The UK has an 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*. The backcloth to this is the further damage locking up can do to children who have often already had deeply troubled lives and its known ineffectiveness at rehabilitating young people:

- Children in penal custody are 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% had been excluded from school before being locked up.⁵ Also a report commissioned by the YJB shows that up to 9 out of 10 children in custody have been abused in the past.
- Lord Carlile's inquiry found in 2006 that some treatment of children in custody would "*in any other circumstances trigger a child protection investigation and could even result in criminal charges*".⁶ Since then the inquests on two children who died following staff restraint have revealed high levels of restraint and poor oversight by the YJB; the serious case review into the suicide of Adam Rickwood reported that "*the 'whole [criminal justice] system' treated AR as a child in need of custody, rather than a child in need of care*"⁷; the Prisons Inspectorate has repeatedly expressed concerns about the use of force and inadequate safeguarding in young offender institutions; and Parliamentary Questions have shown very high levels of self-harm, frequent use of force when strip-searching and the common use of handcuffs in secure training centres (44 times in 2006).
- 6 children have died in custody since the UK last reported to the UN Committee on the Rights of the Child in October 2002; there have been 30 child deaths since 1990.

⁵ Reducing re-offending by ex-prisoners. Report of the Social Exclusion Unit (Pages 156-158)

⁶ Howard League: "An independent enquiry into the use of physical restraint, solitary confinement and forcible use of strip searching in prisons, secure training centres and local authority secure children's homes", (page 12)

⁷ Report of the Serious Case Review Panel upon the circumstances surrounding the death of AR at Hassockfield Secure Training Centre on 9th August 2004 (LSCB, 3 September 2007), page 12, first para.

- Custody does not rehabilitate the vast majority of children: three-quarters reoffend within a year of release.⁸ This is despite it costing about 70% (£280 million) of the YJB's annual programme budget
- In June 2006, the Parliamentary Public Accounts Committee published its report on prison overcrowding. The chair, Conservative Edward Leigh MP, urged: *"Another way of relieving the pressure is to think long and hard about practical alternatives to imprisonment for some key categories of prisoner: such as those on remand, those with mental health problems and children."*⁹ That same month the Local Government Association (LGA) recommended moving towards more community sentences for children. The chair of its Children and Young People's Board said, *"It's time we explored more effective and sustainable ways of dealing with children in trouble, rather than resorting to locking them up."*¹⁰

(ii) Growth in child custody

Despite these dangers and deficiencies child custody has grown substantially:

- The numbers of children (under 18s) in custody in England and Wales have more than doubled (110% increase) in 15 years, from 1405 in 2002 to 3000 by last summer and 2800 now. Under 15s have increased even more dramatically (over 700% (sic) increase), from 100 (all sentenced for serious crimes) to over 800 (only 50 for serious crimes).
- These increases have been driven by Government legislation and the sentencing climate. Over the same period indictable offences by young people have dropped by 20%. The latter is no artificial change: clear-up rates have been stable since 1995 and 42% fewer people report being crime victims.¹¹
- We use custody far more than comparable countries. For example, per 100,000 under 18s we lock away 23, France 6, Spain 2 and Finland 0.2 (sic).¹²

⁸ Ministry of Justice Statistical Bulletin: Re-offending of juveniles: results from the 2005 cohort. (Page 10)

⁹ Committee of Public Accounts Press Notice No. 44 of Session 2005-06, dated 6 June 2006 National Offender Management Service: Dealing with increased numbers in custody (HC 788)

¹⁰ A Position Paper: Children in Trouble: LGA campaign to reduce youth offending

¹¹ Home Office Statistical Bulletin 11/05 ; British Crime Survey

¹² International Centre for Prison Studies <http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/europe.html>