



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

March/April 2008

Children's custody threshold

THE AMENDMENT

**Baroness Falkner of Margravine
Baroness Miller of Chilthorne Domer**

After Clause 1 insert the following New Clause-

- (1) This section applies where a person under the age of 18 years is convicted of an offence punishable with a custodial sentence other than one:
- a) Fixed by law or
 - b) Falling to be imposed under section 51a(2) of the Firearms Act 1968 or under sections 226 - 228'
- (2) In the title of section 152 of the Criminal Justice Act 2003 (c. 44) (general restrictions on imposing discretionary custodial sentences), after "general restrictions on imposing discretionary custodial sentences", insert "on offenders aged 18 or above".
- (3) In section 152(1) of the Criminal Justice Act 2003 after "where a person", insert "aged 18 or above".
- (4) After section 152 of the Criminal Justice Act 2003, insert -

"152A Restrictions on custodial sentences for offenders aged under 18

- (1) A court shall only pass a sentence of custody on a person under the age of 18 as a measure of last resort and where:
- (a) The offence committed caused or could reasonably have been expected to cause serious physical or psychological harm to another or others, and
 - (b) A custodial sentence is necessary to protect the public from a demonstrable and imminent risk of serious physical or psychological harm.
- (2) The court shall state in open session its reasons for passing any sentence of custody under this section.'

PURPOSE

The aim of this amendment is to create a statutory custody threshold that must be met before any child is sentenced to custody, in order to ensure that children are only locked up as a last resort, and for reasons of public protection, save where mandatory custodial sentences apply.

BRIEFING

The Standing Committee for Youth Justice notes the strength of feeling among Peers in relation to the very high numbers of children in custody, and the care and treatment received by children in custodial settings. We welcome the commitment of Peers to ensure human rights standards developed especially to safeguard children are reflected in criminal justice legislation. We note the Minister's statement at Lords Second Reading that "*crime is down by one third [from 1997]*" and at the same time "*Few in this House will take solace from the number of children and young people currently in custody.*"

At any one time there are about 3,000 children held in juvenile custody in England and Wales and over a third of these are officially classed as vulnerable.¹ Despite the Youth Justice Board's target of a 10% reduction in children entering custody between 2005 and 2008 (approved by the Home Office), the numbers of children entering custody have risen, not decreased. Four in every 100 children in custody are subject to a care order. Six more children have died in custody since the UK was last examined by the UN Committee on the Rights of the Child in 2002: this brings to 30 the total number of child deaths in custody since 1990. Custody is known to be one of the least effective, and most harmful, of criminal justice disposals for children, with eight out of 10 reoffending within two years of release. Public surveys show consistent and strong support for tackling juvenile crime without resort to imprisonment.

The Standing Committee strongly welcomed attempts in the House of Commons to introduce a distinct custody threshold for children. We note that the Minister David Hanson, MP did not object to the concept of a custody threshold, though we do not share his view that the provisions in the Criminal Justice Act 2003 are adequate.

We believe the aim of a custody threshold for children should be to ensure that children are only ever locked up as a last resort, in line with international human rights law (see below), and for reasons related principally to public protection. We acknowledge Ministers' concerns about children who have committed grave crimes and would support a custody threshold that relates only to offences other than murder and the serious crimes listed in sections 226 and 228 of the Criminal Justice Act 2003.

A distinct custody threshold for children and young people was introduced by Parliament more than 25 years ago and resulted in a 54% decrease (over nearly a decade) in the number of under 21s given a custodial sentence for indictable offences. In the year ending March 2007, the Youth Justice Board spent £280million on custody for children (notwithstanding the costs of support in the community for these children and their families). A reduction in the numbers of children in custody would release considerable resources for improved prevention and rehabilitation where it can be most effective, as noted by the Audit Commission, Public Accounts Committee² and many others.

Addressing the Ministers' statements

A custody threshold already exists

Section 152(2) of the Criminal Justice Act 2003 requires that "*The court must not pass a custodial sentence [where there is discretion] 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 or a community sentence can be justified for the offence.*" This threshold is inadequate for children for the following reasons:

- International human rights law requires that children who offend be treated in a recognisably different way from adults – because of children's particular needs and developmental stage. Article 40(3) of the UN Convention on the Rights of the Child requires that "*States Parties shall seek to promote the establishment of laws procedures authorities and institutions specifically applicable to children.*"
- International human rights law requires that custody for children should only ever be used as a

¹ Written answer to Parliamentary Question, 28 March 2007: Column 1653W

² 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)

last resort and for the shortest possible time. The Joint Committee on Human Rights (January 2008) notes that, *“the provision in the Criminal Justice Act restricting the use of custody is a general restriction applying to all offenders, rather than one aimed at ensuring that custody is only ever used as a genuinely last resort in relation to juveniles. In our view, a much more specific safeguard is required in order to ensure that the obligation in Article 37(b) CRC is properly implemented.”*³

- The threshold is meaningless without any definition of “so serious” – and this definition will necessarily be related to a person's age and circumstances.
- The number of children being received into prison under an immediate custodial sentence has increased by 13% since 2003, from 4,918 prison receptions for 15 to 17 year-olds in 2003 to 5,291 in 2006 (this does not take account of receptions into secure training centres and local authority secure children's homes). There was an overall reduction of 22% in all prison receptions (adults and children), raising concerns that children are disproportionately being given an immediate custodial sentence.⁴

This would put the public at significant risk

- Ministry of Justice figures (December 2007) show that **the vast majority (78%) of the 5,291 children aged 15 to 17 who were sentenced to imprisonment in 2006, were not convicted of offences related to sexual offences or violence against the person.**⁵
- More than one in 10 children (14%) were imprisoned for “theft and handling”, 5% for motoring offences and 4% for drug offences. A quarter of children were imprisoned for other offences which include affray (115 children), criminal damage (66 children) and even drunkenness (2 children). There are well known cases – such as the “the Deerbolt Two” – of custodial sentences being passed for graffiti offences committed whilst children.
- A poll conducted in December 2007 by SmartJustice found that 65% of adults believe prisons are not effective in reducing young people's offending for non violent crimes and two in three people think that prisons are “universities of crime”. Only 30% believe that building more prison places would be effective in reducing re-offending amongst young people who have committed nonviolent crimes. **It is not the case that the public is calling for more imprisonment to protect them from non-violent crimes – the reverse is the case, and Ministers are lagging behind public opinion in this matter.**

Other reasons for a custody threshold for children

We believe this has been promised

The Youth Justice Board's “Strategy for the Secure Estate for Children and Young People” (November 2004) said *“it expects legislative changes that are due soon, to bring greater clarity for courts about the [children's] custody threshold”*. YJB policy documents are cleared by Ministers, and thus effectively become Government policy.

Everyone agrees there should be fewer children in custody

It is difficult to find anyone inside or outside Government that believes the current high number of children in custody is acceptable or beneficial – to children or to wider society.

The Youth Justice Board's target of 10% reduction of children in custody between March 2005 and March 2008 was agreed with the Home Office. Whilst the YJB states “Target [is] highly unlikely to

³ Joint Committee on Human Rights (January 2008) Legislative Scrutiny: Criminal Justice and Immigration Bill Fifth Report of Session 2007–08

⁴ Ministry of Justice (December 2007) Statistical bulletin. Offender management caseload statistics 2006.

⁵ Ministry of Justice (December 2007) Statistical bulletin. Offender management caseload statistics 2006.

be met”⁶ – understandably so given there has been no tightening of the powers of courts to sentence children to imprisonment – there has been no indication that the YJB (or Ministers) want to remove this target.

In the Home Office strategy paper⁷, which lays the groundwork for much of the content of this Bill, the Government says, “*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). In relation to children it says, “*We believe that it is important to keep children out of prison if it is at all possible*” (para 3.31).

Furthermore, the Children's Plan, published in December 2007, promises that the Government is taking “*a fundamental look at the way in which the criminal justice system overall is working for young people to ensure we learn from existing good practice and address current concerns. This includes examining what we know about [child offenders], what a more effective approach to prevention would look like [and] the options available for dealing with children who commit crimes...*”

Organisations working with children in the criminal justice system, and those concerned with the protection of human rights, are united in urging a considerable reduction in the numbers of children in custody. The general public wants more effective intervention (see above) and less imprisonment. The chair of the Local Government Association children and young people board summed up: “*It's time we explored more effective and sustainable ways of dealing with children in trouble, rather than resorting to locking them up.*”⁸

Concern about children in custody is extremely high

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% had been excluded from school before being locked up.⁹ A report commissioned by the YJB shows that up to nine out of 10 children in custody have been abused in the past, but they rarely get the help they need whilst locked up.¹⁰

Against this background, Lord Carlile found in his inquiry that some treatment of children in custody would “*in any other circumstances trigger a child protection investigation and could even result in criminal charges*”.¹¹ Since the publication of Lord Carlile's report in February 2006, the inquests of two children that died following restraint-related incidents have revealed high levels of restraint and poor oversight by the YJB; the serious case review into the death 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*”¹²; 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).

In one recent illustration of the crisis facing child custody and culture of violence, the joint inspection report of HM Inspector of Prisons and Ofsted on Oakhill secure training centre, published on 17 March 2008, has recommended that the centre be temporarily closed in order to address ‘*an over-reliance on emergency measures – in particular, a staggeringly high level of use of force by staff...*’.

⁶ Youth Justice Board (July 2007) Annual Report and Accounts 2006/07, page 26

⁷ A Five Year Strategy for Protecting the Public and Reducing Re-offending, Home Office, February 2006: page 11, para 2.1

⁸ A Position Paper: Children in Trouble: LGA campaign to reduce youth offending

⁹ Reducing re-offending by ex-prisoners. Report of the Social Exclusion Unit (Pages156-158)

¹⁰ “YJB accused of burying child abuse report”, Community Care, August 7 2007

¹¹ 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”, (page12)

¹² 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.¹³ This amendment would enable interventions to be improved considerably for those who need to be locked up for genuine reasons of public protection, and enable the re-allocation of resources for more suitable and effective community rehabilitation for those who do not pose such a risk. About 70% (£280 million) of the YJB's programmes budget is spent each year on locking up children. In June 2006, the Parliamentary Public Accounts Committee published its report on prison overcrowding. The chair of the Committee, 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."*

Human rights standards

Article 37(b) of the UN Convention on the Rights of the Child ("CRC") requires that the *"detention or imprisonment of a child shall be a measure of last resort..."* The requirement is included in the UN Beijing rules¹⁴ (rule 19.1), which require that *"the placement of a juvenile in an institution shall always be a disposition of last resort."*

Moreover, article 40(4) of the CRC requires that *"a variety of dispositions, such as care, guidance, and supervision orders; counselling; probation; foster care; educational and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence"*.

In its 2002 concluding observations,¹⁵ the UN Committee on the Rights of the Child criticised the UK for the continuing high use of custody for children. It said, *"[T]he committee is deeply concerned at the high increasing number of children in custody, at earlier ages, for lesser offences"* and that *"deprivation of liberty is not being used only as a measure of last resort"*.¹⁶ The report recommends that the State Party should *"ensure that detention of children is used as a measure of last resort"*.¹⁷

Inconsistency in sentencing

Between April 2001 and March 2006, the custody rate (expressed as the number of cases resulting in custody as a proportion of all court disposals) varied widely between the English regions and Wales.¹⁸ For example, in the North East it was 6% and in London and West Midlands, it was 11%. In relatively rural Wales, it was 10%. A statutory custody threshold would address this inconsistency.

Parliament has supported a custody threshold before

Section 1(4) of the Criminal Justice Act 1982, repealed by the Criminal Justice Act 1991 (S101(2), Sch 13), set a custody threshold for people under 21.¹⁹ Before it was repealed, this had a significant effect on the number of young people sent to custody – between 1982 and 1990 there was a 54% reduction in the use of immediate custody for indictable offences for under 21s.²⁰

Section 1(4) provided that the courts must not pass a sentence of custody on a person under 21, unless they were *"of the opinion that no other method of dealing with him is appropriate, because it appears to the court that he is unable or unwilling to respond to non-custodial penalties, or because a custodial sentence is necessary for the protection of the public, or because the offence was so serious that a non-custodial sentence cannot be justified."*

¹³ Ministry of Justice Statistical Bulletin: Re-offending of juveniles: results from the 2005 cohort. (Page 10)

¹⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), 1985

¹⁵ Concluding Observations of the UN Committee on the Rights of the Child: United Kingdom of Great Britain & Northern Ireland (2002)

¹⁶ Ibid page 15 para 57

¹⁷ Ibid page 16 para 58, recommendation f

¹⁸ "The Sentence" Sentencing Guidelines council Newsletter Feb 07 pages 18-21.

¹⁹ "Growing out of Crime" (pages 16-18) by Andrew Rutherford, Waterside Press 2006

²⁰ Ibid page 15

The threshold was opposed by the then Conservative Government, and was achieved only by an amendment moved and won in the Lords by Conservative Peer Baroness Lucy Faithfull, a former social worker and children's officer. The Government subsequently generously admitted that Baroness Faithfull had been proved right by subsequent events.²¹

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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.

²¹ Ibid page 17