

Prison Reform Trust response to the Home Office consultation on the Offensive Weapons Act guidance – October 2019

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

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Introduction

There is understandable public concern about the recent spate of acid attacks and rise in knife crime in some inner-city areas. The evidence presented in the government's serious violence strategy suggests that solutions are most likely to lie in better regulation and control of supply and increased investment in preventative measures, including early intervention, education, trauma-informed and public health responses. Many children and young adults caught up in gangs are subject to coercion by older adults and responses by public agencies need to be mindful of underlying welfare and safeguarding concerns. Provisions which unnecessarily criminalise children and young people risk driving the problem underground and could result in more vulnerable individuals being drawn into the criminal justice system, instead of putting them in contact with the treatment and support they need.

There is ample evidence that children and young people in contact with the criminal justice system are vulnerable. By definition, they are vulnerable due to their young age and developmental immaturity. This is often compounded by difficulties including trauma and adverse childhood experiences (ACEs), mental and physical ill-health, special educational needs, literacy and communication difficulties and more:

- The rate of mental health problems amongst children in trouble with the law is thought to be at least 30%, and three times higher than within the general population.¹

¹ Harrington, R. and Bailey, S. (2005) Mental Health Needs and Effectiveness of Provision for Young Offenders in Custody and Community, London: Youth Justice Board cited in [Jacobson, J., et al. \(2010\) Punishing Disadvantage: a profile of children in custody, London: Prison Reform Trust](#)

- Children with special educational needs are twice as likely to carry knives as their peers.²
- One-third of young people in custody have identified special educational needs.³
- 60% of children who offend have a communication disability.⁴
- Around 30% of children who have ‘persistent offending histories’ in custody have IQs of less than 70, signifying a learning disability.⁵
- There is increasing understanding about the prevalence of different types of traumatic childhood and adolescent experiences in the backgrounds of children involved in the youth justice system⁶, the effects that such trauma can have in the short-term, and its longer-term impacts on emotional, social, and neurological development. There are evident links between trauma and young people’s behaviour.⁷
- There is evidence that children frequently do not understand court proceedings and are unclear about the expectations of any court order. This lack of understanding was a feature of ASBOs: research confirmed that children often did not understand the conditions of their order or how to comply with it. Without this, the likelihood of learning and sustained behavioural change is arguably remote.⁸

PRT and the Standing Committee for Youth Justice assisted parliamentarians on scrutiny of the bill during its parliamentary stages. Below we highlight areas where we continue to have concerns and where we believe the guidance could be further improved in order to mitigate some of the potentially unintended consequences of the legislation.

6. Offence of having a corrosive substance in a public place

We understand the serious, justifiable concern around recent attacks involving corrosive substances. However, this section 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. Not only is the definition of a corrosive substance loosely defined in this section; the new offence puts the onus on the child or adult to show they have good reason for carrying it. Proving this defence will be

² [Whittaker, F. \(2019\) Schools Week, ‘Fact check: What are the links between school exclusions and knife crime?’](#)

³ [Gyateng, T., Moretti, A., May, T. & Turnbull, P.J. \(2013\) Young People and the Secure Estate: Needs and Interventions, London: Youth Justice Board](#)

⁴ Bryan K., Freer J. and Furlong C. (2007) Language and communication difficulties in juvenile offenders, *International Journal of Language and Communication Disorders*, 42, 505-520, cited in [Talbot, J. \(2010\) Seen and Heard: supporting vulnerable children in the youth justice system, London: Prison Reform Trust](#)

⁵ Rayner J., Kelly T. P. and Graham F. (2005) Mental health, personality and cognitive problems in persistent adolescent offenders require long-term solutions: a pilot study. *Journal of Forensic Psychiatry and Psychology*. 16: 248–62, cited in [Hughes, N., et al. \(2012\) Nobody made the connection: The prevalence of neurodisability in young people who offend, London: Office of the Children’s Commissioner](#)

⁶ See [Youth Justice Board \(2014\) Victims reference group ‘Offenders as victims’ Statement of intent November 2016, London: YJB](#)

⁷ [Liddle, M., et al. \(2016\) Trauma and Young Offenders: a review of the research and practice literature, London: Beyond Youth Custody](#)

⁸ [Youth Justice Board \(2006\) Anti-social behaviour orders, London: YJB](#)

difficult. Below we outline improvements which should be made to the guidance to limit the risk that vulnerable children and young people end up being unnecessarily prosecuted and criminalised under the new offence.

Defence

More detailed guidance will be required for the police and CPS when determining whether an offence has been committed and whether it is in the public interest to prosecute. The draft guidance states that “the final arbiter in any particular case will be the courts”. However, the police and CPS also have responsibilities to ensure that children and young people are not unnecessarily arrested and prosecuted, and that any welfare or safeguarding concerns are handled appropriately. These responsibilities should be made explicit in the guidance. For example:

- The police have a duty to safeguard and protect children. The CPS also have a duty to consider the welfare needs of the child in prosecution decisions. Age and / or lack of maturity is also a factor which prosecutors are required to take account of in decision making.
- For defendants under the age of 18, it is vital that the police liaise with the local Youth Offending Team to ensure that needs of the defendant, including any welfare or safeguarding concerns, are identified and met.
- Liaison and diversion services should also be involved at the earliest possible stage in order to assess and address any underlying vulnerabilities.
- The decision whether or not to prosecute must take into consideration the fact that many children and young people involved in serious violence are groomed and exploited. There is emerging evidence regarding the scale of child criminal exploitation, for example the National Crime Agency has identified over 1,000 “county lines”, where exploitation of children is a fundamental part of the drug-dealing model.⁹ The guidance should address this, including the absence of support offered to children recognised as victims of trafficking or Modern Slavery, which can increase their vulnerability to being re-trafficked and re-exploited; and affected by serious violence.¹⁰ In any case, where trafficking or exploitation is suspected a referral should be made to the National Referral Mechanism and any decision whether to proceed to a criminal prosecution should be deferred pending the outcome of that process.

The Joint Committee on Human Rights raised specific concerns regarding the lack of clarity as to what constituted a ‘good reason’ defence in a letter to the then Home Office Minister Victoria Aitkin MP.¹¹ The government’s response to the letter went some way to providing a fuller explanation and also included the following commitment:

“It would not be reasonable to have a list of all the circumstances that would be covered by the good reason defence. We will however look to produce guidance for

⁹ [National Crime Agency \(2019\) County Lines Drug Supply, Vulnerability and Harm 2018, London: NCA](#)

¹⁰ [Field, F. \(2019\) Independent Review of the Modern Slavery Act 2015: Final Report, London: HMSO](#)

¹¹ [Hamwee, S. \(2018\) Letter to Victoria Atkins MP regarding the Offensive Weapons Bill on behalf of the Joint Committee on Human Rights](#)

*the public, the police and prosecutors setting out examples of what might constitute a good reason before the new offence is brought into force.*¹²

Despite this assurance, Page 18 of the draft guidance includes only a very limited number of examples of what might constitute a ‘good reason’ defence:

“It is also likely that a court would consider that a person had good reason to have possession of a corrosive substance that they used in the course of their business or employment. For example, a plumber who has a drain unblocker, a builder who has a brick cleaner, an employee of a cleaning company who has industrial strength cleaning agents or an employee of a swimming pool cleaning company who has swimming pool chemicals.”

In line with the government’s commitment to the JCHR, therefore, we recommend that a full list of circumstances is produced and that these are included in the guidance.

8. Appropriate custodial sentence for conviction under section 6

Mandatory sentences remove judicial discretion and the ability of courts to ensure that the penalty best fits the circumstance of the offence. As PRT and the SCYJ highlighted in its evidence during the parliamentary stages of the bill, measures that attempt to prevent/address possession offences through mandatory custodial sentences are problematic for three main reasons: there is no evidence custodial sentences deter children or young people from committing crime;¹³ the ‘public protection’ argument is extremely weak for children; and custody is not rehabilitative but deeply harmful, so ineffective at producing the desired result of reducing crime levels.

The importance of prioritising the welfare needs of the child is an underlying principle of the youth justice system, grounded in national and international law. Furthermore, 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.¹⁴ There is an emphasis on avoiding unnecessary criminalisation and promoting reintegration. By removing judicial discretion, these provisions work against the Sentencing Council’s guidance.

While it is not possible to prevent the negative consequences these provisions will have, the guidance could do more to mitigate them. It already highlights the requirement of the court to have regard to its duties under the Children and Young Persons Act 1933 and the Crime and Disorder Act 1998. In addition, the guidance should refer to the relevant sections of the Sentencing Council’s Overarching Principles—Sentencing Children and Young People.¹⁵

¹² [Atkins, V. \(2018\) Letter to the Chair of the Joint Committee on Human Rights regarding the Offensive Weapons Bill](#)

¹³ [Nagin, D \(2013\) Deterrence in the Twenty-first Century: A Review of the Evidence Pittsburgh: Carnegie Mellon University](#)

¹⁴ [Sentencing Council \(2017\) Sentencing Children and Young People: Overarching Principles, London: Sentencing Council](#)

¹⁵ *Ibid.*

9. Search for corrosive substances: England and Wales

Corrosive substances, along with knives and other offensive weapons, are likely to be discovered via stop and search. BAME children and young people are significantly more likely to be stopped and searched¹⁶ and therefore more likely to be prosecuted and mandatorily imprisoned for possession of corrosive substances, whether or not they are more likely than their White counterparts to be carrying a weapon. There is a significant risk, therefore, that these provisions could exacerbate BAME disproportionality in the justice system. They could also further damage already strained relations between BAME children and the police and decrease the lack of trust in the justice system among BAME communities highlighted by the Lammy review. Despite this, the policy equality statement on the proposals does not contain any specific analysis of the likely equality impact of the extension of investigative and enforcement powers.¹⁷ We urge the government to conduct a detailed equality impact assessment of the provisions and ensure that their equality impacts are closely monitored on an ongoing basis.

50. Offence of threatening with offensive weapon etc in a public place etc

Removing the requirement that there is any objective risk of physical harm, and basing the test on how a reasonable person, in the victim's place, would interpret such a threat, substantially reduces the conviction threshold for this offence. Given the mandatory custodial penalties attached, we believe this is far too low a threshold to impose, which will result in children and young people being unnecessarily sent to prison. As they are still maturing, children and young adults can be impulsive and lack empathy and may find it difficult to anticipate the impact of their behaviour on others. Therefore, these proposals could place young people at a particular disadvantage for behaviour whose consequences they did not foresee and which did not put anyone at an objective risk.

More detailed guidance is required on the policing and prosecution of the new offence, particularly as it relates to cases involving children and young people. In addition, in relation to sentencing of children for this offence, the guidance should refer to the relevant sections of the Sentencing Council's Overarching Principles—Sentencing Children and Young People.

¹⁶ [Ministry of Justice \(2017\) Statistics on Race and the Criminal Justice System 2016, London: Ministry of Justice](#)

¹⁷ [Home Office \(2018\) Policy equality statement: Offensive Weapons Bill, London: Home Office](#)