Raising the custody threshold

About the Standing Committee for Youth Justice

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-focused 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.

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1. **Background**

Despite a recent drop in the number of children incarcerated for criminal offences\(^1\), England and Wales has one of the highest rates of child imprisonment in Western Europe. The number of children sentenced to custody more than tripled between 1991 and 2006 and the child custody population in England and Wales increased by 795% from 1989 – 2009.\(^2\) Since 2000 the number of children locked up on remand has increased by 41%. England and Wales has one of the lowest ages of criminal responsibility in Western Europe. Children as young as ten can be imprisoned for serious violent offences, and those as young as 12 for persistent non-violent offences. Children from the age of 12 can be locked up on remand. Over the last fifteen years a series of changes in legislation have extended the criteria for child custody in terms of age and offence. The Standing Committee for Youth Justice has long been concerned at the size of the child custodial population. There are many ways that the population could be reduced, but we believe the most powerful one to be primary legislation and, in particular, raising the custody threshold.

2. **The Criminal Justice and Immigration Act 2008**

2.1 The most recent piece of legislation potentially affecting child custody was the Criminal Justice and Immigration Bill 2008. There were no changes to the custody threshold in the original bill but SCYJ lobbied MPs and Peers to table an amendment to introduce a new higher custody threshold. The new clause suggested that the court should only pass a sentence of custody on a person under the age of 18 “if the offence caused or could reasonably have been 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”.

2.2 The amendment was tabled in January 2008 at report stage. Minister David Hanson argued against the amendment – he said it needed to be examined in terms of preventative measures involving the Youth Justice Board rather than a blanket approach that would restrict the court’s flexibility. He said the threshold would be difficult for both the public and community at large to accept since it would place the public at risk. However many peers were sympathetic to the amendment and the House of Lords bill committee did not share the view of Minister David Hanson that the provisions of CJA 2003 were adequate.

2.3 The amendment was not carried. The only significant change in CJI 2008, which may affect child custody, is a stipulation that sentencers must explain when sentencing a child to a Detention and Training Order, why the two alternatives to custody – ISSP and intensive fostering – were not considered suitable.

2.4 Since the passage of the Criminal Justice and Immigration Bill, numbers of those sentenced to custody have decreased slightly, but numbers remanded have remained high.
3. Who is imprisoned?

This section looks at the number of children who are imprisoned, whether sentenced or on remand, who they are, and their vulnerabilities. It shows that:

- Boys received the overwhelming majority of the nearly 7000 prison sentences given to children last year (91%) but the number of prison sentences given to girls has increased by more than 10% in recent years.
- In 2008/9, the average child custody population was 2,881— one in five children were on remand.
- In the courts, Black or black British children are twice as likely to be given a prison sentence as white children.
- Approximately a third of children in prison have been in care; 83% have been excluded from school; nearly a quarter have learning difficulties; a third of the girls report having been sexually abused.

Disposal type

The Youth Justice Board Annual Workload Data for 2008-9 showed that:

- 6,720 custodial disposals were given to children, accounting for 3.6% of all pre- and court disposals, or 6.1% of all court disposals - of these, 6,142 were Detention and Training Orders (DTOs). More than one in three DTOs were 4 month sentences, of which boys received 88% - the remaining were between 4 month and 24 months in length, of which boys received 92%.

Chart 1: Age breakdown of Detention and Training Order sentences 2008-09

![Chart 1: Age breakdown of Detention and Training Order sentences 2008-09](image)
[NB: Data on the breakdown of sentences of more than 4 months and less than 2 years in length has not been made publicly available, despite requests for this information to the Youth Justice Board.]

Remand

3.2 In 2008-9, the average length of time spent in custody on remand was 42 days, an increase of 5 days on the previous year.

3.3 Since 2000, the number of children imprisoned on remand has increased by 41%.

3.4 In 2009, there were 2,529 receptions into prison by 17 year olds on remand pre-trial – this compared to 2,281 receptions by 17 year olds under sentence. For 16 year olds the numbers were 1,002 and 1,188 respectively.

3.5 Between April 2000 and March 2005, the number of custodial remand episodes for girls more than doubled. A remand episode is counted from the time of the original remand decision to sentencing or to another remand decision – if another remand decision is made and the remand status changes, this is classed as another remand episode.

3.6 In 2009, more 15-17 year olds girls entered prison on remand than under sentence.

Gender

3.7 In 2008/9, boys received 91% of all custodial disposals and girls 9%. There has been an 11% increase in the number of custodial disposals given to girls since 2004/5.

Ethnicity

3.8 White children received 76% of all custodial sentences; Black and Black British children received 12%; Mixed-ethnicity children received 7%; and Asian children received 4% [see chart’s 2 and 3 below for further information].

3.9 The number of children of mixed ethnicity sentenced to custody has increased by 50% since 2004/5.

3.10 Custody accounts for 5% of all court disposals given to white children, 8% of all court disposals given to Asian or Asian British children, 9% of all court disposals given to children of mixed ethnicity, and 11% of all court disposals given to Black or Black British children.

- Children of mixed ethnicity account for 2.9% of the 10-17 general population and 3.1% of the young offender population
- Asian children account for 6.1% of the 10-17 year old general population, and 3.6% of the young offender population
- Black children account for 2.9% of the 10-17 general population and 5.9% of the young offender population
3.11 1 in 5 children given a 4 month DTO were BME; for DTOs between 4 months-2 years, this proportion increased to 26%. [BME children made up 45% of all children given custodial disposals under Section 90-91 and Section 226/228 legislation in 2008-9].

Chart 2: 10-17 year old general population by ethnicity, England and Wales

Chart 3: Custodial sentences given to 10-17 year olds by ethnicity, England and Wales 2008/9

Vulnerability

3.12 Children in custody come in the main from the most disadvantaged families and communities, whose lives are characterised by deprived social landscapes, with many having suffered severe abuse or maltreatment in their lives prior to entering custody.5

3.13 Two in five girls and one in four boys in custody report suffering violence at home. One in three girls and one in 20 boys in prison report sexual abuse.6
A study by Oxford University based on ASSET returns showed that the number of children in custody who were abused as a child is 50% higher than others on Youth Offending Team caseloads and 30% of these children had experienced or witnessed domestic violence compared to 8% of others on the caseloads. Other studies undertaken over the last ten years confirm these high levels of childhood abuse, neglect or traumatic loss among the custodial population.

24% of young men and 49% of young women in custody report being in care at some point.

15% have a statement of special educational needs compared to 3% of the general population.

86% of young men and 79% of young women in YOIs have been excluded from school compared to just 6% of the general population.

More than 33% of young men in YOIs were younger than 14 when they last went to school.

Mental health, learning disabilities and learning difficulties

Behavioural and mental health difficulties are particularly prevalent amongst children and young people in prison. Research commissioned by the YJB in 2006 found that 19% of 13-18 year olds in custody had depression, 11% anxiety, 11% post-traumatic stress disorder and 5% psychotic symptoms.

Earlier research from the Social Exclusion Unit found that 95% of young prisoners (aged 15-21) suffered from a mental disorder, with 80% suffering from at least two. Nearly 10% of female sentenced young offenders reported having already been admitted to a mental hospital at some point in their lives.

In recent research by Barnardo’s into younger children in custody, 8% of 216 children aged 12, 13 and 14 years old serving a Detention and Training Order sentence had attempted suicide at some time in their young lives.

Research undertaken in 4 secure units found that 59% of the children had had contact with, or been referred to, mental health services, 39% had self-harmed and 16% had attempted suicide.

In addition, 23% of young offenders have learning difficulties (IQ below 70) and 36% borderline difficulties (IQ 70-80) – and at least 60% have difficulties with speech, language and communication that adversely affect their ability to participate in certain elements of the custodial regime.

An assessment of the language and communication skills of 58 15-17 year olds in one custodial establishment found that 90% of the sample received ‘below average’ and 67% ‘poor’ or ‘very poor’ scores on listening vocabulary and 82% received ‘below average’ and 62% ‘poor’ or ‘very poor’ scores on speaking vocabulary.
Physical disabilities

3.25 There is considerable under-reporting of the extent of disability in prison, with little data available on the prevalence of long-standing illness or physical disability within the juvenile custodial population. Research from 2000 found that over a quarter of boys, and a third of girls, in custody, reported a long-standing physical complaint.

3.26 A recent report published by HM Inspectorate of Prisons found that 15% of prisoners overall, and 13% under the age of 21, consider themselves to have a disability. Almost a third of young adults who said they had a disability reported that they had been restrained, the highest proportion across the age groups.

3.27 Under the Disability Discrimination Act, all public authorities are required to promote disability equality and eliminate unlawful discrimination in England and Wales. That the prisons’ own recording systems tells them that only 5% of prisoners have a disability suggests that a significant number of people in prison, including children and young people, are not receiving the help and support they are entitled to.

4. Why are they imprisoned?

This section looks at the offences children are imprisoned for, trends in sentence length for non-violent offences and receptions into prison, then considers the public benefits which are accrued from community sentences. It shows that:

- At any one time, almost half of the children in custody are there for committing non-violent offences
- Over the last 10 years, the average lengths of prison sentences given to children who have committed non-violent offences have increased across the board

Sentencing violent/ non-violent offences:

4.1 According to the Ministry of Justice, ‘violent offences includes the offences of violence against the person, robbery and sexual offences...non-violent offences includes the offences of burglary, theft and handling stolen goods, fraud and forgery, drugs offences and all other summary and indictable offences’. In 2006, 62% of juveniles aged 10-17 sentenced to immediate custody were sentenced for non-violent offences. In 2007, this figure was 61%.
4.2 Research undertaken by Barnardo’s involving nearly half of all children aged 14 and under sentenced to a DTO in 2008, found that 28% of them had not committed a serious or violent index offence. The most common offences for which these children received a DTO included: breach of a community intervention (22%); burglary in a dwelling (16%); and robbery (12%); other offences included handling stolen goods, theft and criminal damage.

Receptions into prison

4.3 Prison reception statistics count all 15-17 year old children sentenced to immediate custody as they are received into prison. These figures are not an accurate picture of the prison population at any one time, nor do they include those children aged 10-17 who are sentenced to custody and held in either Secure Children’s Homes or Secure Training Centres. On average approximately 80% of the juvenile custodial population are held in prisons.

4.4 Latest Offender Management Caseload statistics from the Ministry of Justice show that in 2009 there were 4,014 first receptions into prison establishments by 15-17 year olds under sentence, a decrease of 24% on the previous year; however the proportion entering prison on sentences of less than 12 months has remained the same, at two thirds - for girls this proportion is even higher at 70%.

4.5 Since 2003, the number entering prison under the longest sentences (4 years or more but not indeterminate) has increased by 20%.

4.6 Between 2003-2009, the number of 15-17 year olds entering prison under indeterminate sentences increased fourfold.

4.7 In 2009, there were 40% more receptions into prison by 15-17 year olds on indeterminate sentences than adults aged 60 and over.
Table 1: 15-17 year old male receptions into prison under sentence by offence group, 2009

<table>
<thead>
<tr>
<th>Offence type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burglary</td>
<td>650</td>
</tr>
<tr>
<td>Theft and handling</td>
<td>476</td>
</tr>
<tr>
<td>Drug offences</td>
<td>190</td>
</tr>
<tr>
<td>Motoring offences</td>
<td>92</td>
</tr>
<tr>
<td>Fraud and forgery</td>
<td>9</td>
</tr>
<tr>
<td>Other offences</td>
<td>828</td>
</tr>
<tr>
<td><strong>Total male receptions non-violent</strong></td>
<td><strong>2,258</strong></td>
</tr>
<tr>
<td><strong>Total male receptions</strong></td>
<td><strong>3,875</strong></td>
</tr>
</tbody>
</table>

Source: Offender Management Caseload Statistics 2009, Ministry of Justice

4.8 Of the 139 15-17 year old girls entering prison under sentence in the same year, 51% had committed non-violent offences:

- Sentences of up to 6 months in length accounted for more than half (55%) of all receptions by 15-17 year old girls
- Sentences of between 6-12 months accounted for 1 in 5 receptions (22%)

4.9 In 2009, one in six 15-17 year olds in prison had 11 or more previous convictions or cautions, the highest proportion since 2005. 6% of boys and 9% of girls in prison have been in custody more than five times.

Sentence length:

4.10 Between 1997 and 2007, the average length of immediate custodial sentences given to children aged 10-17 years old by magistrates’ courts for non-violent offences increased across the board. These increases have not been mirrored across other age groups, where the average custodial sentence length for these offences has either remained largely static or decreased.

Chart 5: Increase in average length of immediate custodial sentence at magistrates’ court

<table>
<thead>
<tr>
<th>Offence group</th>
<th>Length in months</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burglary</td>
<td>1997</td>
</tr>
<tr>
<td>Criminal damage</td>
<td>1997</td>
</tr>
<tr>
<td>Drug</td>
<td>1997</td>
</tr>
<tr>
<td>Motoring</td>
<td>1997</td>
</tr>
<tr>
<td>Theft/handling</td>
<td>1997</td>
</tr>
</tbody>
</table>
Public benefits from community sentences:

4.11 In 2008/9, 8 million hours of work, valued at over £45 million (including young offenders aged 16 and over) was undertaken in the community as part of the Community Payback scheme.

4.12 A SmartJustice poll carried out in 2008 asked over 1,000 adults what the most effective way of dealing with a young addict convicted of a non-violent offence was – that the overwhelming majority (84%) favoured compulsory work in the community, along with drug treatment, suggests that not only does the public think that prison is ineffective in dealing with young [drug addicted] offenders, but also that a penalty which allows offenders to pay back to society for the damage they have caused is of high social value.

4.13 In the Youth Crime Action Plan the Government recognised the value of reparation in tackling reoffending and helping young offenders face up to the consequences of their behaviour, highlighting ‘the effectiveness of the Referral Order which requires young offenders to attend a Youth Offender Panel of community volunteers to answer for their actions and make amends to their victim. The Referral Order has the lowest reconviction rate of any juvenile community sentence’.

4.14 Custody is also extremely expensive when compared with the costs of community alternatives, and accounts for almost two-thirds of the Youth Justice Board’s budget.

4.15 Approximate costs per place per year vary across the secure estate:

- Young Offender Institutions (YOIs): £60,372
- Secure Training Centre’s (STCs): £160,080
- Secure Children’s Homes (SCHs): £215,496

4.16 Research published by the new economics foundation suggests the cost of a place at a YOI is likely to be closer to £140,000 each year, once indirect costs and benefits are taken into account.

5. The damage caused by imprisonment

This section looks at the impact which imprisonment has on children who are already vulnerable by virtue of their life experiences. It shows that:

- Nearly 30% of girls in prison receive no visits at all from family or friends
- The use of restraint against children in prison increased by 25% between 2007/8-2008/9
- 27% of boys and 30% of girls report feeling unsafe at some point whilst in prison
- 15% of children released from custody have no suitable accommodation in place
- Children released from custody and still below the school leaving age experience great difficulties in re-accessing mainstream education
Compounding the damage:

5.1 Based on the evidence above, it is clear that children in custody are already extremely vulnerable and their custodial experience exacerbates and compounds this vulnerability. Notwithstanding the best efforts of individual staff, custody for children is unsafe and offers little by way of rehabilitation, as is evidenced by the high re-offending rates.

The information in the following sections has been gathered, and presented, according to the Every Child Matters programme’s framework for giving children all the help they need.

5.2 Be healthy:

- There were 2,040 reported incidents of self harm among children held in YOIs in 2008.\(^{38}\)
- Only 55% of boys in YOIs said that they were able to have a shower every day.\(^{39}\)
- In half of all YOIs, 15% or less of all boys were able to exercise outside every day, and in one establishment, only 4% were.\(^{40}\)
- In September 2008, 46% of 15 year olds, 41% of 16 year olds and 41% of 17 year olds in prison were held over 50 miles from their homes. The average distance from home for juveniles in prison is 52 miles.\(^{41}\) The YJB target to place 90% of children within 50 miles of home has now been dropped.
- More than a quarter of girls and nearly one in five boys in YOIs had not had any visits from friends or family.\(^{42}\)
- 35% of girls and 31% of boys in custody have problems contacting family and friends by phone or mail.\(^{43}\)

5.3 Stay safe:

- The number of children assessed as vulnerable in custody was 1,148 in 2007. This was a 12% increase on the number assessed as vulnerable in 2006.\(^{44}\)
- 30 children have died in custody since 1990, including one who died as a result of being restrained.\(^{45}\) Boys in prison are 18 times more likely to commit suicide than children of the same age in the community.\(^{46}\)
- 23% of young men in YOIs said they had been victimised by other young men in their current prison, whilst 20% said they had been victimised by staff.\(^{47}\)
- 26% of prisoners involved in assaults which are classified as serious are children, despite children making up only 3% of the prison population.\(^{48}\)
- Between 2007/8 and 2008/9 the use of restraint in YOIs increased by 25% - there were 4,274 incidences of restrictive physical interventions during 2008-9, compared to 3,409 during 2007-8.\(^{49}\) 29% of boys and 21% of girls in YOIs said they had been physically restrained.\(^{50}\)
- In the first three months of 2010, restraint was used in YOIs 1,197 times – an increase of 27% on the same period in 2009.\(^{51}\)
- HM Inspector of Prisons has called for an independent review following the discovery that, over a two-year period, the use of control and restraint techniques
by staff in Castington YOI resulted in children and young people sustaining seven confirmed fractures and three suspected fractures.

- 27% of boys in YOIs reported feeling unsafe at some point during their stay in custody – this figure rose to 42% and 40% for those in Stoke Heath and Warren Hill respectively. For girls, the overall figure was 30%.  

- In 2003, a review of safeguarding and child protection in YOIs (following the Munby Judgement in 2003 in relating to application of the 1989 Children Act to children in custody) resulted in the deployment of 25 social workers in YOIs. However, the future funding of these social workers is under serious doubt. Funding from central Government ceased last year and local authorities have been unable to reach agreement about how they would fund the posts.

5.4 Enjoy and achieve

- The National Audit Office has highlighted the high number of movements of children between jails to make way for new arrivals, disrupting education and training courses and leading to inconsistent support and supervision.  

- Children in YOIs receive the least number of hours of education per week within the secure estate. Less than 20% of YOTs responding to a NAO survey thought that education in YOIs met the needs of young people well.

- Evidence suggests that YJB requirements on the level of education which should be delivered by YOIs are not being met. The 2005–08 service level agreement between the YJB and the Prison Service set agreed targets on the provision of education and training for each YOI. Between April 2005 and March 2006, five YOIs met their individual target - 11 did not.

5.5 Make a positive contribution

- 48% of sentenced young men in YOIs felt they had not done anything whilst in custody that would make them less likely to offend again, despite 90% saying they wanted to stop offending.

Resettlement

5.6 The previous Government published the Youth Crime Action Plan (YCAP) in 2009 with a great emphasis in the plan for improved support for children on their release from custody. However, few of the proposals in YCAP have any statutory basis and it is difficult to see how these children will be provided with an equitable support service which overcomes some of the current problems.

5.7 Returning to full-time education can help young people to stop offending – a study conducted in 2001 found that none of the children who had full-time education lined up immediately on release from prison were re-convicted, compared to one third of those without such provision lined up who were re-convicted.

5.8 Despite this, children released from custody and still below the school leaving age experience great difficulties in re-accessing mainstream education. When asked about preparations for
their release, 36% of young men in custody hoped to return to school or college on release.\textsuperscript{58} In contrast, a survey of Youth Offending Teams found that only 6% of children had been able to continue the education started in custody.\textsuperscript{59}

5.9 Research conducted in 2005 found that 25% of head-teachers, and 40% of teachers, believed that mainstream secondary schools were not appropriate for 10-17 year olds released from custody. In addition, 85% of head-teachers were unaware of the existence of service level agreements or protocols between YOTs and their LEA on the reintegration of young people into mainstream education, despite these being a requirement in YJB national standards for all steering groups.\textsuperscript{60}

5.10 The YJB’s 2006 census survey of YOTs found that 26% of children of statutory school-age in the criminal justice system had no education, training or employment (ETE) provision in place. Analysis of the survey results found that factors such as having previous convictions and experience of custody were significantly associated with lower levels of ETE provision – children with between 1 and 5 previous convictions were more than twice as likely to have no ETE arranged than those with no previous convictions. Children on a final warning were 3 times more likely to have full-time ETE arranged than those on more serious disposals.\textsuperscript{61}

5.11 Children leaving custody also have problems in accessing suitable and supportive accommodation – these problems are exacerbated for 16 and 17 year olds. 22% of Youth Offending Teams say that accommodation is not arranged until the actual day of release and 7% reported not being able to access accommodation until after release.\textsuperscript{62} Research for the Youth Crime Action Plan estimated that 15% of children leaving custody do not have suitable accommodation.

6. The effectiveness of alternatives to custody

This section looks at the sentencing options which are currently available to the courts in England and Wales; their reoffending rates relative to custody; and considers alternatives to custody currently in use in other jurisdictions which have been successful at addressing youth offending. It shows that:

- With three-quarters reconvicted within a year of release, custody has the highest reoffending rate of all sentences
- Preliminary results from alternatives to custody currently being piloted in some areas, such as intensive fostering and multi-dimensional treatment foster care, have shown great potential for reducing reoffending and the use of custody
- The restorative youth conference order introduced in Northern Ireland has a reoffending rate of 38% - this has been achieved alongside a significant reduction in the number of children who are sentenced to custody

6.1 There is substantial evidence to demonstrate that the current range of non-custodial sentences is more effective in reducing re-offending than custodial sentences. Intensive alternatives to custody for children who the courts are currently sentencing to Detention and Training Orders are more likely to address the causes of offending.
Non-custodial sentences available to the court

6.2 A child is far less likely to commit a further offence if given a non-custodial sentence. In fact, re-offending rates for children serving sentences in the community have consistently been lower than for those given a custodial sentence.

6.3 The intensive supervision and surveillance programme (ISSP) – This has been the main non-custodial programme for tackling serious and persistent young offenders by a combination of tracking, surveillance and support. A comprehensive evaluation of the programme commissioned by the Youth Justice Board found that it has a significant impact in terms of reducing the severity and frequency of offending. For example, the frequency of offending was reduced from 8.9 offences to 4.9, a reduction of 43%. Although the actual re-offending rate had not been reduced, the ISSP was shown to be making a difference. \(^6^3\) It should also be noted that YJB research has shown that the reconviction rate for a comparison group of children serving custodial sentences who have committed similar offences, and have similar offending histories as those on the ISSP, is 97%. It is clear, therefore, that the ISSP is no worse than custody and is having a positive impact on the nature of further offending for a group of children who are highly likely to re-offend.

A number of other non-custodial sentences are available to sentencers in England and Wales:

6.4 The new Youth Rehabilitation Order is a generic order combining up to 18 separate requirements, including education, mental health treatment, intensive fostering, drug testing or residence. By allowing sentencers to make the Order as robust as needed, it is envisaged that the YRO will ‘contribute to a reduction in the number of children who are sentenced to custody’. \(^6^4\) To further promote community alternatives, sentencers who opt for custodial sentences will, for the first time, be required to give a reason for doing so in open court.

6.5 Alternative community sentences include the Reparation Order and the Referral Order, which is usually given to all first-time offenders who plead guilty, unless the offence is so serious the court decides a custodial sentence is absolutely necessary, or is relatively minor, in which case a Fine or Absolute Discharge is given. The Criminal Justice and Immigration Act 2008 expanded the use of the Referral Order, for example by allowing, in exceptional circumstances, a second order to be given to a young person who has offended.

6.6 Table 2 (below, including sentences which have since been replaced by the YRO) shows that children serving a Referral Order are the least likely to re-offend, followed by children serving a Reparation Order. Around two-thirds of children given Action Plan Orders, Community Rehabilitation Orders, Community Punishment Orders and Curfew Orders re-offend. This compares to three-quarters of children who are imprisoned.
Table 2: Actual reoffending rates, 2007 cohort by index disposal

<table>
<thead>
<tr>
<th>Index disposal</th>
<th>Actual reoffending rate %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Referral Order</td>
<td>40.5</td>
</tr>
<tr>
<td>Reparation Order</td>
<td>65.5</td>
</tr>
<tr>
<td>Supervision Order*</td>
<td>72.5</td>
</tr>
<tr>
<td>Action Plan Order*</td>
<td>66.1</td>
</tr>
<tr>
<td>Community Rehabilitation Order*</td>
<td>67.8</td>
</tr>
<tr>
<td>Community Punishment Order*</td>
<td>67.8</td>
</tr>
<tr>
<td>Curfew Order</td>
<td>68.7</td>
</tr>
<tr>
<td>Custody</td>
<td>75.3</td>
</tr>
</tbody>
</table>

*Replaced by the Youth Rehabilitation Order which came into use on 30 November 2009.

6.7 There is also evidence from non-custodial interventions which are used in parts of the UK but are not formally part of the sentencing framework in England and Wales that demonstrate re-offending rates are lower for children given community sentences. The most significant example is the Family Group Conferencing model of restorative justice, widely used in Northern Ireland, which has also been used in Essex.

6.8 In Northern Ireland, young offenders can be referred to one of two types of conference: diversionary, where the young person has committed a minor offence and is referred by the Public Prosecution Service; and court-ordered, where the young person has been found guilty and is referred post-conviction. Since 2003, more than 6000 conferences have taken place, and the combined conference order has a reoffending rate of 37.7%, compared to 52.1% for other community sentences and 70.7% for custodial sentences.

6.9 An evaluation of the family group conferencing programme in Essex, meanwhile, found reoffending rates of between 10-31%. The Children’s Society programme working with young offenders in the North East has found similar patterns in victim-offender mediation schemes that are effective in tackling reoffending when young offenders are able to meet their victim, while a significant number of those who declined to participate in the scheme went on to reoffend. Such schemes tend to have high satisfaction rates expressed among victims. A restorative justice approach is also being used to great effect in many schools, to address bullying and minimise exclusions, and in residential children’s homes as a means of reducing the unnecessary criminalisation of looked after children.

6.10 Overall, given the fact that children are less likely to reoffend when given a community sentence there is a clearly a strong argument for diverting children away from custody at every opportunity.

6.11 Comparing reoffending rates for children in custody with children given community sentences is not, of course, a straight-forward comparison. Children serving community sentences are likely to have committed less serious offences and be less prolific in their offending histories so arguably are at a lower risk of reoffending, whereas children in custody (who should, in theory, be more serious offenders) will be at a high risk of reoffending.
6.12 However, as set out in this report, the evidence shows that significant numbers of children are being sentenced to custody for non-violent offences and increasingly for breaching community sentences. They are not at great risk of re-offending and if they were given a community sentence the chances of them re-offending would be much lower. In order to reduce offending and promote public safety these children should be given community disposals.

Resourcing non-custodial sentences

6.13 The Youth Rehabilitation Order includes a number of requirements that can be combined to provide a robust community sentence. However, for these requirements to make a difference to a young person’s likelihood of committing further offences they need to be adequately resourced. The evidence from the introduction of the adult generic community sentence is that some requirements are not adequately funded and so are in effect, unavailable. This has particularly been the case for the alcohol treatment requirement and the mental health treatment requirement.\(^{69}\)

6.14 There is a danger that this will also be the case for the Youth Rehabilitation Order. The lack of mental health provision available to children in the youth justice system due to under-resourced Child and Adolescent Mental Health Services is well documented. There are also limited services to address alcohol misuse. John Fassenfelt, chair of the Youth Court’ Committee of the Magistrates’ Association, has recently expressed concern about the lack of services for children and young people, stating that ‘funding has to be adequate’ if the intoxicating substance treatment requirement of the Youth Rehabilitation Order is to work.\(^{70}\) In addition, until intensive fostering is available more widely across the country, this requirement is unlikely to be utilised by the courts.

6.15 Unless the requirements of the Youth Rehabilitation Order are adequately resourced, children serving the orders are more likely to fail and the capacity of community-based sanctions to prevent further offending will be seriously undermined.

Alternatives to custody which aren’t currently available to the courts nationwide

6.16 This section highlights just some of the many alternatives to custody which have been effective at addressing youth offending across jurisdictions.

6.17 We know that, where children have committed more serious offences, including low-level violence, or are persistent offenders, there is credible evidence that alternative community-based programmes are more effective than custodial sentences.

6.18 Firstly, there is evidence that the alternatives to custody currently being piloted by the Youth Justice Board are making a difference.

6.19 *Multi-dimensional Treatment Foster Care* is currently being piloted in three areas as alternatives to custody. An evaluation by York University, due to be published in 2010, is expected to show positive results in reducing further offending.
6.20 Multi-dimensional treatment foster care programmes have already been operational in England and Wales in 19 local authority areas targeted at children with complex multiple needs in the care system. So far they have had positive outcomes for children who had a history of offending. According to research commissioned by the DCSF, 45% had convictions when they entered the programme and only 13% committed further offences during the time they were in foster care. The research also found other positive outcomes in relation to use of alcohol, violent behaviour and reduction in absconding.

6.21 Secondly, there is evidence from other jurisdictions that alternatives targeted at children who have committed more serious offences, such as robbery, and/or are persistent offenders have a significant impact on reducing re-offending. The most promising are intensive therapeutic programmes that are being used to reduce the number of children sentenced to custody.

6.22 The Juvenile Justice Initiative was set up in New York in 2007 to provide evidence-based alternatives to custody for children who have committed serious offences and/or are repeat offenders. The initiative is made up of 3 community-based intensive-therapeutic programmes:

- Functional family therapy (FFT)
- Multisystemic therapy (MST)
- Multidimensional treatment foster care (MTFC)

6.23 Costs per child are between US$5,000-18,000 depending on the programme, all of which are strictly based on models subject to high quality evaluations showing they reduce reoffending by between 30-70%.

6.24 MultifunC - Based on an analysis of the research and evidence on residential treatment for young people with severe behaviour problems, the MultifunC treatment model has been developed in Norway and Sweden. It is a residential model for children with serious, including violent, behavioural problems. Each facility is a small unit housing only eight children in a non-secure setting with links to local communities. There are six facilities in Norway and three in Sweden. The centres are run by social services but take children who have been given a custodial sentence that the court decides should be served in a MultifunC centre.

6.25 The programme consists of a time-limited period in the residential setting followed by a focused aftercare period that is integrated into the programme. The total length of the programme depends on an individual assessment, but is usually about 10-12 months including aftercare. The aim is for each child to stay no longer than six months in the residential centre.

6.26 The programme focus is on changing children’s behaviour using cognitive behavioural techniques and social learning theory. Links with local schools are established to support the development of pro-social peer relationships outside the centres. Children attend local schools and access community leisure activities. In addition a great deal of support work is done with parents who are directly involved in treatment planning and are supported based on principles from Multi Systemic Therapy and Parental Management Therapy.
6.27 The MultifunC programme has yet to be evaluated but is based on programmes that have been shown to reduce re-offending by at least 30%.

Lessons for the UK

6.28 There is a strong evidence based argument for intensive therapeutic models to be developed as alternatives to custodial sentences in the UK. Multi-systemic therapy is currently being piloted jointly by the Department of Health and the DCSF at 12 sites across England, including the Brandon Centre in London, on behalf of Camden and Haringey YOSs, and Cambridgeshire. The pilots focus on children in trouble and children who have gone missing with one pilot focusing specifically on young people who sexually harm. These have yet to be evaluated but early findings from the Brandon Centre suggest MST has reduced reoffending rates over a two-year period. The case needs to be made for more ambitious pilot projects and for an extension of the three existing intensive fostering pilot sites.

6.29 Finally, it is important to note that the courts in England and Wales already have the power to place a child in accommodation other than that in the current secure estate. Section 34 of the Offender Management Act 2007 provides for a child who is subject to a DTO to be placed in accommodation outside the existing secure estate in placements to be referred to as ‘youth detention accommodation’. This category allows for children to be placed in other forms of local authority accommodation as well as in secure children’s homes; children who commit an offence during the community section of the DTO can also be placed in such accommodation. Section 34 specifies that such accommodation can be secure accommodation provided on behalf of the local authority and crucially removes the restriction (which applies to the current secure estate) that youth detention accommodation must have the purpose of restricting liberty. Section 34 has not yet been implemented, though the YJB is currently looking at the issue.

7. The use of custody as a last resort – obligation under international law

As a signatory to the UN Convention on the Rights of the Child, the UK is obligated to comply with international law:

- The Convention states that imprisoning children should only ever be used as a ‘measure of last resort’
- As recently as 2008, the UK was found to be in violation of this requirement

The United Nations

7.1 The United Nations Convention on the Rights of the Child (CRC) has been binding on the United Kingdom since its ratification in 1991. Article 37(b) of the CRC requires that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the
law and shall be used only as a measure of last resort and for the shortest appropriate period of time (our added emphasis).

7.2 By ratifying the Convention, the UK Government committed itself to undertaking ‘all appropriate legislative, administrative and other measures’ to implement all its provisions, including the requirement to use detention or imprisonment of children only as a measure of last resort and for the shortest appropriate period of time.\(^7^2\)

7.3 However, the UN Committee on the Rights of the Child (the ‘Committee’) has made clear that the UK is currently in violation of this requirement. Following its examination of the UK in 2008, the Committee was severely critical of the UK’s juvenile justice system as a whole. The Committee specifically concluded that Article 37(b) was being violated, as deprivation of liberty was not being used only as a measure of last resort and for the shortest possible period of time.\(^7^3\)

7.4 In order to achieve compliance with its obligations, the Committee recommended that the Government should:


7.5 This recommendation makes clear that in order to understand and implement its obligations in the administration of juvenile justice, as well as taking account of the Committee’s Concluding Observations, the UK Government needs to consider its General Comment No. 10 and the full range of relevant international legal instruments. This is also essential in order to help interpret the meaning of the term ‘measure of last resort’ in this context, including what indicators may be used to determine whether the requirement is met, and what steps could be taken by the UK Government to achieve compliance.

7.6 These instruments make clear that what is required to meet the ‘last resort’ requirement is a significant shift in attitudes to juvenile sentencing and the purpose of child custody. Central to the relevant international instruments is the principle that the purposes of the juvenile justice system should be prevention and rehabilitation, and that every provision of the CRC applies to children in conflict with the law as it does to all other children.

**Indicators of breach of the ‘last resort’ principle and steps required to achieve compliance**

7.7 In its 2008 Concluding Observations, the Committee argued that the sheer numbers of children in custody in the UK indicated that the ‘last resort’ requirement was being violated. It was particularly concerned at increasing numbers of children being detained in custody for lesser offences and for longer periods. The Committee suggested that a broad range of alternative measures to detention for children in conflict of law should be considered and developed. It also specifically recommended that the principle that detention should be used
as a measure of last resort and for the shortest period of time should be given a statutory basis.

7.8 In its General Comment Number 10 on Children’s Rights in Juvenile Justice (GC10), the Committee throws light on the broad principles agreed internationally in relation to child custody. GC10 makes clear that every provision of the Convention – and not only the special protection measures - applies to children in conflict with the law as it does to all other children. This includes the general principles of the Convention – including the requirement to make children’s best interests a primary consideration in all matters affecting them (article 3) and children’s right to survival and maximum development (article 6). In terms of the special protection measures, not only article 37(b) is relevant to the use of child custody, but other provisions including article 40(1) which enshrines children’s right to be treated in ways that promote their reintegration and assumption of a constructive role in society.

7.9 The Committee suggests that in order to comply with these requirements:

It is, therefore, necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care (art. 40 (4)).

7.10 GC10 makes clear that an effective juvenile justice plan must include working with individual young people to understand why they have offended and to prevent recidivism for the benefit of society as a whole.

7.11 GC10 underlines the requirement for States Parties to take account of other international instruments, such as the Riyadh Guidelines and the Vienna Guidelines. These instruments carry the authority of the United Nations and are helpful to interpret the UK’s obligations under the CRC.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDLs)\textsuperscript{75}

7.12 The JDLs take as their starting point in relation to juvenile custodial sentencing the principles of use of custody as ‘last resort’ and for the shortest possible time. These are described as relevant both to sentencing and to pre-trial detention. States are guided to adapt their domestic law to reflect ‘the spirit’ of these principles. It is clear from the JDLs that states’ aim must be to ‘counteract the detrimental effects of all types of detention and to [foster] integration in society.’ Paragraph 2 of the Annex to the rules describes the use of custodial sentencing for juveniles as appropriate only for ‘exceptional cases’. It is specified that the type of custody should suit the particular needs of the individual.

The Economic and Social Council: Administration of Juvenile Justice (The Vienna Guidelines)\textsuperscript{76}

7.13 This document again takes as its founding principle the requirement that juveniles should be detained for the shortest possible time and as a last resort. It focuses on methods for preventing juvenile crime and ensuring that children have support from their families and
local communities, stating that ‘measures of social protection should be developed in order to limit the risks of criminalisation for these children’\textsuperscript{77}. The fundamental assumption of the Vienna Rules is that the systems should be focused on preventing the need for custody and addressing the root problems causing juvenile criminality.

**United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)**

7.14 The Beijing Rules address practices in relation to children already in conflict with the law. The Rules expand on the definition of ‘last resort’ by referring to proportionality in sentencing. Sentencing must be proportionate taking into account the circumstances of both the offence and the offender. Moreover, the Rules specifically indicate that:

\textit{Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.}\textsuperscript{78}

**The International Covenant on Civil and Political Rights (ICCPR)**

7.15 The ICCPR addresses the detention of both adults and children. It specifically requires (Article 14(4)) that the sentencing of juveniles should take into account children’s age and the need for rehabilitation.

**United Nations Guidelines for the Prevention of Juvenile Delinquency (The ‘Riyadh Guidelines’)\textsuperscript{79}**

7.16 Adopted in 1990, the Riyadh Guidelines recommend a pro-active approach to prevention via the use of social and economic strategies, in areas such as the family, community, media and education. The Guidelines also advocate the adoption of specific legislation on the administration of juvenile justice in the hope that the further “stigmatisation, victimisation and criminalisation of young people” may be avoided.

7.17 The multi-disciplinary approach set out in the Guidelines seeks to encourage States to develop community-based mechanisms to avoid juvenile “delinquency” and to recognise that “formal agencies of social control”\textsuperscript{80} should only be utilised as a means of last resort. As well as the active involvement of States and NGOs on a national level, it is actively encouraged that young people should participate in “delinquency” prevention polices and processes.\textsuperscript{81}

**Conclusions**

7.18 It is clear that in order to fully comply with the ‘last resort’ principle, the UNCRC as a whole must be complied with, including the overarching principles of best interests (article 3) and participation (article 12). It is further clear that the purposes of the juvenile justice system as a whole, and the broader approach to supporting children and young people outside the criminal justice system, must be prevention and rehabilitation. Both pre-trial detention and custodial sentences are encompassed by these requirements.
Approaches in other jurisdictions

Children who offend in other legal jurisdictions are dealt with in many different ways:

- In Scotland, most children under the age of 16 who offend are dealt with under welfare, rather than criminal, legislation with children under the age of 12 exempt from criminal prosecution. At the time of writing, there were no children under the age of 16 in prison.
- New legislation introduced in South Africa in 2009 placed diversion at the heart of the justice system and raised the minimum age at which a custodial sentence can be imposed from 12 years to 14 years old.
- In Germany, courts have discretionary powers to sentence 18-21 year old young adults as juveniles in the youth court – up to two-thirds of all young adults who offend are dealt with in this way. Suspended prison sentences account for approximately 78% of all sentences of up to one year, and 56% of all sentences of between one and two years in length, given to 14-21 year olds dealt with in the youth court.

The Children’s Hearings System in Scotland

7.19 Section 52(2) of the Children (Scotland) Act 1995 sets out the legal grounds under which a child or young person can be brought before the Hearings System. They include ‘that the child:

- is beyond the control of parents or carers
- is at risk of moral danger
- is or has been the victim of an offence, including physical injury or sexual abuse
- is likely to suffer serious harm to health or development through lack of care
- is misusing drugs, alcohol or solvents
- has committed an offence
- is not attending school regularly without a reasonable excuse
- is subject to an antisocial behaviour order and the Sheriff requires the case to be referred to a children’s hearing.

7.20 Children under 16 are only considered for prosecution in court for serious offences such as murder, assault which puts a life in danger or certain road traffic offences which can lead to disqualification from driving. In cases of this kind the Procurator Fiscal has to decide if prosecution is in the public interest. Even if so, it is still by no means automatic that the child will be prosecuted. The Procurator Fiscal may refer the child or young person to the Reporter (see below) for a decision on whether referral to a hearing is more appropriate.

7.21 Where the child or young person is prosecuted in court, the court may, and in some cases must, refer the case to a hearing for advice on the best way of dealing with the child. The court, when it considers that advice, may also refer the case back to a hearing for a decision (emphasis added).’

7.22 However, it is worth noting that a children’s hearing may impose a supervision requirement that the child live at secure accommodation, as is demonstrated below. It could be argued that, since the hearing has no powers of punishment and is not imposing a sentence for a
crime (it is, rather, acting in the child’s best interests) this is not equivalent to a custodial sentence:

’If the hearing thinks that compulsory measures of supervision are necessary, it will make a Supervision Requirement, which may be reviewed annually until the child becomes 18. The hearing has wide scope to insert conditions in the Supervision Requirement, and the local authority is responsible for ensuring it is carried out. In most cases the child will continue to live at home but will be under the supervision of a social worker. In some cases the hearing will decide that the child should live away from home with relatives or other carers such as foster parents, or in one of several establishments managed by the local authority or voluntary organisations, such as children’s homes, residential schools or secure accommodation. It may also decide who the child may have contact with, and when.

7.23 The Antisocial Behaviour etc. (Scotland) Act 2004 also gave hearings the power to restrict a child or young person’s movement. This involves intensive support and monitoring services (monitoring is facilitated by an electronic “tag”) where the young person is restricted to, or away from, a particular place. The electronic tag must be supported by a full package of intensive measures to help the young person change their behaviour.

7.24 There is however no element of punishment [emphasis added] in a hearing decision, so it does not for example have the power to fine the child/young person or the parents. All decisions made by hearings are binding on that child/young person. A Supervision Requirement can be terminated when a hearing decides that compulsory measures of supervision are no longer necessary.

7.25 A Supervision Requirement must be reviewed at another hearing within a year otherwise it lapses. A hearing may specify an earlier review date. The child or relevant person may request a review after three months, and the local authority can call for a review at any time. The Reporter has a duty to arrange review hearings. At a review hearing, which is again attended by the child and relevant persons, the Supervision Requirement can be continued, changed or discharged.³⁸²

7.26 If a child fails to comply with the conditions of a Supervision Requirement, the case will be referred back for another hearing, which can choose to either: continue with the existing terms of supervision; vary the conditions; or attach a secure requirement. Data showing how many children enter secure care as a result of not complying with a supervision requirement is not currently available.

7.27 A recent evaluation of Intensive Support and Monitoring Services (supervision combined with tagging/electronic monitoring) published by the Scottish Executive found that, amongst hearing panel members, ‘ISMS was generally considered as being more appropriate than secure accommodation for persistent offenders and for younger children’. Evidence collected as part of the evaluation indicates that ‘the ISMS and intensive support programmes have been effective for a significant number of young people in terms of reduced offending, improved attendance rates on programmes, reduced absconding and reduced substance misuse’. With respect to compliance, the evaluation states that ‘breach is
not necessarily failure if it helps young people to engage with interventions, when they had not previously engaged, and if it leads to a drop in their risk factors."\textsuperscript{83}

**South Africa - A rebalancing act**

7.28 In recognition of the fact that ‘the current statutory law [did] not effectively approach the plight of children in conflict with the law in a comprehensive and integrated manner that [took] into account their vulnerability and special needs’\textsuperscript{84} in May 2009 the South African Government introduced the Child Justice Act, which: established diversion from the criminal justice system at its heart, ‘to prevent the adverse consequences flowing from being subject to the criminal justice system’, ‘to reduce the potential for offending’ and to ‘promote reconciliation between the child and the person or community affected by the harm caused by the child’\textsuperscript{85}; entrenched restorative justice; and created a system of child justice courts.

7.29 The Act raised the minimum age of criminal capacity from 7 to 10 years old but children between the ages of 10-14 who commit a criminal act are presumed to lack criminal capacity unless the State can prove otherwise. The minimum age at which a custodial sentence can be imposed is 14, as this is the age at which children are seen to have full criminal capacity. The Act also places restrictions on the use of custodial sentences for certain offences.

**Germany - The Youth Justice Act**

7.30 The youth justice system in Germany is built around the Youth Justice Act (or Jugendgerichtsgesetz) of 1990, which underpins the notion of diversion and restricts the use of child and youth imprisonment to a sanction of last resort, if educational or disciplinary measures are deemed to be inappropriate, and where the formal sanctioning powers of the juvenile court are structured according to the principle of minimum intervention.\textsuperscript{86} The age of criminal responsibility is 14.

7.31 Since 1953, German courts have had the power to decide whether young offenders between the ages of 18-21 are dealt with through the adult or youth justice system, if, at the time of the offence, it is judged that the young person’s moral and psychological development was that of a juvenile’s – in practice, approximately two-thirds of young adults who offend are dealt with through the youth courts, with those committing serious, violent offences such as murder/manslaughter, sex offences and robbery most likely to be tried under juvenile law.\textsuperscript{87}

7.32 Section 21 of the Youth Justice Act holds that a youth custodial sentence of less than one year will be suspended when it can reasonably be expected that the conviction on its own will serve the offender as sufficient a warning for him or her to lead a non-criminal life. When sentencing, judges can take into account the young person themselves, the circumstances surrounding the offence, their background and any previous offending history and the likely impact of suspension. Custodial sentences exceeding one but less than two years in length will be suspended where execution of the sentence is not mandated on the basis of the offender’s development.

7.33 In 2005, 106,655 14-21 year olds were convicted under the Youth Justice Act, of which 10,106 (9.5 %) received a suspended youth custody sentence and 6,535 (6.1 %) a non-suspended
youth custody sentence. 77.1% of youth custody sentences of up to one year and 55.6% of sentences between one and two years were suspended. 88

8. Experience from abroad: implementing a higher custody threshold

New legislation passed in Canada in 2002 placed restrictions on the use of custody for children. This section provides more detail on the legislative framework in operation and its outcomes.

- Since its introduction, the average child custody population has fallen by approximately 40%
- The number of children being sentenced to custody has declined year on year
- The overall youth crime rate has fallen, with property crime rates in particular declining - the rate of violent youth crime has remained unchanged

The Canadian Model

8.1 Given concerns from politicians that a higher custody threshold would subject the public to greater risk and would be hard for the public to accept, we have looked abroad to find an example of a country which has successfully introduced a new custody threshold. Enver Solomon, working for the International Centre for Prison Studies, has recently researched the process of change in Canada for the Prison Reform Trust.

8.2 Towards the end of the millennium there was a growing concern in Canada that the youth justice legislation was not working. The Young Offenders Act which came into force in 1984 was criticised by Conservative politicians as being too soft and by Liberals and reformers as resulting in an over-use of custody for non-violent offenders. There was also a widespread concern about the fact that, at the time, Canada had one of the lowest rates of youth diversion and highest rates of youth custody in the world.

8.3 A cross-party parliamentary committee was established in 1998 to review the legislation. It concluded that radical reform was needed to reduce the use of custody. Although the Conservative politicians on the committee dissented from the findings the then Liberal government proceeded with its own vision paper setting out plans for a completely new statute, the Youth Criminal Justice Act (YCJA).

8.4 The new legislation was passed by the Canadian parliament in February 2002 with the explicit aim of reducing the number of children sentenced to custody. Indeed the preamble to the act states that:

‘...Canadian society should have a youth criminal justice system that... reserves its most serious intervention for the most serious crimes and that reduces the over-reliance on incarceration for non-violent young persons.’ 89

The Youth Criminal Justice Act’s principle and purpose

8.5 The YCJA includes a ‘Declaration of Principle’ establishing the overall purpose of the youth justice system. It states that it is intended to:
‘(i) prevent crime by addressing the circumstances underlying a young person’s offending behaviour;
(ii) rehabilitate young persons who commit offences and reintegrate them into society, and;
(iii) ensure that a young person is subject to meaningful consequences for his or her offence, in order to promote the long-term protection of the public;’

8.6 The YCJA also sets out the ‘purpose’ of sentencing, stating that it ‘…is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration’.

8.7 Neither this purpose nor the ‘Declaration of Principle’ mentions deterrence. This is a notable omission as it suggests that deterrence does not need to be taken into account when sentencing young offenders. Canadian criminologists have suggested that the elimination of deterrence has contributed to the decline in the use of custody for children by the courts.

Restrictions on the use of custody - even for violent offenders

8.8 Many of the sentencing principles included in the legislation clearly propose limited use of imprisonment.

8.9 Firstly, the principle of the concept of restraint in the use of custody states that ‘all available sanctions other than custody that are reasonable in the circumstances must be considered’. Secondly, proportionality is required not just in its own right but also subject to its requirement ‘the sentence must be the least restrictive sentence that is capable of achieving the purpose [of sentencing]’. Finally there is a limit on the severity of sentencing in the youth court as the sentence must not result in a punishment that is more severe than the punishment that an adult offender convicted of the same offence in similar circumstances would receive.

8.10 Having articulated general sentencing principles, the legislation then prescribes specific criteria that have to be met before a young offender can be sentenced to custody. This explicitly establishes four barriers to custody, described by the Canadian Supreme Court as ‘gateways’.

8.11 ‘A youth justice court shall not commit a person to custody ... unless:

- o the young person has committed a violent offence; [or]
- o the young person has failed to comply with non-custodial sentences; [or]
- o the young person has committed an ... offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt ... or
- o in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.’
8.12 It is notable that breach of a community sentence for the first time cannot result in custody. A young person must have breached a previous community sentence for custody to be given.

8.13 In specific rulings the Canadian Supreme Court has emphasized the need to narrowly construe the four gateways. For example, it ruled that the third provision generally requires a minimum of three prior judicial findings of guilt.  

8.14 Even if a case meets one of the four provisions a number of other custody-related principles must still be considered before a court can impose a custodial term.

8.15 The first restriction is a clear reminder to the court of the importance of the principle of restraint in the use of custody stating that if one of the provisions apply:

‘...a youth justice court shall not impose a custodial sentence... unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles [of sentencing at the youth court level].’

8.16 A second principle to be observed before a custodial sentence is imposed is intended to discourage courts from escalating the severity of the sentence in response to further offending by up-tariffing and imposing a custodial sentence. It states: ‘The previous imposition of a particular non-custodial sentence on a young person does not preclude a youth justice court from imposing the same or any other non-custodial sentence for another offence.’ This clearly allows courts to impose alternatives to custody on consecutive occasions.

8.17 The third principle significantly restricts the use of custody for welfare purposes, setting out that a court ‘shall not’ use custody as a substitute for a child protection, mental health or other social measure. As is currently thought to be the case in England and Wales, under the previous Canadian youth justice legislation courts often used custody for children because they could see no way of providing what were thought to be necessary social interventions for vulnerable at-risk children.

8.18 The legislation also requires courts to consider a pre-sentence report as well as any sentencing proposal made by the young offender or his legal representative. It also allows for the possibility of the convening of a conference before sentencing to facilitate receiving advice from family or community members, or allowing for a victim-offender meeting before sentencing.

8.19 Finally, when a court imposes a term of custody there is a requirement to provide reasons why ‘it has determined that a non-custodial sentence is not adequate’ to achieve the purpose of sentencing set out in the legislation. This is yet another provision of the YCJA that clearly creates a further barrier to the imposition of a custodial sentence.

8.20 Overall the YCJA has successfully resulted in fewer children being sentenced to custody. Official data shows that between 2002/03 and 2003/04, the year the YCJA came into
operation, there was a substantial fall in the number of children sentenced to custody, declining from 14,118 to 9,570 a decline of 32%, the largest annual change since 1991/92. Since 2003/04 the decline has remained constant. What’s more the average daily rate of children in sentenced custody fell by 37% between 2002/03 and 2007/08.

8.21 It is important to note that the decline in the use of custody has not been accompanied by an increase in youth crime. An internal analysis by the Department of Justice found that the youth crime rate in Canada, which is measured as the number of children accused of an offence per 100,000 of the youth population, was on the rise until it peaked in 2003, and has since decreased. In other words, since the implementation of the YCJA overall youth crime has fallen. In particular, property crime by children has fallen substantially although the youth violent crime rate has remained relatively stable over the years.

9. A new custody threshold for England and Wales?

This section puts forward a new custody threshold for England and Wales which has been constructed with the aim of ensuring that custody is used only as a ‘measure of last resort’.

The Standing Committee for Youth Justice considers that, for the detention of children to be used as a last resort, legislation must preclude the imposition of a custodial sentence unless a strict threshold has been met. We believe imprisonment should only be used for the most serious crimes – such as rape, robbery and GBH with intent - and for children who pose a serious risk to the public. A relatively objective measure of offences regarded by society as the most serious are those which would attract a sentence of life imprisonment in the case of an adult. Even in such cases, however, there may be other non-custodial alternatives available that would effectively protect the public, taking into account that the defendant is a child. The threshold should accordingly also require courts to obtain a clinical assessment and consider the particular circumstances of the child to determine whether any form of non-custodial sentence would be sufficient to protect the public.

1. A court shall not impose a custodial sentence on a person under the age of 18 (the child) unless:
   a) The child is convicted of an offence punishable with life imprisonment; and
   b) The court is satisfied that the offence, or the combination of the offence and any offences associated with it, is so serious that no sentence other than a custodial sentence is appropriate; and
   c) The court is satisfied, on the basis of the factors set out in Section 2 below, that there is a significant risk to the public of serious physical or psychological harm occasioned by the commission by him or her of further offences punishable with life imprisonment.

2. In considering whether it is satisfied of the issue in section 1(c), the court must obtain a clinical assessment and take into account all information as is available about the circumstances and background of the child, including any mitigating factors.
3. For the purposes of section 2, mitigating factors may include, but are not limited to:
   a) The age and maturity of the child;
   b) The child’s culpability in relation to the offence or offences;
   c) The particular role played by the child in the offence or offences;
   d) The contribution of the child’s background to his or her offending behaviour;
   e) The child’s best interests; and
   f) The circumstances of any guilty plea entered.

10. A new custody threshold in practice – impact and costs

The impact of a new custody threshold on sentencing, the child custody population, and the costs of custody:

10.1 Using the most recent Criminal Statistics as a guide, in 2008 more than two-thirds (67%) of all custodial sentences given to children were for offences which did not meet the criteria for life imprisonment

10.2 The reduction in the population of the secure estate would be somewhat smaller, given that it would predominantly be short-term sentences that would be avoided. Nonetheless, we calculate that the sentenced population would decline by approximately 55%

10.3 A conservative estimate puts the financial savings which might be delivered by this threshold at approximately £93 million per year – this includes the cost of delivering robust alternatives to custody in the community for children who do not meet the custody threshold (based on the unit cost of the Intensive Supervision and Support Programme)

10.4 In 2009/10, more than £305 million was spent on purchasing accommodation for children in the secure estate, an increase of 3% on the previous year
The YJB YOT Bulletin Issue 111 states that provisional data for May 2010 shows there were 2,070 under-18 year olds in custody, 21% lower than in May 2009 and 31% lower than May 2008.

20 years on: The impact of the 1989 Children Act (29 October 2009) Children and Young People Now


Ibid


Because of their developmental capacity, diagnosing ‘mental disorder’ in children is problematic and may change.


Barnardo’s (2009) ‘Locking up or giving up: Why custody thresholds must be raised’. Barnardo’s: London


Harrington, Bailey et al. (2005) Mental health needs and effectiveness of provision for young offenders in custody and the community. YJB: London


Hansard (2008) Answer from David Hanson to Parliamentary question tabled by Lynne Featherstone MP 23rd June

Hansard (2008) Answer from David Hanson to Parliamentary question tabled by Lynne Featherstone MP 23rd June

Glover, J. and Hibbert, P. (2009) Locking up for giving up? Why custody thresholds for teenagers aged 12, 13 and 14 need to be raised London: Barnardo’s
Calculated using under-18 custodial population at May 2010.
Costs supplied to the Foyer Federation by the YJB at May 2009 - The actual cost of a place in a YOI has been estimated by the Foyer Federation to be closer to £100,000
Response from MoJ to FOI request: http://offlinehbpl.hbpl.co.uk/misc/ PYC/Both-Resources- Documents/Final%20response%20to%20Tristain%20Donovan%20Dated.doc
Hansard, House of Commons written answers, 18 March 2009: Col. 1228W
Hansard, House of Commons written answers, 28 March 2007: Column 1652W
www.inquest.org.uk
Ministry of Justice Safety in Custody Statistics England and Wales – February 2010
‘True level of restraint revealed’ (3 September 2009) Children and Young People Now
‘YOI restraint increases despite fall in levels of custody’ (21 July 2010) Children and Young People Now
Hansard 27 April 2006: column 1263W
HM Inspectorate of Prisons/ YJB Children and young people in custody 2006-2008: an analysis of the experiences of 15-18 year olds in prison
Youth Justice Board (2006) Barriers to engaging in education, training and employment London: JYB
64 Youth Justice Board http://www.yjb.gov.uk/en-gb/yjs/SentencesOrdersandAgreements/YRO/
67 Research Outcomes and Lessons Learned, Restorative Justice Family Group Conference Project, Essex 2002
68 The Children’s Society’s Youth Justice North East Project Evaluation 2005
72 Article 4, UN Convention on the Rights of the Child
74 At Para 78, ibid
75 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990 (the JDJs)
76 The Economic and Social Council: Administration of Juvenile Justice, ECOSOC resolution 1997/30
77 Ibid, para 36
78 Ibid, para 17.1, c
79 http://www2.ohchr.org/english/law/ juvenile.htm
80 At Para 6, ibid.
81 At Para 9(h)
82 http://www.childrens-hearings.co.uk/background.asp
85 Child Justice Act 2008, Section 51
86 http://www.esc-eurocrim.org/files/juvjusticegermany_betw_welfar_justice.doc
87 http://www.esc-eurocrim.org/files/juvjusticegermany_betw_welfar_justice.doc
90 Ibid, Section 3 p6.
91 Ibid, Section 38(1), p38
93 Youth Criminal Justice Act, 2002, section 38 (2)(d)
94 Ibid, section 38 (2)(c)
95 Ibid, section 39 (1)
97 Youth Criminal Justice Act, section 39(1)
98 Ibid, section 39(4)
99 Ibid, section 39(9)
100 Doob, A. N. and Sprott, J. B. (2005), The Use of Custody under the Youth Criminal Justice Act, Ottawa: Department of Justice, Canada.
102 This figure is an estimate only based on the most accurate data publicly available.
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.


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