

Barnardo's response to the consultation paper on principles of sentencing for youths – March 2009.

Pam Hibbert, Assistant Director, Policy and Research Unit
Contact details: pam.hibbert@barnardos.org.uk or telephone 020 8498 7746

Introduction

1. Barnardo's is one of the UK's largest children's charities working with over 110,000 children through 400 projects across the UK. Barnardo's believes in children regardless of their circumstances, gender, race, disability or behaviour; but we are not naive, we know that there is a small minority of children who are troublesome and engage in anti social and criminal behaviour and who can make life difficult for their neighbourhoods and communities.
2. Barnardo's runs 42 projects specifically offering services to children and young people at risk of or involved in criminality and anti social behaviour. These services include alternative education and post 16 training for those most disengaged; fast track responses to anti social behaviour as an alternative to a formal order; intensive family support programmes; parenting programmes for parents on court orders; advocacy services for children in secure training centres and young offender institutions in England; specialist services for young people who sexually harm and, in Scotland, intensive alternative to custody programmes for persistent and prolific offenders. Additionally, we have expertise in supporting young people who may be in the criminal justice system through our leaving care, youth support and young homelessness services.

Barnardo's response to the consultation – general comments

3. Barnardo's is pleased to have the opportunity to respond to this consultation and particularly welcomes that the proposed measures are framed in the context of the obligations of international conventions relating to the treatment of children in conflict with the law.
4. This response is based on Barnardo's experience gained through practice and research; therefore it does not address all the issues raised but only those where our experience is relevant

Barnardo's response to the consultation – specific comments

5. Question 1 – Do you consider the use of the terms best interests or well being signifies any difference in meaning from the use of the term welfare?

Barnardo's believe that there is a fundamental difference in these terms and that confusion arises from the use of different legislation to define welfare in the criminal courts. Since the 1933 Children Act, the 'welfare' principle as it impacts on all other children (and children in trouble with the law in other circumstances and situations) has been enshrined in both the 1989 Children Act, which introduced the paramountcy principle and the welfare checklist; and the 2004 Children Act which gave a range of bodies a duty to 'safeguard and promote' the welfare of children as defined by the five Every Child Matters outcomes. It would seem to be an anomaly that almost all other agencies – including other sections of the judiciary and court services and custodial institutions – have these duties while criminal courts do not. We believe that criminal courts dealing with children and young people should enact their duties in relation to welfare in the same spirit as all other public agencies.

6. Question 2 – In relation to balancing the purposes of sentencing, do you agree that the approach described in paragraphs 47 to 52 should be the general approach?

Barnardo's particularly welcomes the guidance as outlined in Paragraph 49 in relation to younger children and we have recently researched the 550% increase in the imposition of custodial sentences on children aged 14 and younger in the last decade. We also welcome and strongly support the contents of paragraph 51 which stresses that the sentence must be proportionate to the nature of the offence, even when there is a risk of re offending.

There is much evidence indicating that maltreatment is one of the key factors that can lead to anti-social and offending behaviour.^{i ii iii iv v vi vii viii} In addition, children in trouble with the law are much more likely to have grown up in an environment of poor parental supervision with a lack of discipline or harsh and erratic parenting. They have an increased likelihood of living in poor housing and experiencing family conflict and have parents with a history of anti-social behaviour^{ix}. Additionally, we know that there is a high level of mental health problems among these children – 31% of those in custody.^x

However, we remain concerned that these issues are not always fully explored in Pre Sentence Reports. We would like the guidance to remind

courts of the importance of seeking further information where there is an indication of such experiences but insufficient information as to the extent, circumstances, and what interventions, support or treatment have already been offered to the child.

In Paragraph 47, the guidance suggests that courts may believe that the welfare of the child warrants removing them from undesirable surroundings – the presumption contained in that paragraph is that this might contribute towards the imposition of a custodial sentence. Barnardo's understand the Court's dilemma in such circumstances but feel that it is quite wrong for custody to be used in this way and would wish to see guidance urging courts to ensure that they have explored all alternate options, including seeking advice and information from the local children's services as to other solutions.

7. Question 5 – Is there scope for increasing the use of financial penalties? If so, what wider circumstances might merit such a sentence? Should the Education Maintenance Allowance be taken into account?

Barnardo's would be extremely reluctant to see Education Maintenance Allowances (EMA) being taken into account when imposing a financial penalty. Being engaged in education is a significant resilience factor against criminal behaviour and, despite some administrative problems the EMA has proved to be a very effective incentive in engaging 'hard to reach' young people – including those who offend - in education and training. Our experience in Barnardo's training projects suggests that the EMA is seen by young people from the poorest families as significant income and that even partial loss could act as a disincentive to continue in their education/training place.

8. Question 9 – Are you aware of any reliable data on the extent to which orders are breached?

Government figures indicate that in 2006/7 more custodial sentences were made on juveniles for breach of a community order than were made for burglary – almost a quarter of all custodial sentences were for breach.^{xi} The figures from the YJB Annual Workload Data do not indicate the orders which were breached and we still have concerns about children who receive a custodial sentence solely for breach of an anti social behaviour order (ASBO). Barnardo's believes that children who are returned to court for breach only the conditions of an ASBO and not a repeat of the behaviour that led to the order, should not receive a custodial sentence.

Barnardo's are currently undertaking research into children aged 12 to 14 who were sentenced to a Detention and Training Order (DTO) in 2008^{xii} and have analysed the Asset data on 214 of these children - 46% of the

total number of this age group sentenced. Twenty nine per cent of the sample received their DTO for breach of an anti social behaviour order or a community order. Barnardo's would like to see more inquiries made by the court as to the service these young people received to support them to comply with the requirements of the order before breach proceedings were instituted. We think that courts should be satisfied that the Youth Offending Team and other local authority services had taken all steps to ensure that the child had been given appropriate opportunities and support necessary for compliance, before imposing a custodial sentence for breach. A parallel could be drawn with the provisions in Chapter 2 of the Education and Skills Act 2008 in relation to young people at risk of criminal sanctions for not attending education or training, which requires this assurance before proceedings can be taken.

9. Question 11 – What is the most appropriate approach to determining whether a young person is a persistent offender?

Barnardo's is concerned about the lack of clarity in relation to the definition of 'persistent' and while case law has provided some definition, this has perhaps served to further confuse rather than clarify. We understand the need to take account of previous offending when determining whether or not an offence is serious, but would argue that evidence suggests that custodial sentences are being imposed where neither the nature of the offence nor previous offending indicates that such a sentence is truly a 'last resort'. We shall be presenting some of this evidence in our forthcoming research report mentioned in Section 8 of this response, which will demonstrate that a significant number of young children were sentenced to custody when the offence was identified (by the YJB measure) as non serious and where the risk of re offending was assessed as being not high. Barnardo's would argue that custody is not justified as a last resort in these circumstances, particularly for younger children, notwithstanding the aggravating factor of previous offending.

However, this consultation clearly outlines the inherent risks in having a rigid definition of persistency based on previous pre court interventions, summary justice interventions and convictions. Ideally, Barnardo's would have liked to have seen a change in the custody thresholds for children aged 14 and younger to those put in place under the Secure Training Order – the precursor to the DTO – as in Section 1 (5) of the 1994 Criminal Justice and public Order Act which **restricted the use of custody to this age group to those who had committed 3 imprisonable offences and either breached a community order or committed an imprisonable offence whilst on a community order.** Barnardo's would like to see sentencers using this principle as the main guidance for sentencing children aged 14 and under.

We welcome the guidance in relation to court powers contained in Paragraph 167, and in particular highlighting the use of a youth rehabilitation order with a fostering requirement where a child under 15 is identified as a persistent offender. Barnardo's would like to see a more robust direction that this should always be the preferred option to a custodial sentence for a child in this age group.

ⁱ Boswell, G. (1996). *The prevalence of abuse and loss in the lives of Section 53 offenders*. Young and Dangerous – the background and careers of Section 53 Offenders. Avebury.

ⁱⁱ Hawkes, C., Jenkins, J.A. and Vizard, E. *Roots of Sexual Violence in Children and Adolescents* in Ved Varma (Ed) 1997. *Violence in Children and Adolescents*. Jessica Kingsley Publishers. London.

ⁱⁱⁱ Hamilton, C. E., Falshaw, L. and Browne, K. D. (2002). *The Link between recurrent maltreatment and offending behaviour*. International Journal of Offender Therapy and Comparative Criminology. 46(1) pg75-94.

^{iv} Lader, D, Singleton, N and Meltzer, H. (2000). *Psychiatric morbidity among young offenders in England and Wales*. London Office for National Statistics, London.

^v Weeks, R and Widom, C.S. (1998). *Self-reports of early childhood victimization among incarcerated male felons*, Journal of Interpersonal Violence, Vol 13. No. 3, pp346-61.

^{vi} Shields, A.M., Cicchetti, D. and Ryan, R.M. (1994) *The development of emotional and behavioural self-regulation and social competence among maltreated school-age children*, Development and Psychopathology, Vol. 6, pp. 5–75.

^{vii} Widom, C.S. (1989) *Child abuse, neglect, and adult behaviour: research design and findings on criminality, violence, and child abuse*, American Journal of Orthopsychiatry, Vol. 59, No. 3, pp. 355–67.

^{viii} Jonson-Reid, M. and Way, I. (2001) *Adolescent sexual offenders: incidence of childhood maltreatment, serious emotional disturbance and prior offences*, American Journal of Orthopsychiatry, Vol. 71, No. 1, pp. 120–30.

^{ix} Utting, D, Monteiro, H and Ghate, D (2007) *Interventions for children at risk of developing antisocial personality disorder*. London: Policy Research Bureau.

^x Health Commission review 2008

^{xi} Ministry of Justice (2007) Court proceedings data base, Ministry of Justice London 2007; and YJB (2008) Annual Workload Data 2006/7. Youth Justice Board London

^{xii} To be published by Barnardo's in May 2009