

Still waiting for Youth Justice

- The average length of custody imposed on children in the youth court for robbery rose between 1994 and 2004, from 4 to 9.5 months
- Between 1993 and 2004, the number of custodial sentences imposed on girls rose by 400%
- The maximum custodial penalty available for a child in the youth court for a single offence is four times that which can be imposed on an adult in the magistrates' court
- The level of suicide for teenage boys in custody is 18 times that for boys living in the community
- Restraint techniques designed to ensure compliance through the deliberate infliction of pain were used 748 times on children in STCs in the 12 months to November 2005
- 96% of children with between 7-10 previous convictions sentenced to custody are reconvicted within 2 years of release
- 15 – 17 year olds in YOIs receive on average 8 hours education a week
- 29 children have died in penal custody since 1990 and there has never been a public inquiry into the death of a child in custody
- Children are issued with 4 times as many ASBOs as would be expected if they were distributed evenly across the total population

Prevention

Historically, the YJS has been concerned primarily with children who have offended. The Crime and Disorder Act 1998, however, requires everyone working within that system to have regard to the principal aim of preventing offending - as opposed to re-offending. While this aim provides a focus for multi-agency working, above all for staff in youth offending teams (Yots), the interpretation of prevention in this context has become increasingly broad. Yots are expected to take a lead role in delivering, or coordinating, services for a wide range of children who have not offended or who are below the age of criminal responsibility, through a raft of initiatives such as Youth Inclusion and Support Panels, Youth Inclusion Programmes, and Junior Youth Inclusion Programmes. Resources previously allocated through the Children's Fund have more recently been channelled through Yots. The notion of prevention – even for very young children through programmes such as Sure Start and On Track – has, too often, become synonymous with the prevention of offending, subsuming all other forms of social need within a narrow focus on crime.

Yet it is far from easy to predict future offending. 'Risk factors' associated with offending behaviour are also typically characteristic of all children in need. Conversely, many young people who do offend do not come from high risk backgrounds.¹² An exclusive concern with potential criminality deflects attention from the broader range of problems that children from disadvantaged backgrounds frequently face. Treating children as future offenders can act as a 'self fulfilling prophecy' and undermine the creative potential of preventive services.

The SCYJ believes that the primary focus of the YJS should be the prevention and reduction of offending by those already in trouble. The work of Yots must be closely integrated with wider provision for children, but preventive services, broadly conceived, are the responsibility of Children's Services. Funding for such activity should be channelled through Children's Trusts.

Dealing with anti-social behaviour

The corrosive effects of the spreading criminal justice net are also evident in the expanding array of measures to deal with anti-social behaviour (ASB). The police have the power, within designated dispersal zones, to return home children under the age of 16 years whether or not they have done anything wrong. In the 18 months from January 2004 at least 520 children were taken home under these powers.¹³ Meanwhile, the number of acceptable behaviour contracts (ABCs) rose 70% between 2004 and 2005.¹⁴ ABCs are used almost exclusively against children and are frequently a precursor to an anti-social behaviour order (ASBO). ASBOs themselves were originally conceived predominantly as a measure to target problematic adult behaviour and 'neighbours from hell', but are now commonly understood as a mechanism for dealing with teenage misbehaviour. Since their introduction in 1999, 46% of ASBOs have been issued against children aged 10-17 years, even though they comprise just 13% of the population.¹⁵

The SCYJ shares the concerns of those who consider that the 'ASB agenda' has led to a demonising of young people in general. The presumption in favour of 'naming and shaming' those against whom ASBOs are made, through the media or leafletting the local neighbourhood, also demonises individual children. It exposes those who are already among the most vulnerable to emotional damage and can compromise their safety through vigilante action. For others, it becomes a 'badge of honour' or a status symbol.

The current approach to ASB has resulted in more children being drawn into the YJS. Breach of an ASBO is a criminal offence and rates of non-compliance are high. The SCYJ is particularly concerned about the impact on the numbers of children given custody. Recent figures are not available, but by the end of 2003, 46% of 10-17 year olds breaching ASBOs had received a custodial sentence. It is true that, on occasion, there were other matters before the court; however the ASBO breach was either the sole offence for which custody was imposed, or contributed to a longer sentence of detention, in more than 75% of such cases.¹⁶

46% of ASBO breaches involving children result in a custodial sentence

The SCYJ believes that responses to ASB have disproportionately affected children. The ASBO in particular is a negative measure that seeks purely to proscribe particular forms of behaviour and is generally unsuited for dealing with the complex problems exhibited by children in trouble. Extensive use of ASBOs, and other coercive measures, is not a sign of success, as the Government appears to believe, but an indication of local failure to provide appropriate preventive services that can support children at the point at which they start to engage in problematic behaviour. Yet it is clear that in many areas, enforcement is the preferred route. Research undertaken for the Association of Yot Managers during 2004 found that one in five Yots were only occasionally, or never, consulted about applications for ASBOs despite guidance suggesting that they should be.¹⁷ At the same time, the use of individual support orders which provide an opportunity for positive intervention alongside an ASBO remains very low. Recent developments suggest that such concerns are unlikely to diminish: the Home Office has confirmed plans to introduce 'indicators' in every area 'to increase the take-up of ASB powers'.¹⁸

The SCYJ believes that responses to children who display ASB should be predominantly preventive rather than enforcement based, inclusive rather than demonising and that ASBOs are an inappropriate tool for children. The current reliance on the use of ASBOs for children should be phased out. In the meantime, a number of specific legislative provisions should be introduced:

- *A requirement that any application for an order against a child should be preceded by a Children's Services assessment to ascertain the likely impact on the child and his/her family and establish what alternatives might be deployed*
- *A reinstatement of the presumption of privacy in ASBO cases involving children*
- *Courts should be obliged to consider the child protection implications of any proposed ASBO and required to reject the application where the order might compromise safeguarding arrangements*

- *The current minimum of two years should in the case of an ASBO made against a child be reduced to three months*

- *A custodial sentence should not be available for breach of an ASBO by a child.*

Maximising diversion

There is substantial evidence that keeping children out of the criminal courts wherever possible is an effective way of preventing re-offending. Dealing with children without resorting to prosecution also carries with it substantial cost benefits and allows Yots to focus more of their resources on work with young people whose offending is persistent or serious.¹⁹

As late as 1990, the Home Office recognised the 'widespread agreement' that courts should only be used for young people as a last resort since other forms of action 'may reduce the likelihood of offending'.²⁰ From that date, however, there has been a rapid increase in the use of prosecution: between 1992 and 2004 the rate of diversion fell from 74% to 58%.²¹ This trend was reinforced by the introduction of reprimands and final warnings in 2000, limiting the number of pre-court options to a maximum of two per child and eliminating police discretion to deal with subsequent minor offending outside of court. This is particularly alarming since lower rates of diversion are associated with higher levels of custody, as earlier entry into the court system at ever younger ages accelerates children up the sentencing tariff.²²

In *Youth justice: the next steps*, the Government recognised the benefits of maximising pre-court diversion, raising the prospect that the unhelpful rigidity of the final warning scheme might be relaxed. While little progress has subsequently been made in this regard, the Government has finally confirmed that it is looking to extend the range of pre-court options by piloting restorative interventions for 'first misdemeanours' prior to any formal criminal justice intervention, and extending conditional cautioning, currently

available only for adults, to children. The SCYJ welcomes the first of these initiatives but has reservations about whether the second might result in higher levels of compulsory intervention than a child could expect through the court process. The Committee would prefer the development of an alternative mechanism where the threat of subsequent prosecution is removed.

The SCYJ considers that the age of criminal responsibility should be raised substantially to divert large numbers of younger children immediately into alternative, non criminal forms of provision. A fundamental review of arrangements for dealing with children who offend, of the sort envisaged in CiT, would permit the development of a reformed legal framework to ensure effective responses to younger children's behaviour, in even the most serious cases.

Diversion from court should also be expanded significantly for all children above the age of criminal responsibility. Other than for serious offences, where intervention is required, it should be delivered outside the criminal justice framework.

Pending such changes, legislative measures should be pursued that would contribute towards the longer term goals:

- *The legal proscription on a child being given more than one reprimand or final warning should be removed*
- *Children should be not charged without an assessment of need by Children's Services to consider what alternatives might be offered to prosecution: at the very least this should apply to children under 14 and those assessed as vulnerable*
- *For offences that would otherwise lead to a court appearance, the CPS should be empowered to refer children direct to a youth offender panel instead of prosecution. Any agreed contract would not be enforceable but failure to comply could be cited in any future criminal proceedings.*



Children in adult courts

The UNCRC requires that the 'laws, procedures, authorities and institutions' for dealing with young people in trouble should be child specific. Yet considerable numbers of children are routinely subjected to procedures designed for adult offenders. For instance, 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 transferred to local authority accommodation. At court, too, children aged 17 years are treated as adults for remand purposes, being automatically remanded to custody where bail is denied.

Children alleged to have committed certain 'grave' offences and those jointly charged with adults, may be tried in the Crown Court, a venue designed for adults whose offending is of a more serious nature. These arrangements are widely recognised as unsuitable, and the European Court of Human Rights has, on two occasions, found that they constitute a breach of the right to a fair trial.²³ In the most recent judgement, the court concluded that the introduction, in February 2000, of measures intended to mitigate the most intimidating aspects of appearing in the Crown Court were insufficient to guarantee the child's full participation in the trial process.

To date, the Government has taken no action to remove children from adult courts. Indeed, the CJA expanded the number of children liable to be dealt with in the Crown Court by introducing new forms of custodial sentences, including indeterminate detention, for those convicted of a broader range of potentially less serious sexual and violent offences.

This failure to develop a sufficiently distinct YJS means that any new measure designed for adult offenders tends to affect children by default. For instance, the CJA raised the adult maximum penalties for possession with intent to supply a Class C drug and for aggravated vehicle taking. As a consequence, the 'grave crimes' provisions are triggered and children charged with either of these offences, which hitherto were automatically heard in the youth

¹ From April 2006, the organisation hitherto known as the Youth Justice Board for England and Wales is referred to as the YJB.

² Monaghan, G, Hibbert, P and Moore, S (2003) *Children in trouble: time for change*, Barnardo's

³ *Youth Justice: the next steps – annex to Every Child Matters* (2003), Home Office

⁴ *Steps in the right direction* (2005), SCYJ

⁵ Morris, N (2006) 'Raid to make violent criminals serve longer jail sentences' in *The Independent*, 21 July 2006

⁶ UN Committee on the Rights of the Child (2002) *Concluding observations of the United Nations Committee on the Rights of the Child: United Kingdom*, United Nations

⁷ Committee against Torture (CAT/C/CR/33/3) *Conclusions and recommendations of the Committee against Torture United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories*

⁸ European Social Charter, European Committee of Social Rights, Conclusions XVII-2, Volume 2, Chapter 18, September 2005

⁹ Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights on his visit to the UK, 4th – 12th November 2004, Strasbourg, 8 June 2005

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

¹¹ Croke, R and Crowley, A (eds) (2006) *Fighting the wrongs: the reality of children's rights in Wales*, Save the Children

¹² Armstrong, D, 'A risky business? Research, policy, governmentality and youth offending' in *Youth Justice* 4(2), October 2004

¹³ Respect Task Force (2006) *Tackling anti-social behaviour: the story so far and the move to respect*, Home Office

¹⁴ *Ibid*

¹⁵ *State of children's rights in England* (2005), op cit

¹⁶ 'Third supplementary memorandum submitted by the Home Office', in *Minutes of Proceedings of the Home Affairs Select Committee, Oral and additional written evidence*, 5 April 2005, HC 80-III

¹⁷ Thomas, S, Vuong, K and Renshaw, J (2004) 'ASBOs target youths, but to what effect?' in *Safer Society* 23, Winter 2004

¹⁸ *Rebalancing the criminal justice system in favour of the law abiding majority. Cutting crime, reducing offending and protecting the public* (2006), Home Office

¹⁹ Kemp, V, Sorsby, A, Liddle, M and Merrington, S *Assessing responses to youth offending in Northamptonshire*, Research briefing 2, Nacro, 2002

²⁰ *The cautioning of offenders* (1990), Home Office circular 59/1990

²¹ Nacro (2006) *Some facts about young people who offend – 2004*, Youth crime briefing, 2006

²² *A better alternative: reducing child imprisonment* (2005), Nacro

²³ *T and V v the United Kingdom*, 30 EHRR 1211, December 1999 and *S.G. v the United Kingdom*, Application No. 03058/00, judgement of 15 June 2004

²⁴ Nacro (2003) *Children and young people who commit schedule 1 offences*, Youth crime briefing

²⁵ Munroe, J (2004) *Youth and crime*, Sage

²⁶ *Sentencing statistics 2004* (2005), Home Office Statistical Bulletin, 15/05

²⁷ Nacro (2006), op cit

²⁸ *Youth justice annual statistics – 2004/2005*, YJB 2006

²⁹ 'Youth justice news' in *Youth Justice* 4(2), October 2004

³⁰ 'The Carlie Inquiry' Howard League, London 2006

³¹ 'Youth justice news' in *Youth Justice* 5(3) February 2006

³² Fazel, S, Benning, R and Danesh, J (2005) 'Suicides in male prisoners in England and Wales 1978 – 2003' in *The Lancet*, No 366

³³ *Children in trouble* (2006), LGA

³⁴ *Annual report and accounts 2005 – 2006* (2006), YJB

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A child of 10 convicted of possession of cannabis with intent to supply can be given up to 14 years in custody, the same maximum penalty as an adult

court with a maximum custodial sentence of two years, can receive up to 14 years detention in the Crown Court.

Similarly, arrangements for dealing with offenders considered to represent a risk to children (previously known as schedule 1 offenders) apply irrespective of age. This operates to children's disadvantage since:

'an adult who commits a serious assault on another person of the same age will not be classified [as a person who represents a risk to children], even if the incident results in permanent injury. By contrast, a 12 year old convicted of a relatively minor assault on a peer will qualify'.²⁴

The SCYJ considers that a comprehensive review is required to ensure that the treatment of children who break the law is suitable to their stage of development and distinct from adults. Pending such a review, legislation should at the earliest opportunity:

- Preclude the trial or sentencing of children in Crown Court
- Introduce a presumption that changes to the adult criminal justice system do not apply to children unless specifically intended to do so
- Require the Sentencing Guidelines Council to produce separate guidelines for children.

A reduced tolerance for children

Paradoxically, distinguishing children who break the law from adult offenders does not guarantee more lenient treatment. As children in trouble are increasingly drawn into a YJS whose processes are frequently a watered down version of those applicable to adults, they are subject to what has been called 'double bind justice': high levels of need are met with fast track punishment, intensive supervision and increased regulation.²⁵ Interventions are frequently more intrusive, and experienced as more punitive, than those given to adults for similar offending.

The final warning scheme for instance precludes any child who has a criminal conviction (other than a discharge) from receiving a further pre-court disposal, however minor the offence, and restricts the court's ability to impose a subsequent conditional discharge. By contrast, adults can receive a caution or discharge at any stage in their 'offending career'.

Similarly, the maximum detention and training order (DTO) available in the youth court is, at two years, four times the maximum custodial penalty that can be imposed on an adult for a single offence in the magistrates' court. Conversely, while there is no adult minimum, where the youth court considers that a child should be sent to custody, the shortest available sentence is four months.

Between 1994 and 2004, the average length of custodial sentence imposed in the youth court for offences of violence against the person rose from 3.6 to 7.1 months; the equivalent figures for adults aged over 21 years, sentenced in the magistrates' court, were 3.3 and 3.2 months.²⁶

The SCYJ considers that there should be a totally distinct set of legislative procedures for dealing with children's offending.

- Pending such a development, any compulsory intervention through the YJS should never be greater than is warranted by the offending and age should always be a significant mitigating factor.
- The Government should introduce a statutory presumption at the earliest opportunity that no child receives harsher treatment than an equivalent adult for offending of a similar nature.

The use of custody

The SCYJ regards the increased use of custody for children in recent years as one of the most alarming developments within youth justice. The number of custodial sentences imposed during 2004 was almost 60% higher than in the early 1990s. Girls, although underrepresented in the YJS as a whole, have been disproportionately affected: between

1993 and 2004, the number of custodial sentences imposed on females under 18 rose by 400%.²⁷ The average age of children detained has fallen: during 2004, 864 children aged under 15 years were given custodial disposals. Black and ethnic minority children are also overrepresented among the incarcerated population. In 2005, 7% of black or black British children processed by the YJS received a custodial penalty compared with 3.2% of those of white origin.²⁸

The large majority of children in custody are held within prison service young offender institutions (YOIs) which are incapable of meeting the extent of need which such young people exhibit. The number of children assessed as vulnerable detained in YOIs has risen from 432 in 2001/02 to 3,337 in 2003/04.²⁹ Notwithstanding the best efforts of staff who work in custodial establishments to provide a safe environment, the treatment of children in custody, and in particular the use of painful physical restraint, strip searching and segregation (as highlighted recently in the Carlie Report)³⁰ can be damaging for all children and can exacerbate existing vulnerabilities. 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; 29 children have died in custody since 1990;³¹ the risk of suicide for incarcerated teenage boys is 18 times as high as those within the community.³²

Safeguards for children deprived of their liberty are urgently required. The SCYJ considers that all children in custody should be considered 'looked after' just as those in other forms of public care. It is clear that improvements in custodial regimes, and the removal of vulnerable children from YOIs to more appropriate provision, are severely constrained by the large numbers detained unnecessarily within the juvenile secure estate. A recent report by the Local Government Association, for instance, argues that abolishing custody for children

who commit non-violent offences would reduce the detained population by 65%.³³

YJB initiatives to develop alternatives to custody have so far made little impression. Indeed, the Board has recently acknowledged that its target to reduce the custodial population by 10% by March 2008, is 'at risk'.³⁴

The SCYJ considers that there should be a statutory presumption against placing a child in custody unless there is a demonstrable risk of serious harm to the public and that all children who have to be detained should be placed in child focussed provision, designed to meet their needs and aimed at therapy and rehabilitation. Pending that outcome, additional statutory safeguards for detained children should be introduced:

- A requirement that all children in custody are considered to be 'looked after'
- A requirement that the Director of Children's Services, as the person responsible for local safeguarding arrangements, is consulted before any child under 16 is placed in custody
- A presumption that no child assessed as vulnerable can be placed in a YOI.

The 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.

Membership:

Barnardo's
Children's Legal Centre
Children's Rights Alliance for England
Children's Rights Officers Association
Coram
CRE
Drugscope
JUSTICE
Nacro
National Association for Youth Justice
National Children's Bureau
National Council of Voluntary Child Care Organisations
NCH
Newmartin Youth Trust
NSPCC
Prison Reform Trust
Rainer
Revolving Doors
Save the Children
Secure Accommodation Network
SOVA
The Children's Society
The Howard League for Penal Reform
The National Youth Agency
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The contents of this paper do not necessarily reflect the views of each of the Committee's member organisations

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A position paper by the Standing Committee for Youth Justice

- Between January 2004 and June 2005, at least 520 young people were taken home by the police in areas covered by dispersal orders
- ASBOs are available for children from the age of 10 years
- Children are up to six times as likely as adults to be the victims of theft and up to four times as likely to be the victims of assault
- During 2004, adults were responsible for 89% of all detected crime
- The majority of children with the 'risk factors' thought to predict offending do not go on to offend
- Leaving aside other jurisdictions in the UK, only 4 countries out of the 46 in the Council of Europe have a lower age of criminal responsibility than England and Wales
- Interventions outside of the court arena are most effective in preventing re-offending
- According to the Code for Crown Prosecutors, the public interest usually requires prosecution of a child who has had a previous final warning even where the offence is trivial. There is no similar presumption in the case of an adult
- 70% of the YJB's programme expenditure is used to purchase custodial provision

In 2003 a coalition of charities – all members of the Standing Committee for Youth Justice (SCYJ) – produced a report entitled *Children in trouble: time for change (CIT)*.² It argued that current arrangements for dealing with children who break the law in England and Wales were seriously flawed as a consequence of three 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.

There has been considerable change across the criminal justice landscape in the three years since *CIT* was published, but little, if any, progress towards ameliorating the identified shortcomings. The provisions of the Criminal Justice Act 2003 (CJA) and the Anti-social Behaviour Act 2003 for instance, fail more often than not to distinguish between adult offenders and children who break the law. The boundaries between the adult and youth justice systems have become further blurred; the treatment of children in trouble continues to be dominated by a punitive approach, deriving from a determination to be tough on all crime; considerations of child welfare, essential to an effective strategy for reducing youth crime, have been allowed to fall by the wayside. The principles and key outcomes outlined in the green paper *Every Child Matters (ECM)*, which are designed to ensure the wellbeing of all children, appear to have had little influence on official responses to those who offend.

Proposals for further reform of the youth justice system (YJS) were outlined in an annex to *ECM*,³ prompting the SCYJ to produce a

position paper in 2005 outlining priorities for change.⁴ At the time of writing, there is no sign of the promised legislation. In July 2006, the Home Secretary announced a 24 point plan to tackle 'public dissatisfaction' with the criminal justice system. It made no mention of the particular circumstances of children and is unlikely to mark a change of direction.⁵

CIT made a powerful case for a comprehensive review of the YJS rather than further piecemeal reform and described a number of tenets that would inform any effective, rights based, approach to dealing with children who break the law. The SCYJ fully endorses the principles of *CIT*, and will continue to press for a comprehensive review. The concerns highlighted in the report echo criticisms made by the UN Committee in 2002 when it last reported on the United Kingdom's implementation of the UN Convention on the Rights of the Child (UNCRC).⁶ The UK has since been criticised by the UN Committee against Torture (2004)⁷ for its high prison population, the European Social Rights Committee (2005)⁸ for its low age of criminal responsibility, and by the Council of Europe's Human Rights Commissioner (2005)⁹ for its approach to tackling anti-social behaviour, especially 'naming and shaming', and its treatment of child prisoners. A recent analysis of the implementation of the Convention on the Rights of the Child in England concludes that the UK Government has 'torn up the treaty' for children in trouble with the law.¹⁰ A review in Wales reached similar conclusions.¹¹

The Government is required to submit its next periodic report to the UN Committee on the Rights of the Child in July 2007. The SCYJ considers that this represents an opportunity to reconsider the direction in which youth justice is heading. This paper outlines a number of key measures which, though they fall short of the fundamental reform we consider necessary, ought to feature prominently among the Government commitments in that report.