Standing Committee for Youth Justice

Standing Committee for Youth Justice response: Home Office consultation on new legislation on offensive and dangerous weapons
December 2017

The Standing Committee for Youth Justice (SCYJ) is an alliance of almost 50 not-for-profit organisations campaigning for improvements to the youth justice system in England and Wales. The Home Office consultation on new weapons legislation proposes a number of new laws around knives and corrosive substances. We set out our views on these proposals, as they affect children (those under the age of 18) below.

Proposal B: Making it an offence to possess certain weapons in private and Proposal C: Making it an offence to possess a knife or an offensive weapon in education institutions other than schools

Proposals B and C would, respectively, make it an offence to possess certain offensive weapons in private, and extend the prohibition on possessing an offensive weapon in a school to other educational institutions. A second offence of possession of a bladed article or offensive weapon in a school will result in a mandatory minimum custodial sentence of four months for 16 and 17 year olds.

Knife crime is a serious problem and in principle we do not object to the extension of existing offences, as per proposals B and C. However, we continue to oppose mandatory custodial sentences for children and would caution that criminal justice measures cannot prevent knife crime.

In general, SCYJ opposes the use of mandatory minimum custodial sentences for children. There is no evidence that the threat of custody deters children from offending, and plenty of evidence that custody itself does not prevent reoffending; last year 69% of children released from custody went on to reoffend within a year (Ministry of Justice 2017) – a considerably higher rate than community sentences. The higher post-custody reoffending rate holds even when one factors in the more serious and persistent offending of those sentenced to custody, “analysis by the Ministry of Justice suggests that, even when relevant factors such as these are controlled for…children who receive custodial sentences of between six and 12 months are significantly more likely to reoffend than a comparison group sentenced to a high level community penalty” (Ministry of Justice 2012, cited in NAYJ 2017: 56). In fact, the evidence indicates that custody is in itself criminogenic (McAra and McVie, 2007). Given the dire state of child custody – HM Chief Inspector of Prisons has said no dedicated child custody institution is safe to hold children (HM Inspector of Prisons 2017) – the negative effects of custody, particularly on reoffending rates, are likely to be heightened.

Custody is a particularly damaging punishment for children, and one which should be reserved for the most severe offences, where it is required for public protection. The UN Convention on the Rights of the Child states that custody should be a last resort (Article 37), yet mandatory sentences remove judicial discretion, and the ability of courts to ensure that the penalty best fits the circumstance of the offence.

As outlined below, children carry knives for a multitude of complex reasons. Their circumstances need to be explored if the penalty is to fit the offence. The Sentencing Council has acknowledged the need to look closely at children’s particular circumstances when sentencing. In 2017, the Council published revised principles for sentencing children (Sentencing Council 2017). This

emphasised looking at the background, circumstances and vulnerability of children in the youth justice system, and drew attention to the importance of considering developmental age as well as chronological age. The revised principles also place a stronger emphasis on children's rights; Paragraph 1.3 states, "a custodial sentence should always be a measure of last resort for children and young people", and there is an emphasis on avoiding unnecessary criminalisation and promoting reintegration (Sentencing Council 2017: Paragraph 1.4). By removing judicial discretion, the proposals work against the Sentencing Council's guidance.

Children carry knives for numerous and complex reasons, often including the perception that they are required for self-protection. New criminal offences and sanctions are not going to persuade them to stop. Educating children and funding wider preventative work in the community will have a greater impact on reducing knife crime (and so the government's stated priority of tackling violent crime). Participation is important if such work is to be effective; children will have some of the best insights into why they carry knives and how this can be prevented. Working to improve relationships between children and the police may also help; children don't who feel protected by the police may be likely to carry a knife for their own protection. Many children who carry knives have been the victim of violence and knife crime, interventions to reduce knife carrying need to take account of this trauma to be effective.

In a recent report, HM Inspectorate of Probation (HMI Probation) outlined research indicating that children who have post-traumatic stress find it difficult to form relationships with adults working with them and thus to respond to certain programmes. It recommended developing trauma-informed approaches when working with such children (HMIP 2017). A custodial sentence is unlikely to support the treatment of post-traumatic stress, and will compound the problem in some instances.

We would urge the government to pursue measures such as those outlined above alongside the introduction of new offences.

Proposal D: Amending the offences of threatening with an article with blade or point or an offensive weapon

It is currently an offence to threaten with an article with blade or point or an offensive weapon (s.139AA of the Criminal Justice Act 1988 (The 1988 Act)). To secure a conviction under the 1988 Act, the prosecution must prove that the defendant threatened another with the weapon "in such a way that there is an immediate risk of serious physical harm to that other person". Proposal D would "strengthen this offence to ensure that if anyone threatens another person with a knife the offence is committed when the victim reasonably fears they would be likely to suffer serious physical harm. This test will be based on how a reasonable person would respond to such a threat, and not whether the victim was objectively at risk of immediate serious physical harm." There is a mandatory minimum custodial sentence of a four-month Detention and Training Order (DTO) for children aged 16 and 17 convicted under s.139AA of the 1988 Act.

In effect, Proposal D introduces a more complicated test for the offence of threatening with a knife or offensive weapon and greatly lowers the threshold for conviction. Given the severe penalty associated with a conviction (custody) SCYJ does not believe the change is justified, particularly as no rationale has been offered other than a desire to "strengthen" the existing offence.

Removing the requirement that there is any objective risk of physical harm, and basing the test purely on the victim's "reasonable fears", substantially reduces the conviction threshold – a person's "reasonable fears" can be very broad, and an individual's perception is very difficult to argue against conclusively. It is likely that the proposed changes will result in a much wider range of cases being prosecuted under s139AA of the 1988 Act. Courts can already impose custodial sentences for possession offences, and are already required to take into account the circumstances of the possession when sentencing. Most of the cases that will be prosecuted under Proposal D could therefore be prosecuted, and given custodial sentences, under existing legislation.

"Reasonable fear" is a problematic test to apply, particularly with regards to children. Children find it more difficult than adults to gauge the consequences of their actions and may find it more difficult to judge the intentions of others (Centre for Social Justice 2012). The system may be ripe for abuse by members of rival gangs or others wanting revenge.

In addition, it is not clear how the "reasonable fear" test should be applied, and clarification may be best achieved by keeping the law as it is. Either "reasonable fear" is established through a subjective test or it relies on a quasi-objective test – such as whether "the man on the Clapham Omnibus" would reasonably be in fear. The former test is problematic because it is so individual as to be constantly changeable and almost impossible to argue against – someone in a vulnerable position might reasonably be in greater fear than others, for example. If the latter test is to be applied (and this appears to be the government's intention), we would expect there to be an objective risk of harm – on the assumption that a "reasonable person" "reasonably fears" harm where there is an objective risk of it occurring. To assume otherwise is to assume that reasonable people cannot assess risk and thus overact, which is an odd basis for prosecution. As such, the proposed quasi-objective "reasonable person" test is similar to the current law, which requires there to be an objective risk of harm. However, to prevent the test being confused with a wholly subjective test, it is preferable to keep the existing objective test in law.

Given the negative effects of imprisonment, SCYJ believes custodial sentences should be used as a last resort and only where it is required for public protection. This will not be the case where children are imprisoned for behaviour that did not objectively put anyone at the risk of harm, which will be the effect of the proposed changes. Children may find it more difficult that adults to anticipate or appreciate the effect of their actions on others. The proposed new test will therefore disadvantage children more than adults, and means children may be convicted and sentenced to custody without having foreseen the effect of their actions, or put anyone at risk of harm.

Proposal G: Making it an offence to possess a corrosive substance in a public place

Proposal G would create a new offence of possessing a corrosive substance in a public place. This would be modelled on existing offences of possessing a blade in a public place, contained in s.139 of the Criminal Justice Act 1988 (the 1988 Act), and similar defences would apply. A second conviction would lead to a mandatory minimum custodial sentence of a four-month DTO for 16 and 17 year olds. It is not proposed that "corrosive substance" is defined in the offence, this is said to be to ensure the offence is "flexible enough to cover a range of possible situations: from someone possessing a corrosive substance in a public place that if used as weapon can leave life changing injuries; through to someone using a less harmful corrosive substance which if used as a weapon can still be very unpleasant to the victim but the effect is not lasting."

SCYJ understands the serious and justifiable concern around the recent spate of acid attacks. However, we believe the proposed legislation is unnecessary. If it is to be introduced, it needs significant amendments to satisfy the requirements of legal certainty and avoid unjust and unintended prosecutions.

As set out in the consultation document, possession of a corrosive substance can be prosecuted under section 1 of the Prevention of Crime Act 1953 (the 1953 Act), which can result in a custodial sentence, including a mandatory custodial sentence for a second offence. The 1953 Act provides that an offensive weapon is any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him or by some other person. Those found in possession of corrosive substances, where there is proven intent to cause injury, could clearly be prosecuted under this legislation. New legislation is therefore unnecessary.

The only rationale for new legislation is that, under the 1953 Act: "in order to prove the corrosive substance is an offensive weapon it must be shown that the person in possession of the substance intended to cause injury…The new proposed offence would put the onus on the person in possession of the corrosive substance …to show they had good reason for being in

possession of it." This is of great concern to SCYJ and, taken together with the fact that "corrosive substance" will not be defined, creates a very loose and ill-defined offence, and one that will lead to unjust prosecutions, convictions and custodial sentences.

People must reasonably be able to predict whether their actions breach the law – legal certainty is well-established principle. However, if the new legislation was passed in its proposed form, it would be entirely unclear what substances could be legally possessed in public. Corrosive substances include water and salt. Many household products contain low-levels of harmful corrosive substances, but at concentrations that do not cause any, or any serious or lasting, harm. At the very least, the new offence needs to specify that it covers corrosive substances that are harmful to humans, and at concentrations harmful to humans.

However, it is unrealistic to expect children to know whether the products they have bought in a shop are corrosive, or whether they are likely to cause injury. Yet this is the basis of Proposal G, despite the fact that Proposal F (which creates an offence to sell corrosive substances to under 18s), may include a list of corrosive substances. This creates a situation where children are expected to know that they can legally buy a substance which it is illegal for them to possess in public. This points to the need for prosecutors to have to prove intent to cause injury.

Whilst the general principle persists that ignorance of the law is no defence, it is deeply problematic for children to be expected to know that shops are not allowed to sell them materials that have hitherto been widely available and legal. If children are sold a substance covered by Proposal F (assuming all such products would be covered by provisions in Proposal G) without being asked their age, it is unreasonable to prosecute them on the basis of possession where there is no intent to cause harm.

The consultation proposes placing the onus on the child to prove they have good reason to be in possession of a substance, rather than on the defence to prove intent to cause harm. The child must therefore be able to explain why they are carrying a substance, even if there is no intention or suggested intention to cause harm. Proving such a defence may be difficult. For instance, how does a child prove they simply remembered to pick-up some toilet cleaner on the way home?

With no requirement on prosecutors to demonstrate intent to harm, children will be prosecuted for possession of ordinary household products where no harm was intended and could even be given a custodial sentence as a result. Given the problems outlined above, many such children may not even know that the substances in their possession had the potential to harm. In the more extreme scenarios, in the absence of a definition of "corrosive substances" in law, children could find themselves having to prove a good reason for possessing a non-harmful corrosive substance, and being charged and prosecuted if they cannot.

All in all, placing the onus on children to explain why they are in possession of a substance – particularly when combined with the lack of definition of corrosive substances – may lead to overcharging, prosecutions against people the legislation was never intended to target and who have no intention of causing harm, and mandatory custodial sentences for such people.

The impact on Black and Minority Ethnic (BAME) children must also be considered. Corrosive substances are likely to be discovered via stop and search. If this is the case, the proposals will disproportionately affect BAME children who are significantly more likely to be subject to stop and search (Home Office, 2017). The lack of clarity in the proposed law, the loose nature of the proposed offence, and the probable subsequent over-charging and misdirected prosecutions, are likely to damage relations between BAME children and the police, which can already be strained (Lammy, 2017)

As set out above, we believe existing provision in the 1953 Act are sufficient to deal with the very real problem of corrosive substance possession. New legislation is not required. However, if the

government chooses to introduce new legislation and number of changes must be made to Proposal G:

- Corrosive substance must be defined, in an annex, statutory order or similar;
- Prosecutors should be required to prove intent to cause harm.

The consultation document argues that it is the intention of the new legislation to cover a broad range of substances. If this is the case the mandatory sentence will be disproportionate in many cases. As set out above, SCYJ opposes mandatory custodial sentences for children, which remove judicial discretion and are ineffective. Even if we ignore the fact that a mandatory sentence could be imposed for possession of non-harmful substances (or where there was no intention to cause harm), we are concerned that the proposals introduce a mandatory sentence for possession of a substance that, if used, would be "very unpleasant" but have no lasting effect. This is disproportionate.

Because of the problems with mandatory custodial sentences, SCYJ would like to see children removed from the mandatory minimum custodial sentence for a second possession offence. If the mandatory minimum sentence is to apply to children, it should only apply to those substances capable of causing lasting harm. In addition, the following amendments should be made to ensure the new offence is in-keeping with knife-possession offences:

- The proposed legislation should clarify that the mandatory sentence only applies to those who were 16 and 17 year old when the offence was **committed** (in-keeping with section 139 (6A)c)) of the 1988 Act). Currently, the consultation document implies that the mandatory sentence applies to those aged 16 and over on the date of conviction;
- The legislation must require the court to have regard to the welfare of the child when deciding whether to impose the minimum mandatory sentence (as per section 139 (6D) of the 1988 Act).

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

References

Centre for Social Justice, 2012, "Rules of Engagement Changing the heart of youth justice", accessed 29 November 2017 at: https://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJ_Youth_Justice_Full_Report.pdf

Home Office, 2017, "Police Powers and Procedures, England and Wales, year ending 31 March 2017", accessed 16 November 2017 at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/658099/police-powers-procedures-mar17-hosb2017.pdf

HM Inspector of Prisons, 2017, "HM Chief Inspector of Prisons for England and Wales Annual Report 2016 –17", accessed 04 December 2017 at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/629719/hmip-annual-report-2016-17.pdf

HM Inspectorate of Probation, 2017, "The Work of Youth Offending Teams to Protect the Public", accessed 16 November 2017 at: https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2017/10/The-Work-of-Youth-Offending-Teams-to-Protect-the-Public_reportfinal.pdf

Lammy, D., 2017, "The Lammy Review – An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System", accessed 16 November 2017 at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf

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, 2007, pp315-45

Ministry of Justice, 2012, "2012 compendium of reoffending statistics and analysis", London: Ministry of Justice

Ministry of Justice, 2017, "Youth Justice Annual Statistics 2015/16, England and Wales", accessed 16 November 2017 at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585897/youth-justice-statistics-2015-2016.pdf

National Association of Youth Justice, 2017, "The State of Youth Justice 2017: An Overview of Trends and Developments", accessed 1 November 2017 at: http://thenayj.org.uk/wp-content/uploads/2017/09/State-of-Youth-Justice-report-for-web-Sep17.pdf

Sentencing Council, 2017, "Sentencing Children and Young People Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery Definitive Guideline", accessed 29 November 2017 at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf