



Standing Committee for Youth Justice

Children and custodial sentences for a second knife offence A briefing for YOTs

In July 2015, a new law came into force which creates a presumption that courts will impose a custodial sentence for a second knife offence – including possession – other than in particular circumstances. There has been some confusion about how this new law applies to children. This briefing by the Standing Committee for Youth Justice (SCYJ) seeks to clarify the situation for Youth Offending Teams (YOTs). The key points are:

- ❖ The law only applies to children aged 16 or older when the offence was committed;
- ❖ The court does not have to give a custodial sentence if it finds it would be unjust to do so;
- ❖ The court has wide discretion to decide what might make it unjust to impose custody;
- ❖ When deciding whether the custodial sentence would be unjust the court must consider the child's welfare, the child's circumstance, and the circumstances of both offences.

What the Act says:

The Criminal Justice and Courts Act 2015 requires courts to impose a custodial sentence for a second knife offence, but it also provides that courts can dispense with that requirement in particular circumstances. In spite of the legal change, courts continue to have considerable discretion to decide when to sentence a child to custody.

Section 28 of the Acts says that "the court must impose an appropriate custodial sentence" for a second conviction involving an offensive weapon. This includes possession of a knife. The minimum sentence for under-18s is a four month DTO. However, these provisions **only** apply when a person is "aged 16 or over" **when the offence was committed** (Section 28(2(2A))).

The Act says that the court does **not** have to impose custody, "where there are particular circumstances relating to the offence, the offender or the previous offence that would make it unjust" to do so (Section 28 (2(2B))). In deciding whether custody would be unjust, the court must "have regard to its duty under section 44 of the Children and Young Persons Act 1933" (Section 28 (2(2C))).

Section 44 of the Children and Young Person's Act 1933 says that every court must "...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."

What this means in practice:

i) Age limit:

The presumption that the court will impose a custodial sentence **only** applies to children aged 16 or 17 year olds when the offence was committed. **There is not presumption in favour of custody for children under the age of 16** convicted of a second knife offence.

ii) Exemption:

If a custodial sentence would be unjust, the court must not impose it.

The court can decide it is unjust to impose custody for **any reason** (or combination of reasons), relating to the child, or to the circumstances of the first or the second knife offence. For example,



if one of the offences is minor or technical, the court might decide a custodial sentence would be unjust.

When deciding whether imposing a custodial sentence on 16 and 17 year olds would be unjust, the court **must** have regard to the welfare of the child (because they must have regard to s.44 of the Children and Young Person's Act 1933). This means that if the custodial sentence would have a negative affect on the child's welfare, the court may find it unjust and therefore would not have to impose it. It would give a different sentence instead. There **do not** have to be exceptional circumstances for a child's welfare to be negatively affected by custody.

When deciding whether the custodial sentence would be unjust, the court should look at all the factors holistically. This means that the court must look at all the different factors together as a whole (the impact on the child's welfare, the circumstances of the offences, etc), not just look at them one by one.¹ So, for example, even if the impact of custody on the child's welfare was not sufficient to make custody unjust, the impact of custody *combined* with the circumstances of the offence might make it unjust.

According to case law, the court should **not** impose the custodial sentence if it would be arbitrary or disproportionate to do so.² So in considering whether a custodial sentence for a second knife offence is unjust, the court should consider whether the sentence would be "arbitrary or disproportionate", given the circumstances and the impact on the child's welfare.

There do not need to be exceptional circumstances for the court to find that a custodial sentence is unjust – the test is whether or not the sentence would be unjust, there is no suggestion that this should happen rarely.

iii) Implications for YOTs

YOTs should assess the impact of custody on the child's welfare and include this information in the Pre-sentence Report (PSR). Relevant considerations include the impact on the child's wellbeing, housing, education and training³, and the impact of separation from their family.

YOTs should also consider whether there are **any** circumstances relating to the child, or to either the first or second offence, that might impact on whether custody would be an unjust sentence. If there are, include this information in the PSR.

YOTs should assess all the above factors together (the child's welfare, the circumstances of the offences, and the child's circumstances), to determine whether, as a whole, they would make a custodial sentence unjust. In coming to a decision, YOTs should consider whether custody would be arbitrary or disproportionate sentence.

If you believe a custodial sentence would be unjust (because of the welfare impact, the circumstances, or a combination of all these factors) say so in the PSR, explaining your reasons. Then use the PSR to recommend that the court imposes a non-custodial sentence, as it is entitled to do under the Section 2 of the Criminal Justice and Courts Act 2015.

¹ The case, R v Rehman, R v Wood [2015] EWCA 2056 related to a mandatory sentence for gun offences. The court found that: "It is not appropriate to look at each circumstances separately and to conclude that it does not amount to an exceptional circumstance. A holistic approach is needed."

² R v Rehman, R v Wood [2015] EWCA 2056 related to a mandatory custodial sentence for gun offences, for which the mandatory sentence must be passed unless there are exceptional circumstances. The court ruled that if the mandatory custodial sentence would be "arbitrary or disproportionate", a court must find exceptional circumstances.

³ Section 44 of the Children and Young Person's Act 1933 requires the court to consider the child's education and training.

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

