Standing Committee for Youth Justice

Offensive Weapons Bill (2017-19)
Standing Committee for Youth Justice Briefing - December 2018

Summary

The Standing Committee for Youth Justice (SCYJ) is an alliance of 50 not-for-profit organisations campaigning for improvements to the youth justice system in England and Wales. The Offensive Weapons Bill creates a number of new laws around the possession and intended use of knives and corrosive substances. This briefing sets out our views on these proposals, as they affect children (those under the age of 18).

SCYJ understands that violent crime is a serious problem and that violent behaviour needs to be prevented and stopped. However:

- The measures will increase the use of ineffective mandatory minimum custodial sentences for children;
- Children carry weapons for a multitude of reasons, and criminal justice measures are unlikely to be effective in tackling this;
- The measures create legal uncertainty and may lead to disproportionate sentences and a consequent lack of trust in the justice system.

There are numerous and complex reasons why children carry knives.[i] For interventions to be successful they ought to be evidence-based and take this context into account. Creating new offences and sanctions and increasing the number of children in custody is not going to persuade them to stop. Custody should be reserved for the most severe offences, where it is required for public protection. Educating children and funding wider preventative work in the community will have a greater impact on reducing serious violence. Many children who carry knives have been victims of violence, and interventions to reduce weapon carrying must take account of and treat this trauma to be effective.

We are calling for children to be removed from minimum custodial sentencing legislation; for clarity around definitions in the Bill; and for conviction thresholds for children to remain the same until there is sufficient evidence that lowering them will be effective at tackling violent crime.

Mandatory custodial sentences

The law currently mandates minimum custodial sentences of 4-month detention and training orders (DTOs) for 16-and-17-year-olds who are convicted of: two or more knife or offensive weapon possession offences; or of threatening a person in public with a knife or offensive weapon.

The Offensive Weapons Bill will increase the use of mandatory minimum custodial sentences for children, by:

- creating an ill-defined offence for possession of a corrosive substance in a public place (Clause 6) and a minimum custodial sentence for two possession offences (Clause 8);
- extending the prohibition on possession of a bladed article or offensive weapon in a school to further education premises (Clause 23);
- lowering the conviction threshold for the offence of threatening a person in public (Clause 28).

We continue to oppose mandatory custodial sentences for children because:

- **There is no evidence that the threat of custody deters children;**
- **Custody is not rehabilitative, and is harmful to children;**
- **Mandatory sentences remove judicial discretion.**

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Custody as a deterrent

A principal argument made for mandatory minimum custodial sentences is that harsher punishments will deter children from committing crime. For this to be true, the child must know what the punishment for the crime is, and then make a rational choice (acting in their own best interest) whether or not to offend. Deterrence theory does not hold true for most people in trouble with the law, and especially so for children: not only is awareness of sentencing amongst children very low,[ii] there are many children in trouble with the law who we would not expect to make rational choices.[iii] This is particularly true when children are carrying weapons believing it is for self-protection, especially if they perceive other forms of protection like the police as unavailable to them. In these cases, carrying a knife may be seen as the rational choice.

Research on deterrence consistently supports this. Studies find no evidence that sentence severity deters crime, while the certainty of getting caught can have an effect (von Hirsch, Bottoms, Burney, and Wikstrom 1999). A recent evidence review concluded that "lengthy prison sentences and mandatory minimum sentencing cannot be justified on grounds of deterrence." (Nagin 2013). Statistics on knife crime offences also show no evidence of deterrence. Since the introduction of mandatory minimum custodial sentencing for weapon possession offences in 2015, numbers of children convicted of possession or threatening offences involving knives or offensive weapons have risen (MoJ 2018b).

Custody for public protection

Another argument often put forward for sentencing children to custody is that locking up those carrying out crimes will reduce the level of crime on the streets. Home Office research found that a 15% increase in the use of custody would be required to see a 1% decrease in crime. These are figures for the general population, and as children in trouble with the law tend to be a more transient group (evidence shows that children go through 'phases' of offending which they then grow out of (Farrington 1986)), it is likely that an even larger increase in child custody numbers would be required to see any substantial impact on levels of crime.

The ineffectiveness of custodial sentences

The principal aim of the youth justice system is, according to UK law, to prevent offending by children. Yet there is plenty of evidence that custody is not rehabilitative. Reoffending rates for children leaving custody are persistently high: last year over 68% of children who left custody reoffended within 1 year, while the figure for those receiving Youth Community Penalties was 58% (YJB 2018). This higher post-custody reoffending rate holds even when one factors in the more serious and persistent offending of those sentenced to custody.[iv]

There is a growing body of evidence that diverting children away from the formal youth justice system is more effective at reducing offending than any punitive responses.[v] In fact, the evidence indicates that custody is in itself criminogenic (McAra and McVie, 2007). This is hardly surprising given the poor state of youth custody;[vi] lack of education provision and trauma-informed care; and the disruption that a custodial sentence brings through "lost accommodation, interrupted education, emotional distress and loss through separation from friends and family" (HMI Probation 2015). Custodial sentences harm children while failing in terms of youth crime prevention and community safety, all at a high cost to the taxpayer.[vii] Research makes the case for the replacement of child custody in favour of restorative justice and rehabilitative community sentences.

The removal of judicial discretion

The UN Convention on the Rights of the Child states that custody should be a last resort, yet mandatory sentences remove judicial discretion, and the ability of courts to ensure that the penalty best fits the circumstance of the offence. Sentencing Council guidelines acknowledge the need to look closely at children's particular circumstances when sentencing, considering the background, circumstances and vulnerability of the child, and developmental age as well as chronological age. There is an emphasis on avoiding unnecessary criminalisation and promoting reintegration. By removing judicial discretion, the proposals work against the Sentencing Council's guidance.

Lowering the conviction threshold for threatening with a knife or offensive weapon

Currently, to convict someone of threatening with a bladed article or offensive weapon in public, there must be "an immediate risk of serious physical harm to that other person". Clause 28 of the Offensive Weapons Bill would amend this such that the offence is committed if "a reasonable person" who was exposed to the same threat would "think that there was an immediate risk of physical harm".

This greatly lowers the threshold for conviction, not only by removing the objective test that a person is actually present and at actual immediate risk of harm, but also by reducing the risk from that of "serious physical harm" to just "physical harm". The use of a "reasonable person" test imports greater complexity into the law unnecessarily. The more complicated test will be open to wide interpretation, and it is likely many more cases will be prosecuted under the amended offence.

Given the severe penalty associated with a conviction, we do not believe the change is justified:

- "Reasonable fears" can be very broad and depend on individuals' perceptions, which are very difficult to argue against conclusively. The new offence creates a dragnet – under one interpretation of the "reasonable person" test, possession of an offensive weapon in a public place would give rise to the conclusion that there was immediate risk of physical harm;
- Courts can already impose custodial sentences for possession offences. Most of the cases that will be prosecuted under the amended clause 28 could be prosecuted under existing legislation;
- Children find it more difficult than adults to gauge the consequences of their actions and to judge the intentions of others (Steinberg et al, 2009, cited in Centre for Social Justice 2012);
- The system may be ripe for abuse by members of rival gangs or others wanting revenge.

The current test of objective risk is sufficient and the best way to achieve legal certainty. We are concerned that the clause was agreed on in the Bill's House of Commons stages without any justification or discussion of the lower threshold of "physical harm", and **we seek clarification as to what the prosecuting definition of "physical harm" will be, and how this differs from the current offence.** As it stands, the offence could see children sent to custody without having foreseen the effect of their actions, or put anyone at risk of serious harm.

Possession of corrosive substances

Clause 6 creates a new offence of possessing a corrosive substance in a public place. Clause 8 creates a mandatory minimum custodial sentence for two or more possession offences for 16-and-17-year-olds. SCYJ understands the serious, justifiable concern around recent acid attacks. However:

- **New legislation is unnecessary**. Currently, someone found in possession of corrosive substances, where there is intent to cause injury, could clearly be prosecuted under existing offensive weapons legislation (section 1 Prevention of Crime Act 1953);
- **Corrosive substance must be clearly defined, in an annex, statutory order, etc.**
- **Prosecutors should be required to prove intent to cause harm.**
- **Children should be removed from the requirement to impose mandatory minimum custodial sentences for a second relevant offence.**

The new offence puts the onus on the child to show they have good reason for carrying the corrosive substance, rather than there being proven intent to cause injury. Proving such a defence may be difficult. This is of great concern to SCYJ and, taken together with the fact that "corrosive substance" has not been clearly defined, creates a very loose and ill-defined offence, that fails to satisfy requirements of legal certainty and will lead to unjust prosecutions and custodial sentences.

A "corrosive substance" is defined by the clause only as a substance "capable of burning human skin by corrosion". Many household products contain low levels of harmful corrosive substances, and the clause does not specify that the substance must be of a certain concentration or capable of causing lasting harm. People must reasonably be able to predict whether their actions breach the law, but as the Bill currently stands, it is unclear what substances could be legally possessed in public. As well as this, as clause 1 on the sale of corrosive substances provides a different definition, the Bill creates a situation where a child could legally buy a product from a shop without realising it is illegal for them to possess it in public. With no requirement on prosecutors to demonstrate intent to harm, children could be prosecuted for possession of ordinary household products where no harm was ever intended.

Impact on Black and Minority Ethnic (BAME) children

The impact of the Bill on Black and Minority Ethnic (BAME) children cannot be ignored. Corrosive substances, along with knives and other offensive weapons, are likely to be discovered via stop and search. BAME children are significantly more likely to be stopped and searched (Home Office 2017), and therefore more likely to be prosecuted and mandatorily imprisoned for possession, whether or not they are more likely than their White counterparts to be carrying a weapon. Almost half of the children currently in custody are from BAME backgrounds, and the government should be taking steps to reduce this rather than creating punitive legislation, accompanied by expanded stop and search powers (clauses 10), that is likely to exacerbate the issue.

As well as this, the lack of clarity in the proposed laws (clauses 6 and 28), the loose nature of the offences, and the probable over-charging and misdirected prosecutions this will cause, are likely to damage already strained relations between BAME children and the police (Lammy 2017). The overall lack of legal certainty is likely to decrease trust in the justice system.

Progress of the Bill

The Bill started in the House of Commons, completing its progression there on 28th November 2018. The Bill entered the House of Lords on 29th November, and now awaits its second reading on Monday 7th January 2019.

We are disappointed that following the Bill's progress through the House of Commons children remain in proposals around mandatory minimum custodial sentencing, despite members of the Public Bill Committee raising our concerns. We are disappointed that the definition of corrosive substance remains ambiguous, and that a number of amendments tabled by Sir Ed Davey that we supported were not called, including:

- **Amendment 14** would have made it an offence to have a corrosive substance in a public place only with the intent to cause injury to someone.
- **Amendments 15 & 16** would have removed mandatory custodial sentences for people convicted under the new offence in Clause 6 who have at least one previous relevant offence.
- **Amendments 17, 18 & 19** would have retained the current definition of risk for offences of threatening with an offensive weapon.

We are concerned that the focus of the Home Office seems to be on creating and pushing through punitive legislation that has damaging implications for children without consideration of the evidence base, or lack thereof, for the effectiveness of these measures in reducing violent crime.

This is particularly true in the case of the 'knife prevention Asbo' that has apparently been proposed by Home Secretary Sajid Javid. We are concerned about the proposal, which would create a knife prevention order that could be imposed on children much like an injunction against anti-social behaviour. Children could be detained in a custodial institution for a breach of the order, even if they had not committed a criminal offence. Justice Secretary David Gauke is said to have opposed the original proposal due to a lack of evidence that such orders are effective in preventing crime, and we echo his concerns. **We expect the proposal to be added to the Offensive Weapons Bill as an amendment, and urge Peers to oppose.**

Next steps

We urge Peers to attend the second reading of the Bill on 7th January, and speak out in favour of evidence-based responses to dealing with serious youth violence. If you would like to meet or talk to one of the SCYJ team before the debate, please don't hesitate to get in touch.

Lord Ramsbotham will also be hosting a briefing meeting for Peers ahead of Committee Stage. If you are interested in attending to learn more about the Bill, you can reach our Programmes Manager, Millie Harris, on millie.harris@scyj.org.uk, or 07481855127.

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

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SCYJ's evidence submission to the Offensive Weapons Bill Public Bill Committee is available here.

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[i] See for example Palasinski and Riggs (2012)

[ii] See for example Redthread oral evidence to the Home Affairs select committee serious violence inquiry available here: http://bit.ly/2NZBc9H. A study by Miranda Bevan (2016), that aimed to shed more light on this perception by holding focus groups of young people, concluded that "the majority of young people had substantial deficits in their knowledge of the criminal justice system." Their low level of awareness raised concerns that "the majority of the participants appear to be ill-equipped to make reasoned judgements around certain offending".

[iii] Many children involved in the justice system have mental health and learning difficulties (Carlile 2014), or problems with drug and alcohol abuse. Children have "limited capacity to determine the consequences of their decisions, and are "both more suggestible ('the tendency to change one's mind as a result of pressure or suggestion from others') and compliant ('the tendency to go along with others' propositions or instructions without internal agreement')" (Farmer E, Gudjonsson G H, cited in Centre for Social Justice, 2012). The National Institute of Mental Health has found changes in adolescent brains that alter behaviour, with studies (Blakemore & Choudhury 2006) suggesting that adolescent frontal lobes experience excess production of grey matter. As the frontal lobe is associated with rational thinking, this change impacts on decision making, organisation, self-control, emotional and impulse regulation, and risk-taking behaviours.

[iv] From NAYJ's the State of Youth Justice (2017): "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" (MoJ 2012, cited in NAYJ 2017: 56). More recent MoJ analysis again finds that, for similar cases, community sentences have lower rates of reoffending than short-term custodial sentences, and this effect is stronger for younger defendants (18-to-20-year-olds, as the analysis looks only at adults) (MoJ 2018a).

[v] See for example Wilson, Brennan, and Olaghere (2018); and Lesley McAra's essay in NAYJ's "Child-friendly Youth Justice?" compendium of papers (2018).

[vi] In 2017 the HM Chief Inspector of Prisons found not a single dedicated child custody institution to be safe to hold children (HMI Prisons 2017). While there have been steps taken to improve conditions since then, and the most recent inspection reports do recognise some positive developments, outcomes in terms of safety, resettlement, respect and purposeful activity largely remain unchanged or declining (HMI Prisons 2018), levels of violence are still increasing, and the conditions in which children are held remains unacceptable by international human rights standards. See also Willow (2015)

[vii] See for example Gavin (2014), Goldson (2005), and Gooch (2016)