

Locking up or giving up?

Why custody thresholds for
teenagers aged 12, 13 and
14 need to be raised

An analysis of the cases of 214
children sentenced to custody
in England in 2007-08

**Believe in
children**



Barnardo's

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Acknowledgements

Barnardo's would like to thank the members of staff in the 61 youth offending teams (YOTs) across England who took the time out of their busy schedules to provide us with the data that is presented here. We are grateful for their continued support. And we acknowledge the work of all YOT workers, overwhelmingly dedicated to protecting the public while trying, sometimes against heavy odds, to change the lives of troubled children.

Throughout this report, where we talk about *young teenagers* or *young children*, we are referring to those aged just 12, 13 and 14, the majority of whom will serve their custodial sentences in secure training centres and local authority secure children's homes.

Foreword



Last year, Barnardo's publicised the widely-held perceptions of a significant proportion of the British public about children.

We pointed out with some alarm that many people believed children (not just a minority of children) were out of control, and considered that it was fair to routinely describe them as *feral*.

Many people believe that there are a significant number of dangerous children rampaging through our streets, responsible for more crime than ever before. Those who believe that to be the case will not be alarmed at the fact that in 2007 (the last year for which data is available) we incarcerated 513 children aged 14 and younger¹.

The Government does not do this casually. It has consistently made clear that it considers custody should be used by the courts as a last resort. And the Justice Secretary has asserted that children as young as 12, 13 and 14 should only ever be incarcerated where it is the only way to protect the public.

It is sometimes assumed that because we are a children's charity our

ambitions are much greater than that. But, in fact, Barnardo's does not share the widely-held view that there are no circumstances in which children as young as 12, 13 and 14 should be sent to custody. But we do believe that they should only be incarcerated when – as the law requires – their offending has been grave or both serious and persistent.

So were the 513 teenagers of this age whom we incarcerated in 2007 all guilty of grave offences or of serious and persistent offending? Were they all violent? Did they pose an unmanageable risk to the public? In fact, as this study shows, a significant number were neither violent nor dangerous. Many of them were found guilty of non-violent offences and some were guilty only of summary offences, the least serious on the statute book and those which, in the case of adults, are rarely punished by imprisonment².

Remarkably, of these 513 children, aged 12, 13 and 14, it would have been illegal to incarcerate 465 of them until 1998. Can anyone really believe we need to lock so many of them away now?

Martin Narey
Chief Executive, Barnardo's

1 Ministry of Justice (2008) *Criminal statistics England and Wales 2007*. Ministry of Justice, London. November, 2008.

2 1.8% of adults (21 years and older) convicted of summary offences were sentenced to custody in 2007. From Ministry of Justice (2008) *Sentencing statistics 2007*. Ministry of Justice, London. November, 2008.

1. Summary and key findings

1.1 Of the 513 children aged 14 and under sentenced to custody between 1 January and 31 December 2008³, 48 were sentenced for grave crimes or given extended sentences for serious offending. Barnardo's recognises that custody for such crimes, however regrettable, is necessary. The remaining 465 children sentenced to custody had not committed grave crimes or been given extended sentences for serious offending. This report examines the Asset⁴ profile data collected by YOTs for 214 – or 46 per cent – of those 465 children⁵.

1.2 The law requires that a Detention and Training Order (DTO) should only be given to a child as young as 12, 13 or 14 if the court decides that only a custodial sentence reflects the **seriousness** of the offence, **and** the young child is a **persistent offender**.

1.3 Barnardo's believes that the findings from this research show that Parliament's clear intention of making custody for such young children genuinely a last resort is not reflected in sentencing practice. Our research shows that:

- **Twenty two per cent of the children received their custodial sentence for breach of a community intervention – such as an ASBO, a supervision order or a curfew.**
- Using the Government's (the Youth Justice Board's) own classification

of 'seriousness', **28 per cent of the children in our sample had not committed a serious or violent index offence**, and other offences sentenced at the same time were also not serious or violent.

- Using the Government's procedural definition of 'persistency' (used for the court process, set originally by the Home Office and now under the auspices of the Office for Criminal Justice reform)⁶ **9 per cent of the children in our sample were not persistent offenders.**
- **Thirty five per cent of the sample did not appear to meet the custody thresholds** defined in the Powers of Criminal Courts (Sentencing) Act 2000. These state that a DTO should only be given to a child aged 12-14 if the court decides that only a custodial sentence reflects the seriousness of the offence, **and** he or she is a persistent offender.
- Moreover, examination of the life circumstances of the children in our sample showed that just under **half had experienced some form of abuse; 22 per cent were living in care; 16 per cent had special educational needs; and 8 per cent had attempted suicide at some point in their young lives.**

1.4 Barnardo's argues that these findings indicate an urgent need to re-examine how we deal with young teenagers in the criminal justice system.

³ Ministry of Justice (2008) *Criminal statistics England and Wales 2007*. Ministry of Justice, London. November, 2008.

⁴ See paragraph 4.1 for explanation of the Asset tool.

⁵ The timescale that we used relates to YOT reporting deadlines for The Youth Justice Board (YJB), and is therefore slightly different to that used by the Ministry of Justice when collating national custodial figures.

⁶ Convicted of an offence on three or more occasions, prior to this offence.

Key recommendations

We are recommending:

1. A change in sentencing thresholds in England and Wales so that a child aged 14 and under cannot be considered for custody unless:
 - they have been convicted of a 'grave crime'

or

 - they have been convicted of a serious or violent offence

and

 - they are deemed to be a persistent offender, based on new and more stringent criteria (see recommendation 2)

or

 - in exceptional circumstances, they have been convicted of lesser offences but with an extreme degree of persistency.
2. **That the Government should urgently review the current varied definitions of persistency** with a view to setting stringent criteria for the definition, for example, something akin to those which governed the Secure Training Order (which was in statute between 1994 and 2000)⁷.
3. **That breach of a community-based sentence should never result in a custodial sentence** for a child aged 14 or under, unless the original offence was serious or violent, or the breach was accompanied by a conviction for another serious or violent offence.
4. That there should be a **requirement in National Standards for YOTs – based on the needs and circumstances of the individual child** – actively to support the child in complying with the conditions of a community order, with evidence of this presented to the court where breach proceedings are instituted.
5. Children in the criminal justice system will very often have experienced abuse, neglect and disadvantage. We would like to see **guidance instructing courts to seek further information** when the pre-sentence report (PSR) indicates such experiences but provides insufficient information about the circumstances.
6. **That the Government should take the steps necessary to implement Part 3, Section 34 of the Offender Management Act 2007** which allows children serving a DTO to be placed elsewhere than in the secure estate.

⁷ The criteria for an STO was that children aged 12, 13 and 14 had to have committed at least three imprisonable offences and breached the conditions of a supervision order or committed another imprisonable offence whilst on supervision. In relation to STOs, 'imprisonable offence' means an offence (not being one for which the sentence is fixed by law) which is punishable with imprisonment in the case of a person aged 21 or over.

2. Background

2.1 At any one time there are around 2,700 children aged from 10 to 17, held in custody in England and Wales.

2.2 Overall, in the last 10 years there has been a welcome reduction in the numbers of 10 to 17-year-olds sentenced to custody; from 7,083 in 1997 to 5,830 in 2007. However, despite this decline in overall numbers, there has been a dramatic 483 per cent **increase in the use of custody for children aged 10 to 14**; from 130 in 1997 to 513 in 2007⁸ despite offending rates by all children remaining steady⁹.

2.3 In our previous report *Locking up or giving up: is custody for children always the right answer?* (2008)¹⁰ we highlighted that the use of custody for younger children who had committed summary offences, burglary and breach of community sentences had increased significantly since 1996, with a steep rise when DTOs were introduced in 2000.

2.4 *Locking up or giving up* also gave a voice to some of the children serving DTOs in England. Their testimonies revealed experiences of poverty, violence, abuse and exclusion from school. Their stories highlighted the failure to provide early support, and presented clear evidence of the

damaging effects of being written off by the system at such a young age.

2.5 We argued that the use of custody is failing these children – it is expensive (£164,750 per place in a secure training centre (STC)¹¹ and £415 million spent on the whole secure estate for children each year¹²); ineffective (almost 80 per cent of 10 to 14-year-olds reoffended within 12 months of release¹³) and often fails to provide the intensive rehabilitation needed by the few serious offenders.

2.6 Ofsted Inspection reports for 2008 note that there are 307¹⁴ places in STCs in England and Wales, and increasingly younger children are being placed in these units rather than the smaller local authority secure children's homes. When the STCs were first introduced in 1998, they were designed, in part, to take vulnerable 15 and 16-year-olds out of prison service establishments and provide places for the small number of younger children sentenced to a secure training order (STO). The huge rise in the use of custody for the younger age group does not seem to have been anticipated and has resulted in STC places being used for the 12, 13 and 14-year-olds. Vulnerable older children have to stay in Young Offender Institutions (YOI), sometimes with tragic consequences.

8 Ministry of Justice (2008) *Criminal statistics England and Wales 2007*. Ministry of Justice, London, November, 2008.

9 Home Office (2008) *Young people and crime: Findings from the offending, crime and justice survey 2006*. Home Office, London.

10 Barnardo's (2008) *Locking up or giving up: is custody for children always the right answer?* Barnardo's, Barking.

11 National Audit Office (2004) *Youth offending: The delivery of community and custodial sentences*. National Audit Office, London, p.27.

12 Solomon, E and Garside, R (2008). *Ten years of Labour's youth justice reforms: an independent audit*. Centre for Crime and Justice Studies, London.

13 Methurt, C and Cuncliffe, J (2007) *Reoffending of juveniles: results from the 2005 cohort*. Ministry of Justice, London, 2007.

14 www.ofsted.gov.uk/Ofsted-home/Publications-and-research/Browse-all-by/Documents-by-type/Thematic-reports/Secure-training-centre-inspection-reports accessed 24.06.09.

2.7 Locking up or giving up called for a change in sentencing thresholds so that 12 to 14-year-old children are only locked up for serious, violent offences – and for a redirection of funding to provide more preventative services for young people at risk.

This report looks more closely at the characteristics of the young

children we incarcerate and at their criminality. The conclusions are clear. The children we incarcerate are often challenging, but for many of them custody might have been avoided. Not only would this have more positive outcomes for the children themselves but, we believe, it would also reduce the risk of future offending – better protecting future victims.



3. Current policy

3.1 The Government maintains that custody should be reserved for the most serious and violent and persistent offenders. The YJB secure estate strategy¹⁵ states that, ‘custody (for children) should be used particularly sparingly, because of their dependent, developing and vulnerable status’. Furthermore the Government’s Youth crime action plan (YCAP) published in July 2008¹⁶ and the new draft guidance on sentencing for youths¹⁷ both reiterate a belief in custody as a ‘last resort’ for young offenders. In November 2008, in a report of an interview with Jack Straw for *The House Magazine*, the editor said:

‘Straw’s tough Home Secretary persona is also notably absent when he talks about youth justice. Custody for children and young people “is always a last resort” he says. And while he stresses that sentencing is a matter for the courts, he argues that children are only sent to jail “if they’ve committed grave offences – murders or rapes or offences like that, when there is no option but to give them custody”¹⁸.’

Barnardo’s agrees that for children who commit these very serious offences, custody is inevitable. But in 2007, only 48 of the 513 young children we sent to custody had committed a grave offence or were given extended sentences for serious offences.

3.2 Of the 465 other young children sentenced to custody, 85 were incarcerated for summary offences¹⁹ – defined as the least serious offences²⁰. There are also regional inconsistencies in sentencing; in 2007-08, the ratio of custodial disposals to community disposals on this age group ranged from one custodial disposal for every 20 community disposals in the North East, to one for every nine community disposals in the East Midlands and Yorkshire²¹. Seventeen authorities had no children of this age sentenced to a DTO despite no significant variations in the nature of youth crime in those areas compared to those who found it necessary to incarcerate. Clearly, the picture is complex, but, custody is not being used as a ‘last resort’ in many parts of England and Wales.



15 Youth Justice Board (2005) *Strategy for the secure estate for children and young people – Plans for 2005-06 to 2007-08*. YJB, London. p.8

16 Home Office (2008) *Youth crime action plan*. Home Office, London.

17 Sentencing Guidelines Council (2009) *Overarching principles – sentencing youths*. Sentencing Guidelines Council, London.

18 The House that Jack Builds? *The House Magazine*, Parliamentary Monitor, cover article, issue 164, 3 November 2008. Available online: www.housemag.co.uk/index.php?id=341&tx_ttnews%5Btt_news%5D=8612&tx_ttnews%5BbackPid%5D=92&type=editorial

19 Derived from Ministry of Justice (2008) *Criminal statistics England and Wales 2007*. Ministry of Justice, London.

20 Summary offences are defined as: ‘The least serious offences... for example driving offences, drunk and disorderly, common assault and criminal damage’. Her Majesty’s Courts Service (2005) *Criminal jurisdiction in the Magistrates Courts*. Her Majesty’s Courts Service, London.

21 Youth Justice Board (2009) *Annual workload data: Disposals, regionally*. Youth Justice Board, London. www.yjb.gov.uk/NR/rdonlyres/49FF8931-8FDE-40C7-B783-6EE2FF7F8E34/0/Disposalsregionally200708.xls

4. The research

4.1 The Asset is a structured assessment tool used by YOTs in England and Wales with all young people who come into contact with the criminal justice system. It aims to look at the young person's offence or offences and identify the factors – ranging from lack of educational attainment to mental health problems – which may have contributed to their offending behaviour. It is designed to enable YOT workers to plan interventions to reduce reoffending.

Method

All 157 YOTs in England and Wales were asked to contribute to the research with data from the Asset core profiles of 12 to 14-year-olds given DTOs in 2007-08. This is what is known as an opportunistic sample, but to minimise selection bias by local authority, each YOT was contacted up to three times to encourage participation and the researchers offered to do on-site visits to collect the data themselves if required. To prevent case selection bias, each participating YOT submitted data for all their 12 to 14-year-olds sentenced to DTOs in the relevant year.

Sixty-one YOTs (39 per cent), from urban and rural areas and representing both unitary and shire authorities across England, responded. Just over half of the YOTs were in authorities where both crime rates and first time

entry rates to the criminal justice system were above the national average, and over two-thirds had higher than average deprivation indices.

In total, 45 YOTs supplied data about the Asset core profiles of 214 young people. The remaining 16 YOTs that responded had no children of this age group sentenced to DTOs in this period. (In total, 17 YOTs in England and Wales had no DTOs on this age group.)

Altogether the dataset represented 46 per cent of the 465 DTOs given to 12 to 14-year-old young people in 2007-08 and as such is statistically representative of the 12 to 14-year-old incarcerated population. For ease of presentation, percentages in this report are rounded to the nearest whole number which means that they do not always add to exactly 100 per cent.

Barnardo's interrogated the data to look at:

- the index offence for which the child received the custodial sentence
- any other offences that were sentenced at the same time as the index offence
- the nature and number of previous offences
- pre-court and court disposals
- the information provided in the Asset core data in relation to family, education and health (including mental health).

4.2 The Asset core profiles of 214 children aged 12 to 14 and sentenced to DTOs²² in England in 2007-08 were analysed²³. This represents 46 per cent of the total number of young people of this age sentenced to a DTO. The sample deliberately did not include children sentenced under Section 90-91 of the Powers of Criminal Courts (Sentencing) Act) which allows children who have committed very serious offences – those which in the case of an adult would carry a custodial sentence of 14 years or more – to be sentenced by the Crown Court. Nor does this research include those children in this age group who were detained for public protection or given extended sentences.

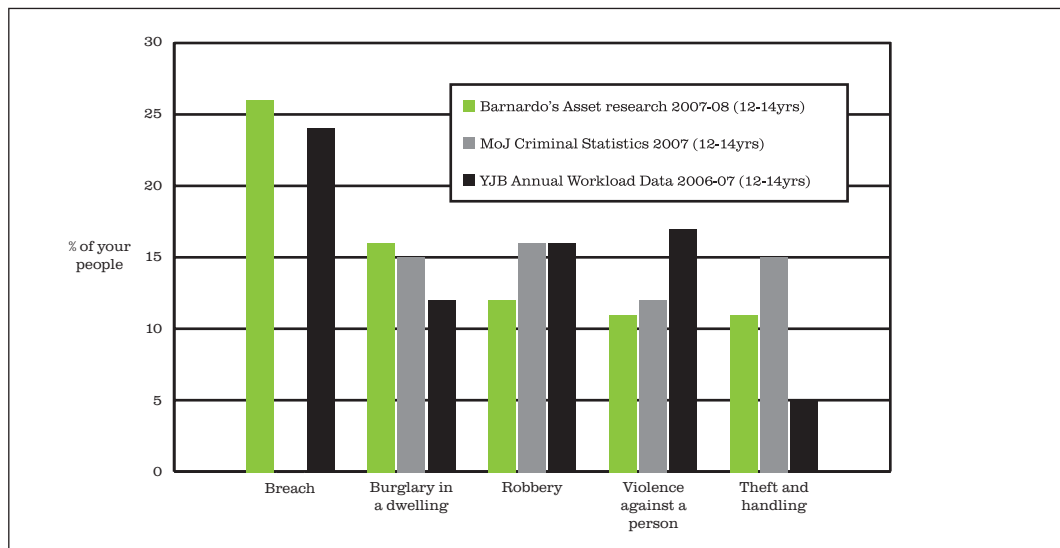
4.3 The most common offences for which our sample of young children

received DTOs were:

- breach of a community intervention (22 per cent)²⁴;
- burglary in a dwelling (16 per cent); and
- robbery (12 per cent)²⁵.

Other offences included handling stolen goods, possession of an offensive weapon, theft and criminal damage. These findings broadly mirror national Government data²⁶ where burglary in a dwelling accounts for 15 per cent and robbery for 16 per cent of all young people sentenced to a DTO in this age group. Government breach data for 12 to 14-year-olds is unavailable, but we know that sentencing for breach of a previous order accounts for 24 per cent of all DTOs on under 18s²⁷.

Chart 1: The most common offences resulting in DTO



22 The DTO sentences a young person (aged 12 to 17) to custody. The length of the sentence can be between four months and two years and the first half of the sentence is spent in custody while the second half is spent in the community under the supervision of the youth offending team (YOT). DTOs were introduced under the powers of the Powers of Criminal Courts (Sentencing) Act in April 2000. They replaced the Secure Training Order and introduced a single criterion for the use of custody – that in the court's opinion the child is a 'persistent' offender.

23 YOTs in Wales were invited to participate but no responses were received.

24 Of these 32 per cent (68 children); six had breached an ASBO, 42 per cent had breached a community order such as a supervision order or curfew, and 20 per cent had breached a previous DTO.

25 Offences were recorded in some detail in our dataset and were therefore classified into the YJB definitions for ease of analysis.

26 Ministry of Justice (2008) *Criminal statistics England and Wales 2007*. Ministry of Justice, London.

27 Youth Justice Board (2009) *Annual workload data 2007-08*. YJB, London.

5. Analysis of our sample according to sentencing thresholds

5.1 The Powers of Criminal Courts (Sentencing) Act 2000²⁸ states that a DTO should only be given to 12 to 14-year-olds if the court decides that only a custodial sentence reflects the **seriousness** of the offence; and he or she is a **persistent offender**.

5.2 The law in England and Wales requires a court to determine **seriousness** of an offence by assessing harm caused (or foreseeable) and the culpability of the offender, taking into account aggravating and mitigating factors relating to the offence²⁹. For the purposes of assessing ‘seriousness’ in the most objective way possible in this report, we have relied on the YJB definition of seriousness. The YJB classify offences from one (least serious) to eight³⁰. Throughout this report we therefore refer to ‘serious or violent’ offences as all those scoring five to eight (inclusive) on the YJB scale, plus any offences with lower scores that involve any violence against a person³¹.

5.3 A ‘persistent offender’ is even more difficult to define. There is no **legislative definition**; and the case law relies on subjective interpretation by the court (see 5.7 for more detail). Therefore, for the purposes of this

report, we have relied on the only definition that has clearly defined boundaries – the *procedural* definition. This is used for the court process, was set originally by the Home Office and is now under the auspices of the Office for Criminal Justice Reform. It defines a **persistent offender** as, ‘a young person aged 10 to 17 who has been sentenced by any criminal court in the UK on three or more separate occasions for one or more recordable offences and within three years of the last sentencing occasion is subsequently arrested or has information laid against them for a further recordable offence’³².

5.4 We examined the index offences and offending histories of our sample of children in light of the Powers of Criminal Courts (Sentencing) Act 2000 (that a DTO should only be given to a 12 to 14-year-old if the court decides that only a custodial sentence reflects the seriousness of the offence; **and** he or she is a persistent offender). The results are shown in Figure 1 and summarised below.

- Based on one of the Government’s own measures of seriousness (the YJB definition), we found that **28 per cent of our sample had not committed serious or violent index offences** and other offences

²⁸ Chapter 6. Sec. 100(1) and 100(2)

²⁹ Criminal Justice Act 2003. Chapter 1, Sec. 143(1)

³⁰ Youth Justice Board (2009) *Data recording guidance 2009-10*. Youth Justice Board, London. The seriousness scores are derived from analysis of the sentencing pattern for each offence, with offences receiving predominantly custodial sentences scoring seven or eight, while offences receiving first-tier penalties most often scoring one or two.

³¹ The following are scored as ‘four’ on the YJB scale but have been included in our ‘serious or violent offences’ category because they are categorised as violent crimes; actual bodily harm, common assault, unspecified violence against a person.

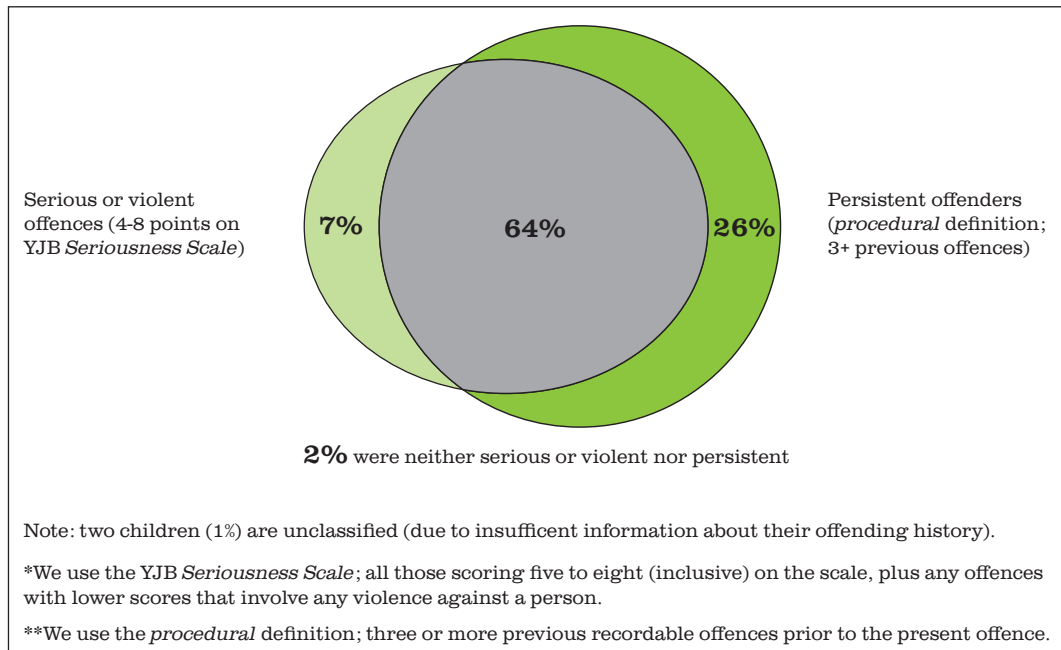
³² *Tackling delays in the youth justice system*; issued 15 October 1997. See www.justice.gov.uk/docs/pyo-jul-sept08.pdf

sentenced at the same time were also not serious or violent.

- Their index offences – for which they received the DTO – included breach of a statutory order (28 children), theft (seven children), breach of ASBO (five children), theft of a motor vehicle (four children) and handling stolen goods (three children).
- Using the procedural definition of persistency, we found that **9 per cent of our sample were not persistent offenders.**
- Using these measures of seriousness and persistency, we found that **35 per cent of our**

sample did not meet the criteria for a DTO that is set out by the Powers of Criminal Courts (Sentencing) Act 2000 (that when imposing a DTO on a child aged 12 to 14, the court must be satisfied that; the offence is so serious that only a custodial sentence is appropriate **and** that the child is deemed to be a persistent offender). Since our sample size is statistically large we can therefore estimate, with some confidence, that in 2007-08 there were around 170 young children who should not have been sent to custody.

Figure 1: Percentage of the 214 young children in the sample who committed serious or violent offences* and/or were persistent offenders**



6. Inadequate and confusing sentencing thresholds

6.1 Why were 35 per cent of the young teenagers in our sample sentenced to custody when they appear not to meet the sentencing thresholds set out in legislation? It may be because while the *procedural* definition of persistency is used by YOTs when preparing pre-sentence reports, there is **no requirement that courts use this definition** when sentencing the children. Legislation governing sentencing does not provide a definition of ‘persistency’ and instead, courts have to be guided by case law, including that which says a child can be deemed to be a ‘persistent offender’ based on nothing more precise than a ‘pattern of behaviour’.

6.2 There are, in fact, three different definitions of ‘persistency’ which might impact on the eventual decision to send a young child to custody. They are:

- that set by case law and based around ‘a pattern of behaviour’
- the procedural definition, which is set by the Home Office and which governs YOT actions and assessment
- the persistency criteria for the Government’s Intensive Supervision and Surveillance Order (ISSP) – the highest tariff community sentence and one which is viewed to be an alternative to custody (see section 9.1 on non-custodial alternatives).

6.3 Barnardo’s believes that this inconsistency contributes to the inequity in sentence practice. We understand the difficulties and the inflexibilities inherent in attempting to arrive at a single definition of persistency, but suggest that clear and robust custody thresholds must be put in place for children younger than 15.



7. Breaching community sentences

7.1 The Government does not make separate data available on the number of 12 to 14-year-olds placed in custody for breach, but YJB data shows that 24 per cent of all DTOs in England and Wales (12 to 17-year-olds) were for breach of bail; breach of conditional discharge or breach of a statutory order³³. Analysis of our sample found that 68 children (32 per cent) received a DTO for breach of a statutory order. While 20 of these children had been breached because they did not comply with the licence requirements of a previous DTO, **48 of them, more than a fifth, had breached only a community intervention – such as an ASBO, a supervision order or a curfew.**

7.2 It is generally assumed that when a child is sent to custody for breach of a community order, that the breach offence is accompanied by an additional serious offence. We were surprised – and alarmed – to discover that in 44 per cent of cases, **there were no additional serious offences.** There were, generally, additional offences, but these included criminal damage, theft and harassment.

7.3 We did not have data available which would allow us to identify the original offences for the 48 children in our sample who had received a DTO for breach of a community order. However, we were able to examine the seriousness of their previous offending history, and found that five children had committed no serious or violent offences in their entire offending history.

7.4 Six of the children in our sample were given custodial sentences where

the primary offence was breach of ASBO. In one case, there was a serious offence committed in addition to the breach of ASBO, but in the other five cases, the additional offences committed were those classified by the YJB as non-serious.

7.5 Children in the criminal justice system are some of the most vulnerable in society and in Barnardo's experience, more often than not, breach is not a wilful act of non-compliance. In this research, those children jailed for breach were more likely than others to have been on the child protection register; to live in a deprived household; to have been missing; to have experienced physical or sexual abuse; to have been bereaved; to have special educational needs; and to have a formal mental health diagnosis. It is unrealistic to expect that they will necessarily be able either to understand or comply with the long-term and sometimes complex instructions of their community order without a high degree of support. YOT performance is monitored and measured by compliance with the National Standards and the standard relating to breach gives very little flexibility which would allow more time for YOTs to work with children to develop support mechanisms to promote compliance with orders.

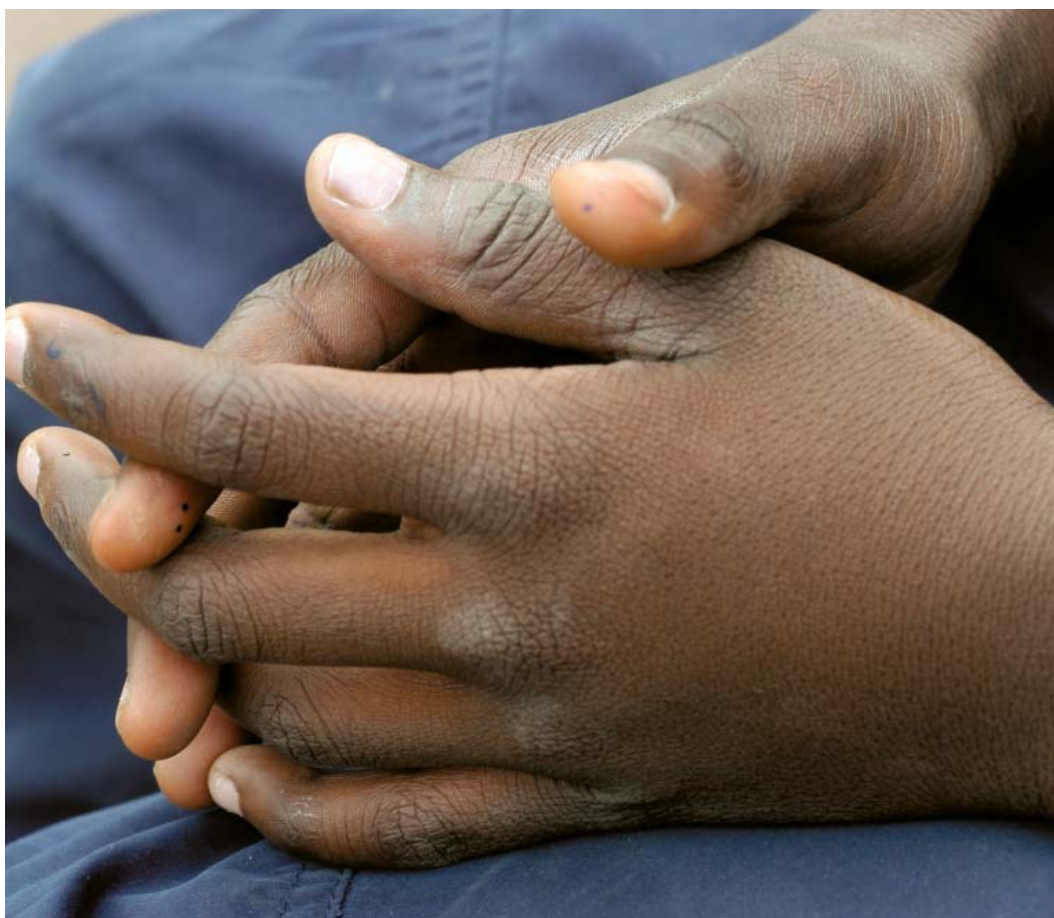
7.6 Barnardo's believes that the standard to which YOTs have to work – and notwithstanding innovative practice by many of them – gives a framework where the emphasis is on **enforcement** rather than **facilitating compliance.**

33 Youth Justice Board (2009) *Annual workload data 2007-08*. Youth Justice Board, London.

7.7 Barnardo's would like to see legislation or guidance that encourages YOTs to evidence how they have used every possible means to support a young person in keeping to the terms of their community sentence before a custodial sentence can be given. An example could be drawn with the provisions in Section 2 of the Education and Skills Act 2008 in relation to young people at risk of sanctions for not attending education or training. This requires local authorities to provide evidence that they have taken all steps to ensure that a young person has been given appropriate opportunities and support necessary for them to participate in the education or

training programme, **before a young person can be taken to court for non-compliance**. Barnardo's believes that if there were to be a comparable requirement for YOTs to support young people on community orders that this would greatly contribute to the successful completion of these orders and subsequent reduction in the use of custody for breach.

7.8 The recommendation for a new National Standard for YOTs is supported by the Association of Youth Offending Team Managers. Their Chair, Mike Thomas said: 'YOTs of course pay attention to supporting young people, but can be constrained by the inflexibility of the breach standard'³⁴.



34 By email, sent 07.05.09.

8. The child behind the statistics

Dean's story

'Dean' was aged just 12 years and nine months when he received an eight month DTO for breaking into a school.

One would expect that a custodial sentence at such a young age would reflect a history of serious and persistent offending over a long period and demonstrate the Government's contention that custody, especially for younger children, is only used as a last resort. However, examination of Dean's offending does not substantiate this. His first offence was committed less than a year before the custodial sentence was made: the offences were not classed as serious or violent and the supervision orders (disposals designed to provide support to change offending behaviour) had little chance to prove effective before the custodial sentence was imposed.

Dean's story demonstrates how the rigidity of the system can accelerate children into an early custodial sentence, grossly disproportionate to the nature and number of the offences.

It is interesting to note that the adult co-defendant in the burglary received **only a three month** custodial sentence.

Dean is a child with a troubled history; he has autism, a diagnosis of ADHD, a statement of special educational needs and he was receiving services from the local Child and Adolescent Mental Health Services (CAMHS). He was also the subject of a Child Protection Plan and had spent periods in respite care.

The Youth Offending Team had recommended a robust alternative to a custodial sentence which included specialist intervention sessions with the local autistic service; community reparation; work to identify a permanent placement in care and an education programme to meet his special needs.

When he was sentenced for the burglary offence, Dean asserted in court that he would not comply with a community penalty and wanted a long custodial sentence. The court obliged by imposing an eight month DTO. No consideration appears to have been given by the court or Dean's solicitor about his capacity – particularly in light of his learning disabilities – to understand the impact of what he had said in court.

| | | |
|-------------|---|--|
| 1st offence | Criminal Damage to a plant pot | Received a Reprimand |
| 2nd offence | Criminal Damage to a fence panel | Received a Final Warning |
| 3rd offence | Criminal Damage to a window at his home | Received a six month Referral Order |
| 4th offence | Public Order – swore at a policeman (this offence was committed before the original referral order was made) | Referral Order extended by three months |
| 5th offence | Common Assault – got into a fight with a boy of the same age | Received a 12 month Supervision Order |
| 6th offence | Robbery – with a group of friends stole sweets and a small amount of cash from another child – Dean was the only one of the group to be charged | 18 month Supervision Order |
| 7th offence | Burglary – with an adult broke into a school – nothing was stolen | Eight month Detention and Training Order |

Young children serving DTOs are some of the most vulnerable individuals in society. Using the data from the Asset core profile of our sample, this section highlights some of these vulnerabilities and shows how these children

have often been failed from a very early age – 33 per cent were just 10 or 11 years old when first convicted. What happened in those intervening two to three years between first conviction and sentence to custody?

8.1 Home and family

A common factor linking children and young people sentenced to custody is poverty. This research found that 37 per cent of the children in our sample sentenced to DTOs in 2007-08 were living in deprived households³⁵. While a minority of children who offend come from stable families, most live in homes which are at best chaotic and at worst abusive. Just under half of the children had experienced some form of abuse, and 38 per cent had witnessed violence within their family. Unsurprisingly, almost half had run away or been missing in the past, 22 per cent were living in care at the time of arrest, and an additional 6 per cent were on the child protection register. Perhaps, most telling of all, is that well over a third of these children were living with known offenders – usually a father or brother – a well documented indicator of offending in young people.

8.2 Health

A recent Healthcare Commission review (2008)³⁶ revealed emotional or mental health needs in 43 per cent of young people known to a YOT, but that only just over half of those cases were referred for specialist assessment.

We found similarly high levels of mental health problems in our sample; 13 per cent had a formal mental health diagnosis; and 19 per cent had self harmed (the Mental Health Foundation puts the estimate for the general population of young people who self-harm at about 8 per cent³⁷). A shockingly high 8 per cent of our sample had attempted suicide at

some point in their short life.

The Criminal Justice Act 2003³⁸ states that, ‘even when the custody threshold has been crossed, a court is **not** required to impose a custodial sentence; mitigating factors should also be taken into account such as age, background and likelihood to reoffend’. Pre-sentence reports (PSRs) are an opportunity for the YOT to provide their professional judgement to the court on appropriate interventions based on mitigating factors including the young person’s risks and needs. Despite this, the Healthcare Commission (2008)³⁹ found that there were, ‘too many occasions where health information from the Asset core profile was not included in the PSR and where no relevant health report was submitted as a supplement, or addendum’. This would suggest that full information about the emotional and mental health problems of these very vulnerable young people is not always presented to the court and therefore not taken into account when sentencing.

8.3 Education

In our previous *Locking up or giving up* report, we highlighted the disproportionately high numbers of young people in the criminal justice system who had been excluded from school – 83 per cent, compared to just 6 per cent of the general population⁴⁰. Now, with the data from Asset core profiles, we are able to highlight the difficulties that many of these children face at school. Eleven per cent of the children serving DTOs in our sample were recorded as attending a special school at the time

35 The Youth Justice Board definition of this for the purposes of Asset is ‘e.g. dependent on benefits, entitled to free school meals’.

36 Commission for Healthcare Audit and Inspection and Her Majesty’s Inspectorate of Probation (2009) *Actions speak louder. A second review of healthcare in the community for young people who offend*, Commission for Healthcare Audit and Inspection and Her Majesty’s Inspectorate of Probation, London.

37 Online resource www.mentalhealth.org.uk/information/mental-health-a-z/self-harm/#ext-gen130. Accessed 25 February 2009.

38 Criminal Justice Act (2003) S.148 (5)

39 See note 36.

40 Department for Children, Schools and Families (2008) *Permanent and fixed period exclusions from schools and exclusion appeals in England, 2006-07*. DCSF, London.

they became involved with the YOT (compared to just one per cent in the general population⁴¹), and 16 per cent had a recorded statement of special educational needs (SEN), compared to 3 per cent of the general under-18 population⁴². This type of information is not always accessible to the YOT and can go under-reported, so it is possible that the figures are even higher.

8.4 Illustration of the chaotic lives of young people on DTOs, and particularly those given DTOs for breach.

This chart demonstrates the disrupted and disadvantaged lives experienced by the younger children who received a custodial sentence, when compared with children in the general population.

| | Young people in the general population ⁴³ | 12 to 14-year-olds on DTOs | 12 to 14-year-olds on DTOs for breach |
|---|--|----------------------------|---------------------------------------|
| A history of running away or going missing | 11% ⁴⁴ | 48% | 53% |
| Experience of abuse within the family | 16% ⁴⁵ | 44% | 48% |
| Living with known offenders | Lack of information ⁴⁶ | 39% | 43% |
| Deprived household (e.g. receiving free school meals) | 18% ⁴⁷ | 37% | 43% |
| Living in care | 3% ⁴⁸ | 22% | 21% |
| Self harm | 7% ⁴⁹ | 19% | 21% |
| Formal mental health diagnosis | 10% ⁵⁰ | 13% | 15% |
| SEN statement | 3% ⁵¹ | 16% | 20% |
| Attending a special school | 1% ⁵² | 11% | 18% |
| Homeless | 1% ⁵³ | 4% | 5% |

41 Department for Children, Schools and Families (2008) *Special educational needs in England, January 2008*. Statistical First Release. www.dcsf.gov.uk/rsgateway/DB/SFR/s000794/SFR15_2008_Final.pdf

42 Department for Children, Schools and Families (2008) *Special educational needs in England, January, 2008*. DCSF, London.

43 Note that this data refers to the under-18 population unless otherwise stated, so as a comparison to data in the other columns which refers to 12 to 14-year-olds, is an indicator only.

44 Estimate of number of overnight runaways based on a survey of 10,000 questionnaires www.childrenssociety.org.uk/resources/documents/Research/Still_Running_2_Findings_from_the_Second_National_Survey_of_Young_Runaways_3195_full.pdf

45 *Children experiencing serious maltreatment by parents*: www.nspcc.org.uk/whatwedo/mediacentre/mediareources/facts_and_figures_wda33295.html

46 A lack of information on this found in *Children of offenders review 2005* (DCSF/Ministry of Justice, 2007), but an estimated 160,000 young people under 18 have a parent in prison.

47 Average entitlement to free school meals in England in 2004. DCSF (2008) www.dcsf.gov.uk/foischeme/subPage.cfm?action=disclosures.display&i_subcategoryID=32&i_collectionID=211

48 Department for Children, Schools and Families (2008) *Children looked after in England*. Year ending 31 March 2008. DCSF, London.

49 Mental Health Foundation (2006) *'Truth hurts'* Report of the National Inquiry into Self Harm among Young People. www.mentalhealth.org.uk/campaigns/self-harm-inquiry/

50 Mental Health Foundation (2006): www.mentalhealth.org.uk/information/mental-health-overview/statistics/

51 Department for Children, Schools and Families (2008) *Special educational needs in England*. Data shows all pupils in schools across England: www.dcsf.gov.uk/rsgateway/DB/SFR/s000794/index.shtml

52 Ibid.

53 Estimate for 16 to 24-year-olds by Office of National Statistics 2006. In Joseph Rowntree Foundation (2008) www.jrf.org.uk/sites/files/jrf/2220-homelessness-young-people.pdf

Vulnerable children – the need for specialist provisions

In England and Wales, over 1,000 children (aged 10 to 17) held in custody are assessed as ‘vulnerable’⁵⁴. The Government says that children who are most vulnerable (and this would include those vulnerable because of their young age) should be accommodated in establishments with the highest staff to child ratio – i.e. local authority secure children’s homes⁵⁵ – but there are fewer than 200 beds commissioned by the YJB in such establishments.

The vulnerability of these children and the need for more specialist provision is illustrated by the case of Joseph Scholes, aged 16, who **committed suicide just nine days into a custodial sentence.**

Joseph, like so many of the children in this sample, had a troubled childhood, experiencing abuse, periods in care and mental health problems including self harming. During one of his periods in care, he became involved in stealing mobile phones with a group of other children. He was arrested and subsequently charged with robbery despite there being no indication that he had used threats or violence.

Joseph received a custodial sentence for this offence. At the time of his sentence the court was made aware of his troubled history and said, after pronouncing sentence that they wanted the information about Joseph’s mental state to be ‘most expressly drawn to the attention of the authorities’. Despite this, Joseph was placed in a Young Offender Institution as there were no places available in local authority secure children’s homes.

While the coroner at the inquest into Joseph’s death returned a verdict of accidental death, they said that his death was: *‘In part contributed to because the risk was not properly recognised and appropriate precautions were not taken to prevent it’*⁵⁶.

Barnardo’s believes that vulnerable younger children require specialist provision, to meet needs such as mental illness or drug misuse. We are urging the Government to implement legislation that would allow children serving DTOs to be placed other than in the current secure estate. This would enable children to be placed in specialist provisions where particular needs could be met, for example treatment for mental health issues; therapeutic input for those who have experienced abuse; drug treatment etc.

⁵⁴ Written answer to Parliamentary Question, 28 March 2007: Column 1653W. The definition of vulnerability is based on assessment information from the YOT.

⁵⁵ Ibid.

⁵⁶ All information relating to Joseph Scholes is taken from *Why are children dying in custody?* A joint briefing by Inquest and Nacro. Inquest. London July 2006, available at http://inquest.gn.apc.org/pdf/why_are_children_dying_in_custody.pdf

9. Non-custodial alternatives – what works for persistent offenders?

9.1 Sixty children in our sample who were sentenced to a DTO did not receive this sentence for a serious or violent offence. There is some evidence to indicate that for this group of children in particular, sustained and robust non-custodial interventions can offer improved outcomes. For example:

- A meta-analysis, which aggregated the results of different studies and evaluations of community-based responses indicated an average of 10 to 15 per cent reduction in offending⁵⁷
- The National Audit Office suggests that community sentences and the work of YOTs reduce risks related to offending, mental health and behavioural and lifestyle issues for over 15 per cent of children in trouble⁵⁸.

9.2 Barnardo's would like to see more funding invested in developing, promoting and evaluating alternatives to custody so that more children and young people can benefit, and their offending behaviour be tackled effectively. A small snapshot of some of the promising alternatives is provided below.

9.3 The Intensive Supervision and Surveillance Programme (ISSP)

The ISSP is the most rigorous non-custodial intervention available for

young offenders. Introduced as an alternative to custody for the most prolific offenders, and for those who commit the most serious offences, it combines high levels of community-based surveillance with a sustained focus on bringing structure to young people's lives and systematically addressing the key risk factors contributing to their offending behaviour, such as educational deficits, weaknesses in thinking skills or drug misuse⁵⁹.

9.4 Eligibility for an ISSP is complex and a young offender may receive this sentence through a number of different routes. Through the 'persistency' route a young person must have been convicted of four or more previous imprisonable offences in the last 12 months, be appearing in court for a fifth (at least) offence and have at least one previous community or custodial penalty⁶⁰. Young people are also eligible for an ISSP if they are: charged with an offence for which an adult could receive 10 years or more in custody (no previous conviction is required); or are at risk of a secure remand because they have a recent history of repeat offending on bail; or have previously had a DTO and, within a year of leaving custody, are facing custody again. So it is possible that a child could be jailed for breach of a community sentence,

57 McGuire, J and Pristely, P (1995) *Reviewing What works: past, present and future*. In McGuire, J (ed) *What works: reducing offending. Guidelines from research and practice*, Wiley, 1995.

58 National Audit Office (2004) *Youth offending: The delivery of custodial and community sentences*. Report by the controller and auditor general HC 190 Session 2003-2004. National Audit Office, London.

59 Youth Justice Board (2008) *ISSP management guidance*. Youth Justice Board, London. www.yjb.gov.uk/Publications/Resources/Downloads/ISSP%20Management%20Guidance%20Updated%200808.pdf

60 Ibid p.41

where they meet none of these criteria, so cannot be considered for an ISSP.

9.5 There is yet to be a long-term robust evaluation of ISSPs. A YJB evaluation found that the frequency of offending reduced by 39 per cent over two years and seriousness of offending went down 13 per cent⁶¹. However, an even greater level of improvement was achieved by a comparison group on DTO without ISSP. The report questioned whether the perceived high demands of ISSP are in fact counter-productive. An independent audit in 2008⁶² showed that custodial reduction targets had been missed and the programme may have contributed to increased custodial rates due to very strict enforcement of breach. More research and possible improvements are needed for ISSPs, but they could, in the future, offer an opportunity to tackle offending and keep children out of custody.

9.6 Intensive fostering

A 2008 report on the Department for Children, Schools and Families Multidimensional Treatment Foster Care in England (MTFCE)⁶³, which works with children in care who also have complex needs, reported positive findings from its four years of service, with significant reductions in violent behaviour and criminal convictions⁶⁴.

The YJB's own evaluation of intensive fostering pilots which have been running for the last three years providing a direct alternative to a custodial sentence has been completed by researchers at York University and publication is anticipated in the Summer of 2009.

9.7 The Youth Inclusion Programme (YIP)

The Government's YIP is a catch-all term for a range of 70 programmes (including sports, education, training and personal skills) operating in deprived neighbourhoods in England and Wales since 2000. A YJB evaluation studied 50 young people aged 13 to 16 who were most at risk of going to custody prior to commencing the programme. The evaluation found that their offending decreased 73 per cent, and their seriousness of offending by 68 per cent⁶⁵.

9.8 Barnardo's

Barnardo's runs 40 projects that work directly with young people in trouble with the law, including those young people who offend persistently. Barnardo's Freagarrach Project is one such example. The project operates in Scotland but would work well within the English and Welsh legislative framework.

61 Youth Justice Board (2005) *ISSP – The final report*. Youth Justice Board, London.

62 Centre for Crime and Justice Studies (2008). *Ten years of Labour's youth justice reforms: an independent audit*. Centre for Crime and Justice Studies, London.

63 MTFCE was developed and evaluated in the United States as a cost-effective alternative to residential care for adolescents with complex needs including offending behaviour. It involves parenting training, for both the foster carers and the biological (or adoptive) parents, which emphasises the use of behaviour management methods to provide a structured and a therapeutic living environment. The training is combined with access to a single multi-disciplinary team, providing a combination of mental health, education and social services. A young person's placement usually lasts 10 months.

64 Department for Children, Schools and Families (2008) *Multidimensional Treatment Foster Care in England: Annual project report 2008*. DCSF, 2008.

65 Youth Justice Board (2003) *National evaluation of the youth inclusion programme*. YJB, London.

9.9 Barnardo's Freagarrach

Barnardo's Freagarrach, based in Stirling, Scotland, was set up in 1995 as a national demonstration project to pilot models of good practice with persistent young offenders. The project supports young people aged 12 to 18 who have offended at least five times in the last six months and are at risk of entry into, or escalation within, the criminal justice system. The project also supports 16 to 18-year-olds exhibiting sexually harmful behaviour, and offers a drug and alcohol service for 12 to 18-year-olds. In consultation with social workers, police and youth offending teams, a young person is usually referred for an intensive programme of three sessions per week for up to 12 months. Sessions usually last about two hours and are initially in a one-to-one format but gradually broaden out to include other young people, professionals or community members.

The Freagarrach workers and statutory partners within the local authority assess the relationship between the offender and the police, social workers, victims, and community, and, in consultation with the young person and their family, agree a 'contract' of support. The contract will challenge offending behaviour, encourage victim awareness, enable the family

to set boundaries, provide leisure and educational opportunities, and help the young person to avoid reoffending.

As their programme draws to its conclusion, Freagarrach provides an aftercare service that keeps both the young person and their support groups in a network, to sustain the progress they have made.

The project's aims are to: prevent offending and reduce reoffending, keep young offenders in their community by offering appropriate community-based support, and to reduce the risk factors associated with offending. The risk factors associated with offending are well-researched⁶⁶ and are reflected in the YOT assessment tool.

- In 2007-08, 76 per cent of entrants completed the offenders' programme.
- **68 per cent of the young people had a reduction in their risk factors associated with offending** (measured by pre- and post-programme Asset scores).
- **62 per cent had a significant reduction (of more than 60 per cent) in known offending during the period of the programme, compared to the period prior to the programme** (measured using police data passed to service staff).

⁶⁶ See the following literature review undertaken by Communities that Care on behalf of the Youth Justice Board (2005): Anderson, B, Beinart, S, Farrington, Prof, D et al. *Risk and protective factors*. YJB, London.

10. Conclusion

10.1 The Government wants custody for children aged 14 and younger to be used only as a last resort, yet our research has shown that **a significant number of 12 to 14-year-old children (35 per cent of our sample) were sentenced to DTOs despite not meeting the criteria** that is set out by the Powers of Criminal Courts (Sentencing) Act 2000 (that when imposing a DTO on a child aged 12 to 14, the court must be satisfied that the offence is so serious that only a custodial sentence is appropriate and that the child is deemed to be a persistent offender). On this evidence, the judicial system is not protecting the public from violent, dangerous young people, but turning vulnerable children into young people who will continue to offend – almost 80 per cent within one year of release from custody⁶⁷.

10.2 We have also shown that young children serving custodial sentences are exceptionally vulnerable members of society – suffering disproportionate levels of disruption including inadequate parenting, abuse and neglect, learning difficulties and mental health problems – whose needs are often not met throughout their young lives and not fully represented when they appear in court.

10.3 We have highlighted the lack of clarity in, and inconsistent use of, Government custody thresholds. A young teenager can be sentenced to custody because they are deemed to be a ‘persistent’ offender, yet there is

no legislative definition of persistency and the Home Office, the Courts and the YJB ISSP use different criteria. We have noted that a child in Yorkshire is twice as likely as a child in the East Midlands to be sent to custody for what could be an identical offence and pattern of behaviour.

10.4 The over-use of custody for breach of community orders is a continuing problem and one which could so easily be addressed not only through a change in custody thresholds, but the provision of robust and reliable support – which has to be evidenced to courts at breach hearings – for the young people to meet the terms of their community orders.

10.5 Effective alternatives to custody do exist and many magistrates and YOTs must be commended for their work to ensure that children and young people are given the opportunities to make best use of them. ISSPs and Intensive Fostering Programmes have shown reduced reoffending rates, and the work that Barnardo’s Freagarrach does is just one example of how the voluntary sector can work effectively with persistent offenders. However, there is still a long way to go in ensuring that more young people are given these opportunities; a distinct and increased custody threshold would give magistrates more power to direct to these non-custodial alternatives.

⁶⁷ Medhurst, C and Cunliffe, J (2007) *Reoffending of juveniles: results from the 2005 cohort*. Ministry of Justice, London.

11. Recommendations

1. **A change in sentencing thresholds** in England and Wales so that a child aged 14 and under cannot be considered for custody unless:
 - they have been convicted of a ‘grave crime’
 - or**
 - they have been convicted of a serious or violent offence
 - and**
 - they are deemed to be a persistent offender, based on new and more stringent criteria (see recommendation 2)
 - or**
 - in exceptional circumstances, they have been convicted of lesser offences but with an extreme degree of persistency.
2. **That the Government should urgently review the current varied definitions of persistency** with a view to setting stringent criteria for the definition, for example, something akin to those which governed the Secure Training Order (which was in statute between 1994 and 2000)⁶⁸.
3. **That breach of a community-based sentence should never result in a custodial sentence** for a child aged 14 or under unless the original offence was serious or violent or the breach is accompanied by a conviction for another serious or violent offence.
4. That there should be a **requirement in National Standards for YOTs – based on the needs and circumstances of the individual child** – actively to support the child in complying with the conditions of a community order, with evidence of this presented to the court where breach proceedings are instituted.
5. Children in the criminal justice system will very often have experienced abuse, neglect and disadvantage. We would like to see **guidance instructing courts to seek further information** when the PSR indicates such experiences but provides insufficient information about the circumstances.
6. **That the Government should take the steps necessary to implement Part 3, Section 34 of the Offender Management Act 2007** which allows children serving a DTO to be placed other than in the secure estate.

⁶⁸ The criteria for an STO was that children aged 12, 13 and 14 had to have committed at least three imprisonable offences and breached the conditions of a supervision order or committed another imprisonable offence whilst on supervision. In relation to STOs, ‘imprisonable offence’ means an offence (not being one for which the sentence is fixed by law) which is punishable with imprisonment in the case of a person aged 21 or over.

*Locking up or giving up?
Why custody thresholds for
teenagers aged 12, 13 and
14 need to be raised*

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Images posed by models.
Names have been changed to protect identities.



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