Standing Committee for Youth Justice

Response to Sentencing Advisory Panel Consultation Paper on Principles of Sentencing for Youths

March 2009

Question 1
Do you consider that the use of the terms best interests or well-being signifies any difference in meaning from the use of the term welfare?

Paragraph 37 states that:

> 'The classic welfare in domestic law is in section 44 of the Children and Young Persons Act 1933; this states that "Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the *welfare* of the child or young person, and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training". It is probably that no significant differences arise in practice from the use of different terminology – *best interests, well-being* or *welfare*. Since "welfare" is the term used in the legislation applicable to England and Wales, that is the term used in this consultation paper.'

The UK's domestic law in relation to the welfare of the child is set out in the Children Act 1989, which states that in all matters relating to the upbringing of a child the court must have the child's welfare as its paramount consideration. The Children Act 1989 is generally regarded as setting the marker and standard for the treatment of children and young people in England and Wales today. However, the 'welfare principle' contained in the Children Act 1989 does not clearly apply to proceedings other than family proceedings.

We would accept that the terms welfare and well-being are closely related. The latter has become more popular over recent years, yet its meaning in policy and practice terms is likely to be very similar, if not the same as, welfare. While the term welfare does predominate in legislation, the more recent Children Act 2004 refers to the well-being of children through its five outcomes framework. It is difficult to say to what extent an assessment of children's welfare under the Children Act 1989 would result in a significantly different conclusion to that of a child's well-being based on the five outcomes.

We believe that the term 'best interests' does imply a different set of principles. The duty to ensure that in all actions undertaken by institutions including courts of law, the best interests of the child shall be a primary consideration is enshrined in Article 3 of the UNCRC. The Children Act 1989 also establishes that decisions taken by the court must be taken in the child's best interests through the establishment of the welfare checklist and the need for the court to take matters into account.

'Best interests' implies a more subjective judgement, and introduces the idea that a child has interests and that some options will be serve a child better than others. The term explicitly indicates that there is a responsibility for the person making such judgements to choose the best option for a child. We would argue that the term presents a stronger vision for children and a need to always place children first. It is the language most associated with the children's rights agenda and, as noted above, used by international human rights instruments including, amongst others, the United Nations Convention on the Rights of the Child.

Question 2

In relation to balancing the purposes of sentencing, do you agree that the approach described in paragraphs 47-52 should be the general approach? If not why not?

SCYJ welcomes the Panel's attempt to find a way to develop clear guidance for courts as to the purposes of sentencing young people. The statutory framework often pulls and pushes sentences in differing directions. Guidance from the Panel as to the way in which they should approach sentencing and a clear framework in which to operate will be of significant assistance to those who represent children and those who sentence them.

In particular SCYJ welcomes the Panel's comments that the sentence must be proportionate to the seriousness of the offending behaviour, even where the risk of re-offending is high. Too many young people are treated as if they are on a conveyor belt of sentencing options, getting a more serious sentence for each offence, even where the offence with which the court is dealing is significantly less serious than others on their record. SCYJ would welcome strong guidance on this point and emphasis that the offence and the sentence should be proportionate. The phrase used in paragraph 52 is especially helpful, that the proper approach is for a, *"sentence that is no more restrictive on liberty than is proportionate to the seriousness of the offence."*

The four objectives listed in paragraph 52 are a useful way to cut through the statutory framework. SCYJ particularly welcomes that the Panel have not included 'punishment' as one of the 4 objectives that are relevant to sentencing. SCYJ considers that a punitive approach to children and young people who commit criminal offences and find themselves before the courts is unhelpful and ultimately fruitless. It is well known that custodial sentences are not a deterrent to offending behaviour and recidivism rates after a sentence of imprisonment are high. Therefore we particularly welcome the lack of an

overtly punitive approach in the four objectives as recommended by the Panel.

Question 3:

Are you aware of any further information relevant to consideration of ethnicity and gender issues and sentencing patterns?

Race and ethnicity

SCYJ shares the Sentencing Advisory Panel's concern at the over-representation of black and minority ethnic (BME) young people at every stage of the youth justice system. It should be noted however that the pattern of representation is markedly different for different ethnic groups, as shown in the table below.

Representation of BME young people in the general population and in the youth justice system 2006/ 2007[1]

	All BME groups	Asian / Asian British	Black / Black British	Chinese / other ethnic group	Mixed heritage
10 – 17 general population	15.6%	6.4%	3%	1%	3%
Youth justice population	12.3%	3.1%	5.8%	0.4%	3%
Court population	14.3%	3%	7%	0.4%	3.9%
Community sentences	15.2%	2.6%	7.5%	0.3%	4.8%
All custodial sentences	21.6%	3.7%	11.8%	0.5%	5.6%
Long term custody	36.4%	4.5%	23.4%	0%	8.6%

Figures for the overall over-representation of BME young people thus disguise significant variation between ethnic groups. Asian and Chinese/ other young people are under-represented within the youth justice system relative to the composition of the general 10 – 17 population. Conversely, black / black British young people and those of mixed heritage show higher levels of over-representation than the overall data suggest. Moreover, the over-representation for these latter two groups becomes progressively more marked as interventions involve higher levels of punishment. So, for instance,

[1] Derived from Youth Justice Board (2008) *Youth justice annual workload data 2006/07.* London: Youth Justice Board

while black young people constitute 7% of the court population, they account for almost one in four of those receiving sentences of long term detention.[2]

The Panel rightly notes that this pattern of disposals is explained in part by different patterns of detected offending which also tends to vary by ethnic group. However, the research conducted by Feilzer and Hood, cited in the consultation document, suggests that evidence of over-representation remains, even where seriousness of the offending is taken into account.[3]

In the current context, one particular aspect of that report is worth highlighting: the authors note that pre-sentence reports prepared by YOT staff were more likely to propose custody and more restrictive community penalties in cases involving BME young people. These differences were not statistically significant for black / black British males, but were so for males of mixed heritage. Such findings mirror those of a previous review conducted by Her Majesty's Inspectorate of Probation.[4] That earlier study found that reports written on black adults were more likely to propose custody, were frequently of a lower quality than those prepared on white defendants, and were, on occasion, expressed in a manner that tended to reinforce racial stereotyping. This is of particular concern given research within the youth justice context suggesting that the quality of pre-sentence reports is itself predictive of the local level of custody.[5]

It is clear too that, even where there are no discernible differences in the quality of reports on BME and white young people, there is nonetheless a potential for indirect discrimination. Research conducted in one youth offending team area, for instance, found that it was common practice for PSR authors to argue that continued denial of an offence is indicative of a lack of remorse.[6] Such practice is problematic since a young person cannot consistently deny involvement in a particular episode and simultaneously appear penitent. At the same time, there is evidence that the issue of remorse carries significant weight with sentencers, and can impact on ultimate disposal, particularly in borderline cases where custody is a consideration.[7] The potential for indirect discrimination arises because BME young people are more likely to deny the offence; in such circumstances, equivalent treatment of all young people can generate differential outcomes.

A further contribution to differential outcomes for young people from ethnic minority groups is made through the breach process. During 2006/07, breach of a statutory order accounted for a higher proportion of offences leading to

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[2] Sentences of long term detention include orders made under: sections 90 and 91 of the Powers of Criminal Courts (Sentencing) Act 2000 and sections 226 and 228 of the Criminal Justice Act 2003.

[3] Feilzer, M and Hood, R (2004) *Differences or discrimination.* London: Youth Justice Board

[4] Her Majesty's Inspectorate of Probation (2000) *Towards race equality: a thematic inspection*. London: HMIP

[5] Bateman, T and Stanley, C (2002) *Patterns of sentencing.* London: Youth Justice Board

[6] Nacro (2007) Building on progress: maintaining lower levels of custody within Luton. London: Nacro

[7] Tombs, J and Jagger, E (2006) 'Denying responsibility: sentencers' accounts of their decisions to imprison' in *The British Journal of Criminology,* 46, September 2006

disposal for children of mixed parentage than for any other group.[8] Given that such young people are in any event more likely to receive higher tariff disposals, breach of an order is, on average, more likely to be associated with a custodial outcome.

SCYJ is aware that since April 2005 youth offending teams have had a target to ensure that any difference between the ethnic composition of offenders in all pre-court and post-court disposals and the ethnic composition of the local population is reduced year on year. To date that performance indicator appears to have had a limited impact on BME over-representation. SCYJ considers that a continued focus on attempting to reduce those differences is a prerequisite of an equitable sentencing process for young people.

To that end, SCYJ believes that more detailed research is required into the particular needs of BME young people and the extent to which interventions delivered through the youth justice are adequate to meet those needs. Given the different patterns of representation, it may be important that such research distinguishes between different populations rather than assuming an identity of need. SCYJ is aware that the Youth Justice Board has commissioned research on this issue, but the results have, at the time of writing, yet to be published.

Gender

The Sentencing Advisory Panel notes that '*whilst more young offenders are male, there has been a trend of increasing criminality among females*' (paragraph 71). SCYJ would make two points in this regard. First, the figures for detected offending do not support such a trend until very recently: for instance, the number of girls receiving a substantive disposal for an indictable offence fell from 33,700 in 1992 to 23,300 in 2002, a decline of almost 31%. Over the same period, the proportion of the youth offending population that was female remained stable relative to boys.[9] It is however true that over the same period, the number of girls convicted rose (despite the decline in detected offending) as a consequence of an increase in the proportion of females coming to police attention who were prosecuted (from 12% to 28%) as opposed to given some form of pre-court disposal.[10]

Second, while there has been a marked rise in girls' detected offending since 2003, it is not at all clear that this is a consequence of changing levels of female criminality rather than reflecting a changing response by the youth justice system to girls' behaviour.[11] In fact, it has been convincingly argued that the trend since 2003 reflects changes in police practice in response to government performance indicators.[12] In 2002, the government established a

[8] Youth Justice Board (2008) *Youth justice annual workload data 2006/07.* London: Youth Justice Board

[9] Nacro (2008) *Responding to girls in the youth justice system.* Youth crime briefing, July 2008. London: Nacro

[10] Ibid

[11] See for instance, Bateman, T (2008) *Review of provision for girls in custody to reduce offending.* Reading: CfBT

[12] Bateman, T (2008) '"Target practice": sanction detection and the criminalisation of children' in *Criminal Justice Matters* 73

target to narrow the 'justice gap' between offences recorded and those '*brought to justice*' by increasing the number that resulted in a '*sanction detection*'. The target required a growth in annual sanction detections from 1.025 million offences in the year ending March 2002 to 1.25 million by 2007/08.[13] The target was met early: in the year ending March 2007, 1.434 million offences were disposed of by way of sanction detection.[14] However, the rise in sanction detections was *not* accompanied by any increase in the proportion of crime reported to the police that was cleared up. Rather, the expansion in offences brought to justice, was:

> *a function of sanction detections being imposed for behaviour that would previously not have attracted such an outcome*'.[15]

The target was, in other words, met at the expense of those populations of offenders who might otherwise have received an informal response for minor transgression against the law, in particular girls and children below 15 years of age. Significantly both of those groups have shown substantial rises in the figures for detected crime since the sanction detection indicator was established. These rises are significantly more pronounced than equivalent rises for boys and young people aged 15 – 17 years.[16]

Recent trends, in other words suggest a shift in the treatment of girls who break the law from being perceived as '*at risk*' to a '*straightforward criminalisation*'.[17] One consequence of that shift has been a dramatic rise in the use of custody for girls from 100 in 1992 to 469 in 2007. In the view of SCYJ, such a rapid expansion cannot be explained in changes to the volume or nature of girls' offending over that period. Rather it reflects a less tolerant approach by criminal justice agencies to problematic female behaviour and a failure to develop gender specific and gender sensitive interventions that would support an equitable and effective sentencing framework.[18]

SCYJ is also concerned at the emerging evidence that assessments of girls in trouble tend to inflate risk.[19] That tendency already has the potential to lead to court report proposals for higher levels of intervention than would be anticipated where the same offending behaviour was exhibited by boys. In the view of SCYJ, it poses substantial problems for a non-discriminatory implementation of the Youth Justice Board's scaled approach, an issue

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[13] Office for Criminal Justice Reform (2004) *Strategic plan for Criminal Justice 2004.* Home Office

[14] Home Office (2007) *National community safety plan 2008 -2011.* Home Office

[15] Bateman, T (2008) '"Target practice": sanction detection and the criminalisation of children' in *Criminal Justice Matters* 73

[16] Nacro (2009) *Some facts about children and young people who offend – 2007.* Youth crime briefing. March 2009. London: Nacro

[17] Worral, A (2001) 'Girls at risk: reflecting on changing attitudes to young women' in *Probation journal* 48(2)

[18] Bateman, T (2008) '"Target practice": sanction detection and the criminalisation of children' in *Criminal Justice Matters* 73

[19] Nacro (2008) *Responding to girls in the youth justice system.* Youth crime briefing, July 2008. London: Nacro

considered further in SCYJ's response to consultation questions 6 and 8, below.

SCYJ concurs with the Panel that the sentencing of young people should be '*individualistic*' by comparison with the arrangements for adults (paragraph 99). It also commends an approach that recognises difference in relation to maturity and physical age (paragraph 100). However, SCYJ takes the view that an appropriately individualised response ought in addition to be sensitive to the particular circumstances and needs of girls and young people from a minority ethnic background.

Question 4

The panel would welcome your views on whether guidance would be helpful in relation to referral orders. If so, do you agree with the approach set out in paragraph 116?

SCYJ believes that guidance would be helpful in relation to referral orders. While we fully support enabling a 12 month order to be used for a young person who is close to the imposition of custody, and for purposes of extending the order where a further offence is committed, we do not agree with the approach set out in paragraph 116.

Our concerns about the approach set out in paragraph 116 mirror our concerns about the 'scaled approach' which, as noted in para. 16, is based on low, medium and high ratings derived from the assessment of the risk of reoffending and harm. SCYJ has a number of serious reservations about the implications of the scaled approach for youth justice practice, which are detailed below.

Our first set of concerns relate to children's rights. Currently the statutory framework is based on the principle of proportionality: the intensity and duration of any court ordered intervention is accordingly constrained by the seriousness of the offending. By contrast the scaled approach proposes that the level of compulsory intervention should be determined by the risk of what the young person might do in future.

The scaled approach – to the extent that it might allow more intensive responses than would otherwise be warranted by the seriousness of the offending – appears to be in tension with international obligations. The United Nations Convention on the Rights of the Child requires that responses to offending behaviour should be proportionate to young people's circumstances and to their offending.[20] As the Beijing Rules make clear, interventions aimed at safeguarding the welfare of the child should not infringe upon the fundamental right of the young person to receive a proportionate response.[21]

The scaled approach presents potential for inequitable outcomes with significant disparity in disposal for the same offence. A young person with a

[20] Article 40 (4) UNCRC

[21] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), commentary to Rule 5.1

high *Asset* score would be required to attend significantly more frequently than a lower risk co-accused.

Such implications are unfortunate since, for the most part, children attracting a high *Asset* score will be those exhibiting greater levels of welfare need. This would mean that young people from the most disadvantaged circumstances, with the least adult support, who experience reduced educational and other opportunities, will, as a result of the scaled approach, be subject to higher and more intrusive levels of criminal justice intervention. Thus there is a risk of discriminating against the most deprived children.

More generally, SCYJ considers that the limitations of any process of risk prediction are likely to be irreconcilable with a children's rights agenda. *Asset* is a useful indicator of whether or not a young person is likely to reoffend, but it should also be noted that in almost one in three cases (30.6.%), the assessment failed to make the correct prediction over a two year follow up period.[22] These false predictions, equally split between false negatives and positives, mean that nearly one in six young people, who would be predicted to reoffend did not do so. The scaled approach would require higher levels of intervention in such cases, which could not be justified on the basis of a need to prevent offending or as a proportionate response to their behaviour.

SCYJ is extremely concerned about the consequences of the scaled approach for the treatment of children who offend in terms of proportionality, fairness, social justice and children's rights. We therefore do not support the approach set out in para. 116.

There are also widespread concerns about the impact on effective practice. Firstly there are concerns among YOTs about the potential of such an approach to result in increased workloads. A significant number of young people will generate a score that places them in the high risk bracket. Secondly, there is a growing body of evidence that effective practice is contingent on the establishment of a positive relationship between youth justice staff and the young people with whom they work. The perceptions of young people of the treatment that they receive are crucial. Where higher levels of intervention are imposed, on the basis of the supervising officer's assessment, it would not be unreasonable to expect that he or she will feel unfairly treated.

We are further concerned about the inflationary impact on the use of custody as a consequence of an inevitable rise in levels of non-compliance by young people subject to a risk led model. Re-sentencing following breach already makes a substantial and increasing contribution to custody. By substantially increasing what is expected in terms of length of order, the scaled approach will inevitably reinforce that trend.

[22] Baker, K, Jones, S, Merrington, S and Roberts, C (2005) *Further development of Asset,* YJB

Young people assessed as representing a high risk of reoffending will be subject to the referral order for longer than their low risk peers, even if their offending behaviour is similar. We presume however that breach arrangements will be uniform, in which case there will be greater opportunity to breach. Additionally, young people who score highest on an *Asset* assessment will be those whose social circumstances are such that they will find compliance more challenging than those assessed as representing a lower risk. The model accordingly imposes markedly more onerous expectations on children least equipped to respond. Given the potential for a considerable proportion of young people for whom intervention at the highest level would be prescribed, to regard their punishment as unfair, motivation to comply will almost certainly be reduced among this group.

In light of these reservations SCYJ takes the view that the SAP should not promote the approach to referral orders that is set out in para. 116.

Question 6
What criteria should be used when setting the overall length of a youth rehabilitation order?

SCYJ considers that the Panel's summary of the appropriate balance to be achieved when determining the overall length of a youth rehabilitation order (YRO) sets out the relevant issues in a concise and sensible manner (paragraph 140). However, for reasons explored below, SCYJ has serious reservations about the Youth Justice Board's 'scaled approach' and we do not consider that it is appropriate for *Asset* score to be a significant factor in determining either levels of contact or the length of the order.

As a consequence, SCYJ is disappointed that paragraph 150 of the consultation paper, which outlines the Panel's preferred decision-making process in relation to the imposition of a YRO, suggests that such decision-making should start from a consideration of the nature of intervention indicated by the scaled approach. It is not furthermore obvious that such a starting point is consistent with the earlier account in paragraphs 47 – 52 of the consultation paper that outlines an approach to achieving an appropriate balance in regard to the various purposes of sentencing. In particular, SCYJ notes a tension between paragraph 51 of the paper – which cautions that cases involving relatively less serious offending but an assessed high risk of reoffending should not lead to the imposition of greater restrictions on liberty than warranted by the gravity of the offence – and the endorsement of the scaled approach in paragraph 150.

The *'scaled approach'* and principles of sentencing
The consultation paper suggests that the scaled approach aims to ensure that:

> *the response to an offence is based on an appropriate balance between the seriousness of that offence, the risk of harm in the future from any further offences the young person might commit and the needs of the young person'* (paragraph 130).

SCYJ does not accept that this is an accurate characterisation of the risk led model. The latest version of the scaled approach, released after the consultation paper was published,[23] does acknowledge in the introduction that, in addition to risk of reoffending, the youth offending team should also '*take as its starting point, the court's view as to the seriousness of the offence, as well as the purposes of sentencing*' (p3). Later (at page 10), the document indicates further that the '*seriousness of the offence is and will remain a critical principle governing the court's sentencing decision*'. To this end, pre-sentence report authors are enjoined to consider offence seriousness (p11). The problem is that, despite these concessions, at no point does the document indicate *how* youth offending team staff are to take into account the principle of proportionality, since the level of contact, and thereby the restriction of liberty within any given time period, is given directly by the *Asset* score. That equation, it is proposed, will be written into national standards.

Indeed, in writing the court report, the author will be required to indicate to the court that the level of supervision:

> *will be in accordance of their assessment of the appropriate level of intervention. They should make it clear that the frequency of supervision will be delivered in accordance with the minimum [national] standards'* (p13).

The accompanying table relates levels of intervention directly to *Asset* score, with no reference either to proportionality, the child's welfare, or to the other purposes of sentencing.

It is true that the later versions of the scaled approach (unlike the original model published in November 2007) do allow the court to make some adjustment to the length of the order on the basis of proportionality. Specifically, it is proposed that if the *Asset* score would dictate higher levels of contact than would be commensurate with seriousness of the offence, the court might wish to consider imposing a shorter order. Conversely, where the offence is serious but the *Asset* score low, the latter will again take priority in terms of determining levels of contact, but the court may wish to reintroduce the notion of proportionality by imposing a longer order than it would otherwise have done.

SCYJ would make two points in relation to this proposed mechanism. First, contrary to what the consultation paper suggests, it gives a clear priority to the risk of reoffending over proportionality, not to mention considerations of welfare. Second, this rather artificial device for allowing the seriousness of the offence to influence the length of disposal inevitably undermines two of the potential rationales for the scaled approach. If for instance, it is suggested that the scaled approach results in an evidence based approach that directly links the amount of intervention that a young person receives to their assessed risk

[23] Youth Justice Board (2009) *Youth justice: the scaled approach.* Post consultation version 2. London: Youth Justice Board

of reoffending, it would inevitably be counterproductive to then suggest to the court that it manipulates the length of the order to achieve higher or lower levels of overall intervention. Furthermore, if it is argued that the scaled approach represents a rational use of resource allocation by ensuring increased levels of supervision to higher risk cases and vice versa, this supposed advantage is again countermanded by an approach that invites the court to increase or reduce sentence length where level of intervention directed by the *Asset* score departs from a proportionate response.

More recent versions of the model do incorporate elements relating to the young person's offending into the scoring system. In the view of SCYJ, however, this change does not address the failure of the approach to deal with the issue of proportionality. The scoring system for the current offence for instance provides for an addition of a score of 4 for motoring matters and of 3 for domestic and non-domestic burglary. All other offence types, however serious, attract a score of zero. The rationale for the scoring mechanism is an actuarial one since statistical analysis suggests that reoffending is higher following a motoring offence than for any other type of criminality. But an approach that allocates a higher score to such offences than it does to robbery, violent or sexual assaults, can hardly be considered one that attempts to balance risk of reoffending with proportionality.

Similar objections can be levelled at the proposed scoring mechanism for antecedent history. Where a young person receives a first reprimand at age 10-12, he or she will receive an additional 'risk score' of 4, irrespective of current age or pattern of offending in the intervening period. The rationale is again actuarial, based on statistical patterns of reoffending, rather than an acknowledgement of the obligations of the court to consider previous offending history. For instance, a child who received a reprimand for a very minor matter at age 10 would attract an additional score of four if he or she reoffended for the first time at age 17, irrespective of the fact that he or she had stayed out of trouble for seven years. It is not obvious that a previous history of that sort would be relevant to the court's consideration of the seriousness of the current offence. Nor, arguably, could it influence sentencing in any other legitimate manner.

<u>The 'scaled approach' and children's human rights</u>

SCYJ welcomes the fact that the consultation paper devotes considerable space to international obligations in relation to children's human rights. The paper also properly acknowledges the depth of concern expressed by the United Nations Committee on the Rights of the Child that current arrangements for youth justice in England and Wales are not compliant with those obligations in a number of respects. SCYJ considers that the scaled approach is not obviously consistent with the United Nations Convention on the Rights of the Child (UNCRC), associated guidance and regulations. As a consequence, implementation of the approach may exacerbate existing concerns rather than alleviating them.

The scaled approach proposes that the level of *compulsory* intervention should be determined by the risk of what the young person *might* do in future.

The UNCRC requires that responses to offending behaviour should be proportionate to young people's circumstances and to their offending.[24] Moreover, as the Beijing Rules make clear, interventions aimed at safeguarding the welfare of the child should not infringe upon the fundamental right of the young individual to receive a proportionate response.[25] The scaled approach – to the extent that it might allow more intensive responses than would otherwise be warranted by the seriousness of the offending – appears to be in tension with such principles.

The potential for inequitable outcomes is most obvious in relation to co-defendants: for two young people with identical previous convictions, the scaled approach might involve significant disparity in disposal for the same offence. On the basis of the Board's current proposals, a young person with a high *Asset* score would be required to attend six times as frequently as a lower risk co-accused who was subject to 'standard' intervention for the first three months of the order.

Such implications are particularly unfortunate since, for the most part, children who attract a high *Asset* score will be those exhibiting greater levels of welfare need. In other words, young people suffering the most disadvantage, with the least parental or adult support, who experience reduced educational and other opportunities, will - as a direct consequence of the scaled approach - be subject to higher, and more intrusive, levels of criminal justice intervention. There is, implicit in the approach, a risk of discrimination against the most deprived children. These shortcomings of using risk of reoffending to determine the extent of punishment are compounded by evidence, referred to earlier in this response, that *Asset* tends to overpredict risk for girls,[26] leading to the possibility of discriminatory outcomes on the basis of gender.

More generally, SCYJ considers that the limitations of any process of risk prediction are likely to imply irreconcilable tensions with a children's rights agenda. As previously mentioned in para. 4, *Asset* is a useful tool in assessing the risk posed by children but is by no means reliable. Thus, in SCYJ's view, *Asset* scores should not be used to dictate levels of intervention and use of them for this purpose would be a violation of children's rights.

It might be noted in this regard that there is no research base of which the SCYJ is aware that informs the risk bandings proposed by the YJB or supports the proposed levels of intervention. Indeed, the relatively arbitrary nature of the scoring system is demonstrated in the substantial change to the bandings between the first and second post consultation versions of the model. The primary effect of the amendment is to contract the low risk band and to expand the highest risk band, as indicated in the table below. The likely consequence will be to increase further the numbers of young people subject

[24] Article 40(4) of UNCRC
[25] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), commentary to Rule 5.1
[26] Bateman, T (2008) (2008) *Review of provision for girls in custody to reduce offending.* Reading: CfBT and Pitts, J et al (2007) *Luton YOT recidivism study,* University of Bedfordshire

to higher levels of intervention, exacerbating concerns in relation to operational implications. The Board has not published any explanation of the revisions or given any rationale for an expansion of the highest risk category.

Changes in risk banding between first and second post consultation versions of the Scaled Approach

Intervention level	Low / Standard	Medium / Enhanced	High / Intensive
Criteria – post consultation version 1	*Asset* score 0 – 24 and no / low risk of serious harm	*Asset* score 25 – 41 or medium risk of serious harm	*Asset* score 42 – 64 or high / very risk of serious harm
Criteria – post consultation version 2	*Asset* score 0 – 14 and no / low risk of serious harm	*Asset* score 15 – 32 or medium risk of serious harm	*Asset* score 33 – 64 or high / very risk of serious harm
Minimum contacts per month for first 3 months	2	4	12

The scaled approach and effective practice

SCYJ considers that there are at least three tensions between the YJB's risk led model and evidence based practice.

First, there is a growing body of research that effective practice is contingent on the establishment of a positive relationship between youth justice staff and the young people with whom they work.[27] Relationship is itself a two way process, and the perceptions of young people of the treatment that they receive are accordingly crucial: how a young person experiences the intervention is critical to whether it will have a positive impact on his or her future behaviour. Where higher levels of intervention are imposed, on the basis of the supervising officer's assessment, than would be warranted by the seriousness of the young person's offending behaviour, it is a reasonable expectation that he or she will feel unfairly treated. At best such a sentiment will tend to undermine the relationship that is a necessary element of effective working.

Second, since the scaled approach entails that young people whose offending is at a low level but who generate relatively high *Asset* scores, will be subject to more intrusive intervention on the basis that they represent a risk of reoffending, there is a real concern that the process of identifying risk – and reinforcing that identification through criminal justice intervention - might generate a '*labelling effect'*, undermining the potential of the supervision process to reduce offending.[28] For those who do reoffend there will be a danger of uptariffing since, from the court's perspective, such young people

[27] See for instance, McNeill, F (2006) 'Community supervision: context and relationships matter' in Goldson, B and Muncie, J (eds) *Youth crime and justice,* Sage

[28] McAra, L. and McVie, S. (2007) 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending', *European Journal of Criminology*, 4(3)

will already have had the benefit of a more intensive community-based programme than their peers with a similar offending profile. As the Government's Children's Plan acknowledges, '*the likelihood of reoffending increases the further a young person gets into the criminal justice system*'.[29]

The impact of the scaled approach on non-compliance, and the use of custody

SCYJ has consistently argued that the numbers of children incarcerated in England and Wales is too high.[30] One of the most disturbing aspects of the scaled approach is its potential to have a further inflationary impact on the use of custody, increasing pressure on the secure estate for children and young people, as a consequence of an inevitable rise in levels of non-compliance by young people subject to a risk led model.

Resentencing following breach action already makes a substantial contribution to custody. Between 2000 and 2004, the proportion of supervision orders that were returned to court for non-compliance rose threefold, from 7% to 21%. At the same time, the percentage of breaches that resulted in a custodial sentence also increased, from 18% to 25%.[31] During 2007/08 breach of a statutory order accounted for 2,179 custodial disposals, considerably more than any other single offence type and almost one in four of all custodial penalties.[32] By substantially increasing what is expected in terms of attendance for a significant number of young people, the scaled approach will inevitably reinforce that trend.

Young people assessed as representing a high risk of reoffending will – on the YJB's current proposals - be obliged to attend the YOT six times as frequently as their low risk peers, even if their offending behaviour is similar. Breach arrangements prescribed in the *Criminal Justice and Immigration Act 2008* are, however, uniform, irrespective of the assessed level of risk and the required level of intervention. As a consequence, a young person subject to standard intervention might, over a three month period, miss one third of his or her appointments without qualifying for breach action. By contrast, a young person whose *Asset* score determines that he or she should be subject to intensive contact might attend more than 90% of his or her appointments over the same period, but the legislative provisions would still require that he or she be returned to court for failure to comply.

At the same time, young people who score highest in an *Asset* assessment will be those whose social circumstances are such that they will find compliance more challenging than those assessed as representing a lower risk. The model accordingly imposes markedly more onerous expectations on children least equipped to respond in a manner required by relatively inflexible breach requirements.

[29] DCSF (2007) *The Children's plan: building brighter futures,* at paragraph 6.75
[30] See for instance, Standing Committee for Youth Justice (2006) *Still waiting for youth justice.* London: SCYJ
[31] Bateman, T (2006) 'Youth justice news*'* in *Youth Justice* 6(1)
[32] Youth Justice Board (2009) *Youth justice annual workload data 2008/09.* YJB

These tendencies will be exacerbated by the potential, described in an earlier section of this response, for a considerable proportion of young people for whom intensive supervision at the highest level would be prescribed to regard their punishment as unfair. Motivation to comply will almost certainly be reduced among the group at greatest risk of breach action. The anticipated increase in non-compliance, and the associated risk of higher levels of custody as a consequence, will in the view of SCYJ strengthen the case for arguing that youth justice policy and practice are not consistent with international obligations.

Determining the overall length of a youth rehabilitation order

Given the above reservations in relation to the scaled approach, SCYJ does not consider that the assessed risk of reoffending should determine the length of a YRO in any direct fashion.

SCYJ would propose that the starting point for the court is to ensure that the restriction of liberty involved in the order in its entirety is no greater than that warranted by the seriousness of the offending, taking into account the nature of the requirements to be imposed, the individual circumstances of the young person and giving due regard to considerations of welfare. The principle of proportionality should in other words set an upper limit to the level of intervention, part of which is given by the length of the order.

It is acknowledged that the characteristics of some young people are such that relatively short, or lower level, intervention, may make more severe demands upon them than upon their peers who have a more settled lifestyle or a greater capacity in certain respects. By the same token, some requirements, where there is an expectation that the young person will make considerable life changes, for instance in desisting from serious substance misuse, will be experienced as more demanding than would otherwise be the case. SCYJ believes that such individual differences should influence the decision of the court as to the nature of sentence that is commensurate with the offending in any particular case.

SCYJ agrees with the Panel's proposal that the length of the order should be influenced by the period necessary to satisfactorily complete the requirements of the order. Where the intensity of those requirements is not determined by a risk score, such an approach is compatible with a proportionate and individualised approach to sentencing. SCYJ also endorses the Panel's suggestion that an important consideration in determining the duration of the disposal is the extent to which the young person is put at unnecessary risk of further sanction as a consequence of breach or reoffending.

SCYJ is of the view that current sentencing of young people frequently leads to the imposition of unnecessarily long periods of supervision that substantially increase the risk of breach, even where the young person is intent on complying. Research suggests the most effective interventions are

those which are regarded by the subject of the orders as being achievable.[33] Young people inevitably have a different perspective in relation to passage of time by comparison with their adult counterparts, and interventions of a similar duration will accordingly be experienced as more burdensome by the former group. SCYJ considers that the implementation of the YRO provides a welcome opportunity to develop a sentencing practice that prioritises shorter, more focused, programmes of intervention than hitherto.

Question 5

Is there scope for increasing the use of financial penalties? If so, what wider circumstances might merit such a sentence? Should the Education Maintenance Allowance be taken into account?

SCYJ is keen that courts should use first tier penalties for appropriate low level offences and is concerned by the relatively low use of first tier penalties in some courts. Fines play an essential role in the menu of first tier penalties available to courts. SCYJ does not support the use of the YRO in cases where a fine would have been imposed on an adult as this would discriminate against the child and push them up the sentencing tariff. However, SCYJ has a number of concerns about the increased use of financial penalties for young people, and considers that any financial penalty should be limited to rehabilitative or reparative ends, not punishment. Our position includes the current system of court imposed financial penalties as well as the expansion of these to include the greater pre-court use of fines as part of a conditional caution.

An aim of the courts in imposing fines must be generally to achieve a reduction in re-offending; however, it is the belief of SCYJ, supported by research, that their use in the context of punishment would be counter-productive to these ends. Research suggests that punishment generally is ineffective as a mechanism for reducing re-offending in general, and for preventing youth crime in particular.[34] The imposition of financial penalties as a punishment is considered inappropriate for a number of legal and practical reasons:

- Article 40 of the United Nations Convention on the Rights of the Child (UNCRC) requires that the system for dealing with offending by children should be distinct from that for adults, with the presumption that youth justice interventions need not mirror provisions for adults.

- Financial penalties as a common punitive sanction across all areas of the criminal justice system are not consistent with the UK government's position outlined in the 2007 report to the UN Committee on the Rights of

[33] Chapman, T and Hough, M (1998) *A guide to effective practice: evidence based practice.* London: HM Inspectorate of Probation

[34] See for instance, Nacro (2005) *A better alternative: reducing child imprisonment*. London: Nacro

the Child that youth justice '*interventions are intended to be rehabilitative rather than punitive'*.[35]

Increasing the scope of financial penalties to include the EMA and other allowances

The Educational Maintenance Allowance (EMA) is designed to support young people from low income households into further education as part of the government's overall policy to increase the numbers of young people remaining in some form of employment, education, or training. The EMA is offered on a means tested basis and ranges from £30 per week for young people living in households with an annual income of below £20,817, to £10 per week for those with an annual income of £25,522 - £30,810.

There is a strong case for not allowing the financial support offered to young people from low income households to be taken into account when calculating financial penalties as a means of punishment. Given the EMA and related programmes such as cash incentives to enter into Activity Agreements (offered through Connexions as a way of incentivising young people in the NEET category to actively look for work or training) are designed partially with the reduction of youth crime in mind, taking these payments into account in setting the level of fines would place many young people at a greater risk of offending in the future.

That educational attainment is a key indicator of the risk of offending is supported by research carried out by HM Inspector of Prisons who found that of 171 young people [should this be offenders/young people in custody?] 84% had been excluded from school, 52% had left school at 14 and 73% described their educational achievement as nil.[36] The role of the financial support to marginalised households is therefore a crucial element of support in diverting young people into positive activities. This is further demonstrated by the findings of the Institute for Fiscal Studies and Loughborough University in 2004 who found staying-on rates improved by 6 per cent among those who were eligible for the EMA,[37] and that Activity Agreements are a vital tool for re-engaging the long-term NEET population. In the latter case the weekly cash payment to young people who were NEET for 20 weeks and subsequently engaged in education or training was eleven per cent higher than it would have been had no agreement been in place.[38]

Financial penalties may hit the most at-risk young people the hardest

It is the view of SCYJ that increasing the scope of financial penalties for young people will have a disproportionately negative affect on the poorest

[35] UK Government (2007) *The consolidated 3rd and 4th periodic report to the UN Committee on the Rights of the Child*. London: UK Government, paragraph 55

[36] HM Inspector of Prisons: A Second Chance A Review of Education and Supporting Arrangements within Units for Juveniles. 2001 - 2002

[37] http://news.bbc.co.uk/1/hi/education/3638739.stm

[38] Activity Agreements Evaluation, Synthesis Report, Jim Hillage, Claire Johnson, Becci Newton Institute for Employment Studies Sue Maguire Centre for Education and Industry Emily Tanner, Susan Purdon National Centre for Social Research. DCSF Research Report No DCSF-RR063

households who already find it difficult to manage on a limited budget. Many households in receipt of the EMA, for instance, continue to struggle to support young people in education and further eroding their ability to do so will place young people at a greater risk of negative outcomes associated with offending.

Given that the average fine imposed on persons for all offences by magistrates' courts increased by five per cent to £150 between 2005 and 2006 SCYJ feels that any additional increase in the level of the fine, or of the additional payments that can be considered in setting the level of any penalty would make it more likely that young people will be unable to remain in full-time education.[39] This is supported by a 2006 BBC report which suggested that even with the EMA, parents earning less than £30,000 a year still struggle to support teenagers enough to enable them to stay in education past 16.[40]

Fines for under 16 year olds are imposed on parents, while the court has discretion to impose fines on either the parent or child in the case of 16 and 17 year olds. While many families will be able to bear the cost, it is those from lower income households who will be forced to make difficult choices about the priorities for limited funds. The concern that SCYJ has, is that it is precisely these families who need the most support in order to provide stability in education for young people who are statistically most at risk of offending if they are not in full-time education – borne out by the findings from the HMIP report included above.

In conclusion SCYJ supports the use of fines in particular circumstances: where appropriate as a form of reparation and where the family/child clearly has an ability to pay and an understanding of the implications of non-payment. SCYJ does not support the use of fines in the case of families on very low incomes. EMA should not be taken into account in assessing the appropriate level of a fine.

Question 7

In addition to the statutory criteria, in what circumstances is it likely to be appropriate to include a fostering requirement in a youth rehabilitation order?

Recent figures from the Youth Justice Board show that the juvenile prison population increased by 10% in the last year. Given the continued increase in custody rate SCYJ would urge magistrates to actively consider the use of the YRO with intensive fostering as a real alternative to custody. However, the YRO with intensive fostering should only be imposed with the consent of the child, and if the child has been assessed by the approved local provider as suitable for the programme. It is an intensive option and as such, should be used only where the child concerned would otherwise be facing a custodial sentence.

[39] STATISTICAL BULLETIN Sentencing Statistics 2006 England and Wales RDS NOMS. http://www.justice.gov.uk/docs/sentencing-stats2006.pdf

[40] http://news.bbc.co.uk/1/hi/education/4756088.stm

One of the members of SCYJ, Action for Children, has been involved in the ongoing piloting of Intensive Fostering through a partnership with the Youth Justice Board. This work, through the Wessex Community Projects, currently helps four young people though the fostering programme whilst continuing to support three others who have returned home to live with their families.

Intensive fostering works with young people aged 10 to 17 whose home circumstances may have contributed significantly to their offending behaviour. The programme places troubled young people in a structured programme in the home of a foster carer where they are given intensive supervision and support for up to 12 months.

A common characteristic of many young people entering custody is a lack of stability in their lives – caused through emotional disorder, family breakdown, and school exclusion – and periods in custody, especially short spells, are rarely in their, or their communities', long-term interests. As intensive fostering is developed precisely to work with this group in order to provide stability to begin the process of rehabilitation, it is a suitable intervention for many young people who are emotionally unable to respond to a period in custody, or vulnerable simply because of their age. For example, of the 6,944 young people sentenced to a period in custody between 2003 and 2004 12% were 14 years old or under.[41] It is further recognised by the Youth Justice Board that in many cases the youth justice system fails to recognise many young offenders as vulnerable – and Youth Justice Board figures show that 3,337 children and young people who were assessed as being at risk from suicide, self-harm or victimisation were placed into custody in 2004.[42]

Since emotional and domestic instability is a feature in lives of many young people sent to custody, SCYJ would also point to the benefits of intensive fostering in helping to maintain constructive contact with families whist the sentence is carried out. Often the long distances between home and the YOI, or secure training centre, can exacerbate problems by making it difficult for a young person to be supported by their family. This is a significant problem for many young people in the secure estate, and between 2000 and 2005 8,080 young people including 4,378 children under 16 were placed over 50 miles away from home where it is difficult for their parents to visit.[43]

Initial findings from Intensive Fostering pilots show that the service can work in favour of the most vulnerable young offenders by changing their environment, giving them clear and consistent boundaries for behaviour and praising them when they get it right.

Fostering, in comparison with YOIs and STCs, is also a far more cost effective means of achieving a net reduction in rates of re-offending, and forthcoming evaluation from the Youth Justice Board will help to show how this model contributes to the reduction of offending rates.

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[41] Youth Justice Board Annual Statistics 2004
[42] 'Youth justice news' in Youth Justice 4(2), October 2004
[43] Fisher, PQ 209914 19 Jan 2005

SCYJ would therefore encourage the courts to consider Intensive Fostering as an alternative to a custodial sentence, with this option available across the country and the resources available to facilitate the practice.

The general concerns we have raised in response to this question are echoed by the Magistrates' Association as their briefing on the Criminal Justice and Immigration Bill shows – and not only have they welcomed the option of an intensive fostering requirement, (with appropriate safeguards), but stated that resources must be made available for more robust community sentences as they offer real alternatives to custody.

Question 8

In relation to the imposition of a youth rehabilitation order, do you agree with the approach summarised in paragraphs 149 and 150? If not, why not?

The consultation paper maintains in paragraph 149 that:

> '***the*** [emphasis added] *differences from the approach in relation to the adult offender derive from the principal aim of the youth justice system "to prevent offending by children and young people*".

While it is clearly true that the statutory aim is *a* significant difference between the adult sentencing framework and that for young people, it is not the only one. The duty on sentencers to have regard to the prevention of offending aim is subject to the other purposes of sentencing, in particular the welfare of the child. Given the helpful treatment of the latter principle earlier in the consultation paper [paragraphs 36 – 41], SCYJ is disappointed that there is no specific reference to the child's welfare in relation to the determining of the length and content of a YRO. Specifically, SCYJ does not accept that considerations of welfare are necessarily satisfied by interventions tailored to meet 'criminogenic' need as determined by *Asset* (as the consultation document appears to imply in paragraph 52).

To take just one example, where an assessment of vulnerability is triggered by an *Asset* assessment, that does not contribute to the overall *Asset* score. Moreover, as the Youth Justice Board's scaled approach documentation makes clear, identified vulnerabilities would not affect the intervention level determined by a risk led approach. In such circumstances, SCYJ considers that the importance of welfare to the sentencing process should be made explicit in relation to the framing of intervention under the YRO. Moreover, courts should be encouraged to consider the welfare of the child in coming to a decision as an element that is additional to proportionality and the risk of reoffending.[44]

For reasons adduced in our response to question 6, above, SCYJ has serious reservations about the proposal to link the implementation of the YRO to the

[44] This is not of course to deny any overlap between the principles: considerations of welfare might for instance service to mitigate seriousness and addressing welfare concerns might reduce the risk of reoffending.

scaled approach. Accordingly, SCYJ cannot agree with the approach summarised in paragraph 150 of the consultation paper.

The assessment by the youth offending team of the factors that increase, and protect against, risk can properly inform consideration of what forms of requirements are most suitable for the young person. At the current time, there is an expectation in the Youth Justice Board guidance that any domain in *Asset* that generates a score of two or above should be reflected in the intervention plan.[45] Such an approach is unproblematic provided that interventions are also informed by issues of welfare and proportionality.

However, SCYJ considers that the discussion in paragraphs 136 and 137 (and the table reproduced from the scaled approach documentation in Annex D) is overly mechanistic and deterministic. The specific requirements to be included in a YRO should reflect the *particular* elements of identified risk and need rather than an assumption that an overall risk of reoffending score will in some unspecified manner give an indication of nature of the intervention that is required. To suggest that the overall risk banding is likely to be associated with a particular form of intervention is to simplify unnecessarily both the assessment and sentencing process.

More worryingly, the reference to the scaled approach in paragraph 150 implies that the *level* of intervention, and consequently the restriction of liberty, should be determined by the assessed risk of reoffending. As previously argued, such an approach is unhelpful, and in tension with both earlier discussion in the consultation paper and an approach to youth sentencing that is consistent with a children's rights agenda.

Accordingly, SCYJ would propose that decision-making in relation to the length and content of the YRO should conform to the following principles.

> *When a court is considering sentence on a young person who has committed an offence that crosses the community sentence threshold (or one that has crossed the custody threshold but for which a youth rehabilitation order is nonetheless considered to be appropriate), the court should consider:*
>
> - *What restriction on liberty is commensurate with the seriousness of the offending, taking into account any mitigation arising from considerations of welfare?*
> - *What requirements are most suitable for the young person given the assessment of risk and need, and taking into account the full range of circumstances, including age, maturity, gender, ethnicity and the child's best interests?*
> - *Given the nature of those requirements, what length of order, consistent with a proportionate restriction of liberty, would be required to allow satisfactory completion?*

[45] Youth Justice Board (undated) *Asset intervention guidance*. London: Youth Justice Board

Finally, in this regard, SCYJ endorses the proposal in the consultation document (in the second half of paragraph 50) that previous offending should not necessarily lead to a young person progressing from one range of intervention to another. Rather each sentencing exercise should be determined on its own merits on the principles outlined above.

Question 9

Are you aware of any reliable data on the extent to which orders are breached?

There are two good sources of data on the extent to which community orders for juveniles are breached – YJB workload data, and MoJ offender management caseload statistics, which apply only to 15-17 year olds. In the latter[46]) it states that in 8.8% of prison receptions, the primary offence is breach of a statutory order. The latest YJB workload data (for 2007/8) reveals that between 2000 and 2004, the proportion of supervision orders that were returned to court for non-compliance rose threefold, from 7% to 21%. At the same time, the percentage of breaches that resulted in a custodial sentence also increased, from 18% to 25%.[47] During 2007/08 breach of a statutory order accounted for 2,179 custodial disposals, considerably more than any other single offence type and almost one in four of all custodial penalties.

Question 10

Do you agree with the approach to dealing with a breach of a youth rehabilitation order described in paragraph 158? If not, why not?

The Panel proposes that the primary objective to be adopted when dealing with a breach of a YRO is to ensure that the young person completes the requirements imposed by the court. The Panel also proposes that where the failure arises from non-compliance with reporting or another similar obligation that there should be an increase in the punitive element of the order e.g curfew, prohibited activity requirement.

SCYJ has concerns that the approach that the Panel is advocating is excessively prescriptive. When young people appear before a court for breach of a YRO, the court should have regard to the original principles under which the young person was made subject to such an order. Those young people who are involved in the criminal justice system are often those who have the most chaotic lives and for a wide variety of reasons have difficulty with keeping appointments and often with forming relationships with older people. They may well have been excluded from school and find dealing with people in authority, such as those who work for YOT, very difficult. It may be that the young person has made significant improvements in their life and stopped offending behaviour, but is still struggling to comply. The court should have regard to a key purpose of the youth justice system – to prevent re-offending. In circumstances of breach, the court should look to

[46] Table 6.12 Receptions into prison establishments under sentence by age and offence, 2007. MoJ Offender Management Caseload Statistics

[47] Bateman, T (2006) 'Youth justice news' in *Youth Justice* 6(1)

a) Reasons for non-compliance, particularly the young person's home life, and mental health problems and/or learning difficulties.
b) Whether the spirit of the YRO is being complied with, i.e. is the young person broadly engaging?
c) Whether or not the young person has committed any further offences?

Non-compliance with court orders can arise for a variety of reasons. It has to be remembered that by and large the youth justice system is dealing with the country's most vulnerable children. Many will have been excluded from school, have mental health problems or learning difficulties, engaged in substance misuse and have chaotic home lives. It is therefore vital that when dealing with these young people for breach of YRO, the court is able to see that young person in the round, rather than focusing on non-compliance with particular requirements. SCYJ therefore does not support the principle objective as set out by the Panel, and advocates an approach whereby the original purpose of sentence and the reasons for breach are properly analysed.

Question 11

What is the most appropriate approach to determining whether a young person is a persistent young offender?

The definition of a persistent young offender is important, yet not defined in statue. SCYJ notes that it is almost universal practice to define a young person as a 'persistent offender' if they have been convicted for 3 or more offences, no matter what those offences are.

Defining a young person as a 'PYO' effectively allows a court to give a young person under the age of 15 a detention and training order. As such, the decision to find that a young person is a persistent offender is an exceptionally important one. SCYJ recognises that the Panel can only work within the law as set out in statute and case law, but favours the approach denoted in *JD* (2001) 165 J.P 1 that the character of previous convictions should be considered before the court makes a finding of persistence. For example, it would not be appropriate to find a 14 year old to be a persistent young offender if he was before the court for a robbery offence and his previous convictions were for possession of cannabis and criminal damage. Furthermore, SCYJ does not believe that reprimands and final warnings should be used in this exercise. The system of reprimands and final warnings was put in place to divert young people away from the criminal justice system, rather than be used for them to be sent to prison. Furthermore, the fact that an allegation resulted in a reprimand or a final warning demonstrates the level of seriousness that the the police attached to it. They are not required to use such a disposal, and the fact that they did demonstrates that the offence was not such as to require court attendance.

Question 12

Do you agree:
a) that trial should generally take place in a youth court, and
b) that the decision whether a young person should be sentenced in the Crown Court on the basis of the dangerous offender provisions only is best made after conviction?
And <u>Question 13</u>
In relation to the determination of whether a young person should be sentenced in the Crown Court, do you agree with the approach summarised in paragraphs 187-189?

It is SCYJ's view that it is always preferable for young people to be dealt with in the youth court which is far more appropriate to their needs. The Panel has rightly outlined the case law in relation to the determination of where a young person should be tried. It would certainly be useful if the principles outlined in the case of *Southampton* could be enunciated clearly within the text of the sentencing guidelines. There is still a sense that if an offence is seen as serious, or if the young person is a persistent offender then it should not be dealt with in the youth court. This is clearly not as statute intended and clear guidance from the Panel would be welcomed in this area.

It should perhaps also be noted that with the advent of 'Simple, Speedy, Summary Justice' operating in many magistrates' and youth courts, there is considerable pressure on the court and therefore advocates for both the Crown and defence to make progress at the first hearing. Courts should be able to give advocates time to properly prepare for 'mode of trial' arguments, especially in circumstances where the young person appears before the court in custody. Proper preparation for such hearings is vital to ensure that the court has all appropriate case law before deciding if the young person is likely to get two or more years' detention.

Though SCYJ agrees that, as a matter of principle, trials should generally take place in the youth court, this is subject to our general concerns that measures should be put in place to ensure that children are afforded specialist and good quality legal representation in the youth court and that ongoing specialist training of youth court magistrates in conducting cases concerning child defendants is recognised as an essential priority by the Judicial Studies Board and other relevant bodies. Although outside the scope of the consultation, the fact that children do not have a right to elect trial by jury on the basis of informed advice is a matter of concern.

There is no question that as a matter of law children prosecuted for certain offences that attract mandatory sentences must be tried and sentenced in the Crown Court. We agree that the restrictive interpretation of 'homicide' is compliant with the principle that custody should be a measure of last resort.

However, in all other cases, case law suggests that there is always at least some element of discretion. We agree that very young children charged with offences other than homicide offences should only ever be committed to the Crown Court for sentence in exceptional circumstances, whether or not they are 'grave crimes' or specified offences.

Even where children are sentenced in the Crown Court, sentencers should be reminded that in most cases, and especially now that the sentences for public protection are no longer mandatory, the option of lesser sentences, including Detention and Training Orders and community sentences, remains available and should be carefully considered, on the basis of full reports which explore these options.

We therefore agree that the venue for sentence for those convicted of offences that may give rise to sentences of public protection should be considered after conviction in the youth court and following the completion of relevant reports that allow for detailed consideration as to whether the dangerousness criteria are met.

Any true analysis of whether the provisions under s229 of the Criminal Justice Act 2003 are met will need to consider the personal and social background of the young person, drawing on the professional expertise of the Youth Offending Team, and where relevant social care experts and psychologists and psychiatrists. An analysis of dangerousness will need to be made in light of the principles of Lang[48], namely that a child may change and develop in a shorter time than adults. If the child is considered to be dangerous due to circumstances beyond his or her control such as her living conditions or lack of suitable support, serious consideration needs to be made to seeking advice from relevant agencies as to what steps can be put in place to mitigate those concerns before the assessment of dangerousness is finalised. Only once considered reports have been finalised should a decision be made as to whether the young person is likely to meet the dangerousness criteria and therefore require sentencing in the Crown Court.

Question 14

In relation to the determination of the length of a custodial sentence, do you consider that an approach such as that described in paragraphs 195-197 would be helpful?

What elements do you consider should be included within it? Are there any dangers that would flow from such an approach?

We appreciate the desire of the Panel to provide guidance to assist the court in identifying appropriate sentence length for juveniles. We agree that age and maturity should be taken into account when the length of a sentence is decided. However we are concerned that the approach suggested in paragraph 197 may be too formulaic. The UN Convention on the Rights of the Child states that all those under the age of 18 should be considered children, and should be treated as children. Given this, we feel that the difference in treatment outlined in point 197 between 10 year olds and 17 year olds is too great and too simplistic. There are 11 year olds who are relatively mature and 16 year olds who have the maturity of an average 11 year old. Given the need to vary sentence length according to the maturity of the child, we feel sentencers need to make a judgement in the case of each individual

[48] Lang and others [2006] 2 All ER 410

child guided by YOT workers and specialist advice. Judgement of appropriate sentence length should be guided by that assessment of maturity, which may or may not be aligned with age.

Question 15

Where an offender crosses a significant age threshold between committing an offence and being sentenced for it, do you agree with the approach in paragraph 213?

SCYJ fully supports the approach set out in paragraph 213.

Question 16

Do you have any views on the issues in relation to equality and human rights raised in paragraphs 214 – 218?

SCYJ welcomes the Panel's careful consideration of whether any proposals may impact unfairly on any groups of offender and supports the issues it has raised in relation to equality and human rights.

SCYJ would like to take this opportunity to remind the Panel of the report "Past Abuse suffered by Children in Custody: A way forward" (Nov 2006) which was commissioned by the Youth Justice Board but has never been published by them. The report is however now in the public domain. SCYJ is concerned that insufficient account is being taken of this report and its recommendations. We ask the SAP and SGC in particular to implement its recommendations in so far as their role allows, in particular recommendations 6, 7, 9, 15 and 16 of the report (pages 28-29).

In reference to the consultation, SCYJ supports the Panel's recommendation, in paragraph 216, that careful consideration to the strength of familial relationships should be given when imposing a parenting order or a youth rehabilitation order. SCYJ welcomes the acknowledgement of risk of abuse or rejection on the grounds of sexual orientation and that care that must be taken not to disclose this information without a young person's informed consent.

In paragraph 217 consideration also needs to be given to the fact that many young perpetrators of sexual and violent crimes have also been victims of crime (see response to question 17, below). Sexually harmful behaviour is sexual behaviour which is perpetrated against the other person's will in an aggressive, manipulative, exploitative or threatening way. Children and young people who display sexually harmful behaviour pose a risk to other children but are also children themselves. We are also aware that there is a growing body of research evidence that work with children who are sexually harming is effective in reducing sexual risk to others, and there is some evidence that anti-social and offending behaviours can also be reduced.[49] [50] [51] [52]

[49] Bentovim, A. (2002) Preventing sexually abused young people from becoming abusers and treating the victimization experiences of young people who offend sexually. Child Abuse and Neglect 26 pg661-678.

Given the generally successful treatment outcomes with this group, and the proven effectiveness of intervening early, we consider that a far greater focus is needed on treatment and rehabilitation than the current sentencing framework allows. It is wrong that many children are routinely sent down a criminal justice route for sex offending with little attention to their wider safeguarding needs (given that they have often been abused themselves) or those of other children, and their families. The sentencing guidelines should reflect the complexities involved and direct for a more flexible and responsive approach to the needs of this group.

With reference to para. 18 SCYJ attaches to this submission an additional section on capacity, which covers mental health issues and learning difficulties/disabilities.

Question 17
Do you agree that the proposals in this paper adopt the right approach to issues of gender, age, disability, race or ethnic group or would further guidance be helpful?

SCYJ has covered issues of gender and race or ethnicity in our response to consultation question 3, above. The additional section on capacity covers mental disability. Our comments on age are contained in responses to consultation questions 6 and 14, above.

SCYJ considers that there needs to be greater recognition and understanding of the impact of abuse on children and young people. Research has found that being abused as a child increases the risk of later criminality, though it by no means makes it certain. Young et al suggest that young people who perpetrate violence will often have been the victims of abuse or neglect.[53] (Young et al, 2007). Also, young people who regularly witness violence in the home or wider community as they grow up may be more likely to perpetrate violent crimes.[54] Sentencing guidelines should explicitly state that any issues of past maltreatment of young people are considered and specify that therapeutic interventions are provided to address the maltreatment of young people in custodial settings.

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[50] Hawkes, C., Jenkins, J.A. and Vizard, E. *Roots of Sexual Violence in Children and Adolescents* in Ved Varma (Ed) 1997. Violence in Children and Adolescents. Jessica Kingsley Publishers. London.
[51] Jonson-Reid, M. and Way, I. (2001) *Adolescent sexual offenders: incidence of childhood maltreatment, serious emotional disturbance and prior offences*", American Journal of Orthopsychiatry, Vol. 71, No. 1, pp. 120–30
[52] Hickey, N., Vizard, E., McCrory, E., French, L. (2006) *Links between juvenile sexually abusive behaviour and emerging servere personality disorder traits in childhood.* Department of Health, Home Office, London.
[53] Young, T; Fitzgerald, M; Hallsworth, S & Joseph, I (2007) *Groups, gangs and weapons* London: Youth Justice Board
[54] Day, C; Hibbert, P and Cadman, S (Unpublished) *A literature review into children abused and/or neglected prior to entering custody: Commissioned by the Youth Justice Board*

Sentencing guidelines need to acknowledge that there are many forms of criminal activity in which children should also be considered victims, for instance involvement in drug use, dealing and couriering, and children involved in commercial sexual exploitation and the production of child abuse images. Sentencing guidelines need to reflect this and to state that these children will need ongoing support and a pathway out of these behaviours that mirrors their lengthy pathways into it.

SCYJ considers that it is inappropriate and counter-productive for children and young people who are sexually exploited to be dealt with by the criminal justice system. We must realise that these children and young people are **victims** and not offenders. In order to seek help children and young people need reassurance not punishment. The criminal status of victims of child sexual exploitation also forces them to move around more frequently, increasing their isolation and vulnerability, as well as exposing them to unfamiliar and possibly unsafe circumstances. A criminalising approach also helps to drive young people into sectors of the sex industry that take place away from the public gaze, for example, in child pornography peep shows, massage parlours and escort agencies.

SCYJ is concerned about the situation facing children who are held in the secure estate for immigration offences. SCYJ does not consider that children should be prosecuted for offences under section 2 of the Asylum and Immigration Act 2004. Unaccompanied Asylum Seeking Children and children who have been trafficked are particularly vulnerable and detaining them for immigration offences is not an acceptable response. Sentencing guidelines should state that where children have been convicted of immigration offences there needs to be better co-ordination between the criminal justice system and agencies with specialist experience of supporting separated and trafficked children.

Specific guidance should also be given on sentencing trafficked children who are convicted of offences. SCYJ is concerned about the numbers of young people detained for offences when they have potentially been trafficked and forced to undertake activities against their will. Examples of this include young people who have been trafficked and forced to work in cannabis cultivation.

Additional points of particular importance to SCYJ members

<u>Custody as a last resort</u>
SCYJ has long been concerned at the overuse of custody for children in England and Wales. We note custody is not being used as a last resort and that the large variations in custody rates across the country suggest differing attitudes to the use of youth custody. Overall two thirds of custodial sentences imposed on children are for non-violent. We feel that if custody is truly to be a last resort, it should be reserved for children who have committed serious violent offences and who pose a real danger to the public. Recent figures show that in 2007 34 children were imprisoned for possession of drugs, 52 for handling stolen goods, 70 for criminal damage and 105 for

threat/disorderly behaviour.[55] Even if these offences were committed by 'persistent' offenders, we do not feel imprisonment to be an effective or just response. The Criminal Justice and Immigration Act 2008 states that custody should be a last resort and that all sentencers must give reasons why they have not used the YRO with ISSP or the YRO with intensive fostering, when they sentence to custody. We welcome this change in the law, but are still concerned that the criteria for using custody are insufficiently clear. We would like the criteria for using/not using custody to be clarified and sentencers guided in what might be relevant reasons to give to a court for not using YRO with ISSP or intensive fostering.

SCYJ recommends that in case of a child or young person under 18, an offence should only be regarded as 'so serious' that only custody is appropriate when:
- the offence committed caused or could reasonably be expected to cause serious physical or psychological harm; and
- a custodial sentence is necessary to protect the public from a demonstrable and imminent risk of serious physical or psychological harm.

Capacity
The consultation document identifies a need to treat young people differently in the youth justice system because of legislative differences and because of young people's relative immaturity (age and emotional). The document rightly identifies immaturity as inhibiting assessment of culpability and capacity in some cases. There is, however, no real explanation of what is meant by emotional maturity. While isolated mention is made of mental health difficulties and learning disabilities, these issues are not given sufficient prominence as a thread throughout the document and are considerably underplayed in terms of their impact on capacity to understand the consequences of offending and the justice process itself.

High levels of speech and communication difficulties[56], higher than average levels of ADHD and conduct disorder, low IQ levels of less than 70, and emerging personality disorder make the chances of poor consequential thinking and impulsivity amongst young people in the criminal justice system much higher. For example, the National Autistic Society point out in advice to police officers that people with autistic difficulties have problems imagining the consequences of their actions and tend to overreact to perceived infringements of the rules that they see governing their life. All of these impairments could be said to affect assessments of culpability.

[55] MoJ Offender Management Caseload Statistics (15-17 year olds) table 16

[56] Communication disorder is the most common disability seen in childhood and will affect many children with learning disabilities or difficulties (Bryan and MacKenzie, 2008); an estimated 60% of the 7,000 children and young people aged under 18 who pass through young offender institutions have difficulties with speech, language and communication (RCSLT response to the Bercow review, July 2008).

Guidance in this document fails to ensure that capacity issues are properly assessed at the sentencing stage. Existing screening procedures are inadequate for identifying even the *probability* that a young person may have mental health difficulties, learning disabilities, learning difficulties, autism or communication difficulties. Research shows that, in the absence of awareness training and support, many YOT workers are ill-equipped to identify such young people and underestimate prevalence. In consequence, accurate information is unlikely to reach the court. While *Asset* has the potential to identify problems with literacy, it remains too 'blunt' a tool to provide insight into the underlying causes and consequently what disposal options, including interventions and treatment, would be most appropriate.An individual's capacity and maturity are fundamental to ensuring youth justice and as such should be integral to every stage of the youth justice pathway. However they appear only to be considered as an issue as part of the *sentencing* process itself, not as part of the *whole pathway*. Although this document focuses purely on sentencing guidelines, sentencers should be aware that by the time a young person arrives in court, any lack of capacity or emotional immaturity are likely to have already affected decisions made at earlier points in the pathway. For example suspects with learning disabilities in particular are likely to struggle with police questioning and cautions[57] [58](; with the result that they may incriminate themselves even if they are innocent .[59]
This raises issues of particular concern with regard to disability and human rights legislation (Question 16). If young people with disabilities are not being identified it follows that 'reasonable adjustments' as required by the Disability Discrimination Act (2005) are not being put into place. Further, in the absence of 'reasonable adjustments', the concern is raised as to the individual's ability to effectively participate in their own trial, for example due to communication difficulties or learning disabilities, which in turn raises serious concerns about a persons right to a fair hearing, Article 6 ECHR.

To ensure compliance with disability and human rights legislation the courts should have access to professional screening and assessment services for the range of impairments described above. This will help to ensure that the young person has the best chance of completing any disposal, so reducing the likelihood of re-offending. The need to secure professional screening and assessment to inform court decision-making and to ensure this happens at the earliest possible opportunity in the youth justice pathway, for example at the initial point of arrest, should be made explicit in this document. Information should then be made available, as appropriate, whenever the young person comes into contact with the youth justice/criminal justice system.

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[58] Murphy, G. and Mason, J. (2005) "People with Intellectual Disabilities who are At Risk of Offending." In N. Bouras, ed. Cambridge: Cambridge University Press.
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Learning Difficulties and Learning Disabilities. Review of prevalence and associated needs. London: Prison Reform Trust.

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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.

Members are: Action for Children, Association of YOT Managers, Barnardo's, Catch22, Children Law UK/TACT, The Children's Society, Children's Rights Alliance for England, Council for Disabled Children, The Howard League for Penal Reform, Just for Kids Law, JUSTICE, Nacro, National Youth Agency (NYA), National Association for Youth Justice (NAYJ), NCB, NSPCC, The Prince's Trust, Prison Reform Trust, Sainsbury Centre for Mental Health, Secure Accommodation Network, SOVA and VOICE.

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