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CHAPTER 6

England and Wales: Return to Custody

For these are things being done to children by the State – by all of us – in circumstances where the State appears to be failing, and in some instances failing very badly, in its duties to vulnerable and damaged children.

The Honourable Mr Justice Munby: Judgment, Article 172, 2002

If, since 1990, Russia has done little to reduce the reliance upon custody, England and Wales have favoured the increasing use of it. In 1991 the United Kingdom had a Conservative government, in 1997 new Labour swept to power and, ten years later, is still in office. During this period policy towards children who break rules has changed dramatically. The pendulum has swung sharply towards punishment and the use of custody. This at a time when UK governments have signed up to international conventions on the rights of the child and pursuing the welfare of children who break the law, and when other countries in Europe have brought down the numbers of children held in detention. In 2008 a new *Youth Crime Action Plan* appeared, the latest statement on government thinking and intent, an ambivalent or even contradictory document, reflecting different views. In this chapter we outline the contours of these more punitive policies; in the next, we attempt to find an explanation for this puzzling and depressing policy shift. In the final chapter, assisted by evidence of other countries' successes, we address the question: what can be done?

During the 1980s, we remind the reader, the custody rate remained stable – but diversion meant fewer cases coming to court and fewer custodial sentences. The numbers of those under-17 held on remand or sentenced to custody fell by more than two thirds during the decade.¹ However, despite Home Office continued support for alternatives to custody, within a few years there was a sharp reversal of policy. From John Major's 'we should condemn a little more and understand a little less' to Tony Blair's 'tough on crime, tough on the causes of crime' and Jack Straw's criticism of the 'excuse culture' the message from politicians in recent years has been that Michael Howard was

right when he claimed that 'prison works' and that we need more prisons. The result has been a steady climb in the numbers of young people in custody (see Figure 3 in the Introduction). If, in Russia, the penal reform community has struggled, unsuccessfully, to persuade politicians to introduce policies which would result in a substantial reduction in numbers of children behind bars, in England and Wales the combined expertise of Home Office experts, of professionals who work with young people, and of a much stronger and long established penal reform community has failed to prevent politicians producing policies which ratchet up the numbers.

In both countries crime by adults has been of primary concern to politicians. However, if in Russia this meant that youngsters received relatively little attention from the legislators – and it was their neglect that left them victims of a harsh system designed primarily for adults – in England and Wales the Conservative and then Labour government's new approach to tackling crime in general (that is, by adults) included a series of punitive measures directed exclusively towards children. Politicians and some sections of the media consciously strove to make children a target, and to argue for tough, punitive measures, to make them behave.

While in Russia the shadow of the past may carry some weight as an explanation for the slow change (albeit, as we have argued, in terms of a passive acceptance of harsh policies, the absence of a tradition of political and social activism, and the conservatism of the government and judicial apparatus) it is difficult to see a historical inheritance in any way influencing policies at the end of the century in Britain. Earlier governments of all political persuasions had followed, maybe cautiously, a welfare-oriented approach, and had emphasized the importance of reducing and eventually abolishing the use of custody for under-17 or 18-year-olds. The Conservatives may have talked of law and order but, even under Thatcher, diversion and cautioning had occupied centre stage. If we cannot look to history for help in understanding the curious shift that took place at Westminster in the 1990s, then how can we explain it? But, first the new thinking.

New thinking, new policies

In 1991, under Michael Howard's guidance, the Criminal Justice Act extended the brief of the (now renamed) youth court to include 17-year-olds and set the court's maximum custodial sentence at 12 months. Grave crimes still came before a Crown (adult) court. But in 1994, the Criminal

Justice and Public Order Act, passed in the aftermath of the Jamie Bulger murder, lowered the age for indeterminate sentences for grave crimes from 14 to 10 years, raised the maximum youth court sentence for 15–17-year-olds from 12 to 24 months, and created a new Training Order to be served in a private jail (STC) for up to 24 months. This marked the start of a veritable bonanza of criminal justice acts, subsequently introduced by successive Labour Home Secretaries.²

The secure estate for children included, at that time, the local authority children's homes (for those under a welfare order and those sentenced for a criminal offence), the Young Offender Institutions for boys (until 1988 known as Detention and Youth Custody Centres), and places in women's prisons for girls. There were now to be five new Secure Training Centres for persistent offenders, run by private companies. The rationale for such a policy move is difficult to grasp. As Rob Allen notes, Tony Blair, at the time, argued that the idea was 'fundamentally wrong' because 'the last thing you want to do with those persistent young offenders is to put them alongside 40 or 50 other persistent young offenders and lock them up for a considerable period of time'. It was, Blair suggested, 'insane to set up these new centres at the same time as the local authorities are having to close some of their facilities for disturbed young people in communities throughout the country' (Allen 2006: 28).

Yet, once in power, this was forgotten. None had been built by 1997, but under the Labour government four STCs have been built, while local authorities continue to struggle. Until very recently, girls continued to be housed with women; now, in most cases, they are at least in a separate unit in an adult prison.

New Labour's first foray into the field of youth justice came in 1996 with a policy paper from Jack Straw and Alan Michael, 'Tackling Youth crime, Reforming Youth Justice', in which they questioned the claim that most children grow out of crime and argued that fundamental change was needed. This was followed by a White Paper, *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales*, presented to Parliament in 1997 by Jack Straw. We quote from the White Paper at some length because it allows us to see the shift in thinking that has dominated policy-making ever since. The Preface states:

Today's young offenders can too easily become tomorrow's hardened criminals. As a society we do ourselves no favours by failing to break the

link between juvenile crime and disorder and the serial burglar of the future. For too long we have assumed that young offenders will grow out of their offending if left to themselves. The research evidence shows this does not happen.

An excuse culture has developed within the youth justice system. It excuses itself for its inefficiency, and too often excuses the young offenders before it, implying that they cannot help their behaviour because of their social circumstances. Rarely are they confronted with their behaviour and helped to take more personal responsibility for their actions. The system allows them to go on wrecking their own lives as well as disrupting their families and communities.

This White Paper seeks to draw a line under the past and sets out a new approach to tackling youth crime. It begins the root and branch reform of the youth justice system that the Government promised the public before the Election. It will deliver our Manifesto pledge to halve the time it takes to get persistent young offenders from arrest to sentencing.

All those working in the youth justice system must have a principal aim – to prevent offending. That will be the statutory aim we set out for them in the new Crime and Disorder Bill. With Final Warnings instead of repeat cautions, a new action plan, reparation and parenting orders, and a new national network of Youth Offending Teams providing programmes to stop offending behaviour, we are putting in place the means of delivering this aim. To give more strategic direction, set standards and measure performance, the Government will set up a new Youth Justice Board for England and Wales.

Now, in itself, ‘prevention’ can include almost anything: tackling the poverty, abuse and neglect that encourages criminal behaviour, adopting new approaches to drug use by adults that will have repercussions for youth, or new policies on guns and knives, encouraging the use of home and street security systems, or of new strategies (community service, restorative justice) for young offenders, mentoring schemes, or imposing tougher penalties on those caught breaking the law. The question is: which of these strategies, or combination of them, is effective in reducing crime and at the same time helps, rather than damages, child offenders?

The government saw no problem here:

Children need protection as appropriate from the full rigour of criminal law. Under the UN Convention on the Rights of the Child and the European Convention on Human Rights, the United Kingdom is committed to protecting the welfare of children and young people who come into contact with the criminal justice process. The Government does not accept that there is any conflict between protecting the welfare of a young offender and preventing that individual from offending again. Preventing offending promotes the welfare of the individual young offender and protects the public.

How, though, do you achieve this? Does it not depend upon what kind of offending, and offender, you are concerned with? The White Paper took issue with the claim that most young people commit offences at some point in their youth, and most grow out of it, offering instead a picture of a generation of future serial burglars. Yet it was disingenuous when it claimed: 'For too long we have assumed that young offenders will grow out of their offending if left to themselves. The research evidence shows this does not happen.' The research evidence shows that there is a small hard core of persistent offenders who do not grow out of crime, and may well become the more serious young adult offenders. Further into the White Paper, the authors noted that 'about 3% of young offenders commit 26% of youth crime'. Why then not focus on these? Instead the government included all young offenders under one umbrella.

The White Paper referred to: 'The consultation paper Tackling Youth Crime [which] explained the scheme':

- a first offence might be met by a police reprimand, provided it was not serious. Any further offence would have to result in a Final Warning or criminal charges: in no circumstances should a young offender receive two reprimands;
- if a first offence results in a Final Warning, any further offence would automatically lead to criminal charges, except where at least two years have passed since the Final Warning and the subsequent offence is minor; and
- for any offence the police would have the option of pressing charges.

The **action plan order** will combine punishment, reparation and rehabilitation. If community intervention does not work, and for young

offenders found guilty of serious crimes, custodial penalties are necessary to protect the public. Public protection is best served if punishment is combined with rehabilitation so that young offenders are equipped to lead law-abiding and useful lives once they are released from custody. . . . The Government will also give courts clear powers to remand juveniles to secure accommodation where this is necessary to protect the public and prevent further offending.

The Crime and Disorder Act of 1998 followed. The 1994 Act had introduced tougher sentences, and the 1998 Act increased the chances of a youngster being sentenced. Police discretion to issue warnings or cautions following an arrest was reduced; the use of a caution was replaced by a reprimand and final warning – two strikes and you’re out; and a new ASBO (a civil order), with the condition that its infringement automatically resulted in imprisonment, was introduced. The aim seemed to be increase the use of at least short-term imprisonment for a greater number of offences. The Training Order became the Detention and Training Order for 12–17-year-olds, to be operational from 2000; for non-grave offences magistrates could impose a sentence of four to 24 months, half to be spent in penal custody, half in the community. The long-held common law principle of *doli incapax* for children aged 13 and under was abolished.

The government’s commitment to using the criminal justice system to deal with even non-serious crimes by children was further reflected in the 2001 Criminal Justice and Police Act. This permitted the use of detention on remand for ‘repeated’ breaking of the law, irrespective of the seriousness of the offence (shoplifting, petty theft, etc.). ‘Repeated’ has come to be interpreted as ‘more than once’. This, in Goldson’s words, in effect, ‘replaced the long-established “seriousness” threshold with a “nuisance” test: a perfect exemplar of “institutionalized intolerance”’ (2006: 144). Two years later the Anti-social Behaviour Act introduced the use of dispersal orders, giving the police powers to return home any under-16-year-old walking the streets, and allowed for the publication of ASBOs, while the Criminal Justice Act introduced longer sentences for dangerous offences.³

The results of the policies

The Labour government accompanied the increased use of the criminal justice system with the creation of new ‘youth justice’ institutions, aimed at

ensuring an effective and participatory system. The 1998 Act introduced, at central level, a Youth Justice Board, a public body to monitor and oversee the workings of the youth justice system and, from 2000 onwards, to be responsible for the purchase of places within the secure estate for young offenders. At local level, Young Offender Teams, including representatives of social services, police, the probation service, housing departments, and drug addiction agencies were to be set up by local authorities to work with young people who were given non-custodial sentences. The results have been very mixed.

Some YOTs are working well, providing programmes, supervision or support for young people and/or their parents. But the public is largely unaware of their existence.

Three-quarters of the respondents in a national survey in 2004 had not heard of YOTs (Hough and Roberts 2004: 24), and there is no evidence that their activities are denting the prison numbers. It might be possible to argue that the fall in the youth crime rate owes something to YOT activity, but the crime rate began to decline before YOTs were introduced and there is no evidence of their having an impact. Perhaps even more disappointing, while the leadership of the Youth Justice Board has struggled to improve the system it has been powerless to prevent numbers of custodial sentences rising, to reduce the overcrowding or to stem the incidence of suicide by children in custody.

The variety of sentencing options increased over the period, including, in the government's words, 'new and innovative community penalties' – the Intensive Supervision and Surveillance Programme (the increased use of curfews and electronic tagging); Intensive Fostering; the use of restorative justice as part of a range of community orders; the Youth Restorative Disposal, piloted in eight areas of England and Wales; Referral orders; Reparation orders. (In 2008, under the Criminal Justice and Immigration Act, nine of these different community sanctions or orders were grouped together under a Youth Rehabilitation Order to simplify the system.) Reoffending rates for community orders were running at 69 per cent by 2006 and, the government suggested, where magistrates had little faith in community sentences, they tended to use custody.

Rod Morgan, chair of the Youth Justice Board from 2004 to 2007, was arguing in 2006 that:

It's my belief, on the best available evidence, that we would better protect the public from being victims of further crimes if we were locking up

fewer children. We have some very serious offenders in the system, who have to be there, but it does not amount to the 3,000-odd that we've currently got. ... *We are prosecuting too many young people.* [my emphasis – MM] They have to be brought to account if their behaviour is concerning, but we don't have to do it by criminalizing them. (*Guardian* 16 August 2006)

Although it must be well known in Home Office circles that diversion away from the court system is a critical first step, it took two years of pressing by Morgan, on behalf of the YJB, before the Home Office in 2006 expressed a willingness to introduce 'some pilot schemes for looking at greater flexibility in the way the police deal with young offenders'. Had the experience of the 1980s simply been forgotten? In 2008, came the first acknowledgement. The Criminal Justice and Immigration Act of 2008 (referred to in the *Youth Crime Action Plan* of that year as marking 'the biggest reform to the youth justice system since 1998') reintroduced 'the emphasis on out of court diversions by legislating for the Youth Conditional Caution which will reduce the number of young people being taken to court for relatively low-level offences'. It proposed a Youth Conditional Caution, for 10–17-year-olds, to be piloted initially for 16- and 17-year-olds in 2009.

Between 1994 and 2004 the number of youngsters detained by the police in connection with an offence remained stable, but the new legislation meant that an increasing proportion came to be prosecuted (see Figure 10). If at the beginning of the decade the police were diverting two-thirds of the cases involving youngsters out of the system (using cautions, warnings, etc.), in 2004 in roughly half of the cases the child received a court sentence.⁴

By 2006 police reprimands had continued to rise but sentencing figures changed little. How did the judges respond to the increasing number of cases coming before them, and to the changes in sentencing guidelines? And, in particular as regards custody, the most serious sentence, the one that should be used as a measure of last resort where children are concerned? Figure 11 shows custodial sentences rising steadily until 2002 and then dipping slightly, although the 2004 figure is still a third above that of 1994, and by 2006 there was little change.⁵

The custody *rate* during the period hovered between 7 and 9 per cent of all sentences but the greater number of cases before the courts meant that substantially more children were committed to detention (remand and

Figure 10: Cautions and sentences of 10–17-year-olds, England and Wales, 1994–2007

Source: Data from Morgan and Newborn 2006:1044; YJB website.

custody). The percentage of custodial sentences related to violent offences showed no increase between 1996 and 2006, hovering around 14 per cent; by 2007 nearly as many young offenders were receiving custodial sentences for breach of a licence or order as for a violent offence. A measure of last resort? The average length of sentence rose too: from 3.9 months to 6.1 months between 1993 and 2003 (Bateman 2006: 74; *Sentencing Statistics* 2006).⁶ Sentencers, it seems, have become more severe:

This greater severity undoubtedly reflects, in part, a more punitive legislative and legal framework of sentencing. Legislation, guideline judgements and sentence guidelines have all had an inflationary effect on sentences passed. At the same time, the climate of political and media debate about crime and sentencing has become more punitive, and is also likely to have influenced sentencing practice. (Hough et al. 2003, quoted by Goldson 2006: 144)

The UK government claimed: ‘Our juvenile sentencing policy aims to limit the number of young people who are in custodial provision’ (*Justice for All*, Home Office, 2002). Yet the UN Committee on the Rights of Child reported critically:

The Committee is deeply concerned at the high and increasing numbers of children in custody generally, at earlier ages for lesser offences, and

Figure 11: Sentences of 10–17-year-olds, England and Wales, 1994–2006

Source: Based on Morgan and Newburn 2006: 1045; *Sentencing Statistics* England and Wales 2006: Table 2.4, passim.

for longer custodial sentences imposed by the recent increased court powers. ... [I]t is the concern of the Committee that deprivation of liberty is not being used only as a measure of last resort and for the shortest appropriate period of time, in violation of article 37(b) of the [United Nations Convention on the Rights of the Child].

As NACRO commented (2003):

In the same month as the Government reaffirmed its commitment to keeping young people out of custody, the number of children (people under 18) detained through the youth justice system reached a level not seen for at least twenty years. ... The contrast between the Government's aspirations for its juvenile remand and sentencing policies and the United Nations Committee's assessment of the current use of custody within the United Kingdom, could hardly be more stark.

Five years later the Committee's assessment of the situation as regards the use of custody was as critical.⁷

The failings of custody

But what is so bad about having a high number of young people locked up? The underlying reason for the international community's emphasis on a sparing use of custody lies in the fact that, despite the best efforts of staff, locking up children and adolescents is fraught with ethical, social and financial problems as well as proving singularly ineffective in reducing re-offending. (Allen 2006: 22)

Rob Allen, a member of the Youth Justice Board, continues:

The Prison Service, which accommodates 83 per cent of the juvenile custodial population, is particularly poorly suited to locking up young people. In 1996, Chief Inspector of Prisons, Sir David, now Lord, Ramsbotham recommended that they should relinquish responsibility for all children under the age of 18. Children represent less than five per cent of the prison population. An organisation whose key priority is to prevent the escape of dangerous adult criminals cannot be expected to provide the level of care, supervision and support required by teenagers.

Instead of implementing Ramsbotham's recommendation, the Labour government gave the Youth Justice Board responsibility for purchasing secure places. It was hoped that the Youth Justice Board's role would lead to a transformation of the service. Thanks to substantial investment, particularly into education within Young Offender Institutions, there have been improvements. The Children's Rights Alliance for England, normally a stern critic of conditions for detained juveniles, concluded in 2002 that 'results have been great, in some cases near miraculous' (RCP/CRAE 2002). The regular survey of young people's views conducted for the inspectorate makes for a more sober assessment. The 2004 report found that a third of young people felt unsafe at some time, eight per cent said they had been assaulted by staff and 24 per cent assaulted by other trainees. (2006: 28–9)

We cannot guarantee their safety if we are honest. We fulfil a function for society, I suppose, in holding them until the courts decide what they want to do but, in honesty, we do a very limited job. (Senior prison officer)

Lord Ramsbotham's findings and those of the Commission headed by Chief Justice Munby have been echoed by Rob Griles, the Commissioner for Human Rights for the Council of Europe, who, in 2005, concluded that the prison service is failing in its duty of care to children (Goldson 2006: 149), and he repeated his criticisms in October 2008 at the III International Juvenile Justice Observatory Conference in Valencia.⁸ In 2007, the report of the Children's Rights Alliance for England highlighted the continued use of controversial powers of restraint by staff in the STCs (from which one child has died). While the suicides constitute the worst indictment of the system, the youngster's first experience of prison can be harrowing. Even travel there can be degrading. Private firms are now responsible for the transport, and use vans with small cubicles.

It was a long journey, a very long journey. I was locked in a box the same size as that [pointing to a filing cabinet]. There is no toilet on the van. You can't have a piss, you have to wait. If you can't wait I suppose you just have to piss yourself. (Boy, aged 16)

... recent inspections have given us cause for concern ... at one establishment we spoke to juvenile prisoners who had experienced journeys of up to eleven hours, during which they claimed they were expected to relieve themselves in plastic bags as no comfort breaks were provided. (Her Majesty's Chief Inspector of Prisons, 2000; Goldson 2003: 133)

The conditions under which a youngster travels to the place of detention cannot compare with the suffering experienced by some of the Russian children, but that does not excuse them.

We have been very lucky here. We have only had one suicide and not many attempted suicides. Bearing in mind the way that they are treated on the first night, this is more by luck than design. (Prison officer)

There is no real first-night support. We might say that there is but it's all about back-covering really ... if it says check every fifteen minutes and I do, I've done my bit, so it's not my fault if it [self-harm] or suicide does happen. That's hardly support though, is it? (Prison officer)

I was crying, crying about my Mum and that. My Mum is being treated for cancer like I said, and I was worried about my little sister. She is only seven, and if my Mum dies she will grow up with no Mum. (Boy, aged 16)

The worst part was pulling out of Scunthorpe. It was horrible as I realized I was getting miles and miles away from my family. I was shaking and scared. When the van got here I saw all the razor wire and stuff and I just wished I could run away from it all. I was frightened. Really frightened. (Boy, 15)

We have already mentioned the bullying. And there is the racism.

I was scared stiff when I first arrived with no idea what to expect. And my first night there were these other boys leaning out of their windows yelling abuse at me ... dirty Paki and a lot worse. I knew that if I just put up with it I'd be seen to be weak so next morning I went up to the ring-leader and just had a go at him and we had a fight. I got into trouble for that and lost privileges but I had to prove I wasn't going to lie down and take it. (Suliman aged 17; quoted in Neustatter 2002: 41)

You just know you're going to have to put up with racism. You can't go into prison and get treated same as whites because they don't think you are the same. When I was on the induction wing of one YOI I was subjected to racist abuse non-stop – shouting out of the windows, attacks when I went to the shower, this and that... (Jack, now 17; quoted in Neustetter 2002: 63)

In 1997 Her Majesty's Chief Inspector of Prisons had commented:

In recent years the massively increased numbers of children sent to custody have been dumped on prison service establishments, in a prison system that has not, traditionally, recognized that it has a role in caring for children in need of care, development, care and control. Within this system children are, quite frankly, lost. (Cited by Goldson 2002: 65)

The government, in presenting *No More Excuses* seemed to take this on board: 'The Government wants to see constructive regimes, including

education and a high standard of care, to help give young offenders a better chance of staying out of trouble once released.’

Yet, even as regards education, where provision varies enormously from one institution to another, education and personal development schemes in 2000 averaged out at only seven hours a week. By 2006 the Youth Justice Board (YJB) had managed to increase this substantially – to over 26 hours. But for those on short sentences (or arriving in the middle of course) education cannot help them. Many have special needs. In 2003 the YJB reckoned that over a quarter of school-aged children in custody had literacy and numeracy levels of a seven-year old, while mental health problems, including personality disorders, are present in a majority of cases (*Youth Crime Action Plan* 2008; *Bromley Briefings* 2008).

As a Senior Prison Officer commented:

I would say that looking around the prison as a snapshot on any day there is probably quite a lot of kids in here who could be dealt with better outside in the community. Are we the right people to look after these lads without any specialist training? I doubt it, because I think there is a real need for specialist training. We are expected to be parents, child psychologists, and nurses, all without training. I don't know what the alternative is, it's all down to cost and we [YOI] are more cost effective than secure units, but it doesn't necessarily mean that this is the right place for them to be. Yes, they have committed crimes, but in all my experience I can tell you that prison is not a deterrent. We are just locking them up and keeping them off the streets for a few months, but they go straight back out to exactly the same situation that they have left. We had the perfect example today: a sixteen-year-old lad left here this morning with nowhere to live and no money. He'll soon be back in here. I don't think it does them any good to be in here – if anything, it changes them for the worse.

In 2008 the *Youth Crime Action Plan* addressed some of these issues:

Children in custody are amongst the hardest to reform. But we need to continue to work to improve custody so it is as effective as it can be in reducing re-offending and addressing underlying problems. While children are in custody the focus must be to change their behaviour,

Boys (models) in YOI workshop, England

improve their educational attainment, and prepare them for their return to the community. We must also do more to help them on release so that they are equipped to lead law abiding lives.

In particular, we will address ...

- under-achievement in education and the development of relevant skills and qualifications;
- we will also prepare young people for their return to the community from the very beginning of their sentence;
- we will promote the well-being of young people in custody, keeping them safe and protecting them from harm;
- young people should be supervised and cared for by staff who are committed to working with under-18s and who are properly trained for that role; and
- to promote family links and a stable environment for young people in custody, we will seek to avoid unnecessary transfers between establishments.

But concrete measures to achieve these aims, most of which were referred to ten years earlier in *No More Excuses*, are not listed, apart from transferring education provision to the local educational authorities. This cannot be sufficient to address the problem. Either the authors of the plan are simply unaware of the failure of prison as a re-educator or they recognize that, despite its having a marginal effect, it is important to suggest it can solve problems.

The government's claim that its policies are directed towards making children more law-abiding does not stand up to scrutiny. Were it the case that the STCs and YOIs had a successful record of releasing their young inmates back into the community as law-abiding, capable young citizens, the government could at least use that argument. But in 2000 half of those released from the STCs were arrested within seven weeks, two-thirds within 20 weeks of release. A direct comparison with figures for the YOIs is not possible, but the pattern is depressingly similar: of the boys released in 2001 roughly 80 per cent were reconvicted within two years, and just over half received a new custodial sentence (Goldson 2006: 150; NACRO 2005: 10). The figure for reoffending within one year by those released from the secure estate was 77.0 per cent for the first quarter of 2006 (the latest available data) compared with that of 39.7 per cent for young offenders as a whole (*Reoffending of Juveniles* 2008). There has been some improvement in recent years in reconviction rates for those originally sentenced to *lesser* penalties but, as regards the use of custody, the opposite is the case (Morgan and Newburn 2006: 1047).

Prison staff and experts agree: in the great majority of cases, prison does not deter a child from future offending or set an example to others. Instead it damages a child, and makes it more likely he or she will become locked into a future life of crime.

Prison doesn't work – it doesn't ensure the young people will come out of the system decent, law-abiding citizens. It creates anger and resentment, it makes low esteem worse, and it produces a lack of respect for anyone in authority. Many of these kids haven't even been found guilty. (NRRI Practitioner)

Custody has proved an expensive failure: it is incapable of addressing the far-reaching welfare needs of most of the young people whose offending

leads to them being locked up; it does incalculable damage to children who are already amongst the most disadvantaged and vulnerable in society, and it is spectacularly ineffective at reducing youth crime. (NACRO 2005: 52)

We lock them up and send them out less not more able to cope, more not less angry and more likely to be violent. This way we feed the prisons of the future. (Chris Tchaikovsky, founder of Women in Prison, quoted in Neustatter 2002: 113)

Nowhere to go...

Sending a child to prison is, in the majority of cases, the equivalent of sticking a plaster on top of a bleeding sore. While in prison, the wound will not heal, on the contrary it will fester. The child comes out with a suppurating wound and is back where he started – maybe with no family, no shelter, and almost certainly no job. Prison staff in English institutions recognize, as do their Russian colleagues, that without these minimal supports, the child does not stand a chance.

In 1997 *No More Excuses* had suggested that

A supervising officer – a member of the Youth Offending Team – would be appointed at the start of the sentence. He or she would be responsible for supervision after release from custody and would also be involved in the planning and supervision of the custodial element.

More than ten years later, the Action Plan favoured consultation

on a more *comprehensive package of support for children leaving custody* [whose] key elements should include:

- identifying a lead professional to take responsibility for each child during and after their sentence;
- developing a ‘pathway plan’ that is reviewed regularly and sets out all aspects of provision that will be made during the sentence, for immediate resettlement and their longer term success ... ; and
- providing more intensive support immediately following release from custody.

This does not sound very different.

The Action Plan also recognized the importance, for reducing reoffending, of:

a stable lifestyle, especially having strong family support and suitable housing and ensuring health needs (including mental health or substance misuse problems) are addressed. ... A significant proportion of children leaving custody do not have anywhere suitable to live on release and many have wider family, health and personal needs.

Some of the more enlightened YOI institutions, working together with local authorities, try to ensure at least part of a support package for the leavers. The YO in Belfast and the Open YOI at Thorn Cross both had programmes focused towards this.⁹ While we can only commend the efforts put by governors and staff into designing such programmes, there is at the same time something deeply depressing to hear prison staff say 'we have come to realize that without having somewhere to live, a job, and family or other support, the youngster will be back on drugs and stealing to pay for them ... and we shall see him back again'. Surely we have known this for a long time? If the problems are lack of shelter, family or other support, and no job, and the Action Plan recognizes this to be so, why are they not tackled *before* a child ends up behind bars? To expect the prison service to work with the local authority to address them, in the unsuitable prison environment, seems a quite inappropriate strategy, as well as being extremely costly.

Finally, this brings us to the question of cost. In England and Wales the costs of custodial provision are prohibitive and the system of financing encourages its use. Local Youth Offending Teams, and social services, face a situation in which a child who remains in the community, whether on bail or serving a sentence, will be far more costly to the community than one who is placed in custody: the central government pays for custody. The YOIs and the private STCs are funded centrally whereas the local authorities are responsible for their children's homes (where available places fell from 450 in 2000 to 400 in 2005).

The Youth Justice Board, through its budget, is responsible for buying places at the relevant institutions – and ends up spending more than three-quarters of its budget on custody provision. The costs of placing a child in

a local authority home (with their higher staff–child ratios) are roughly three and a half times the cost of a placement in a YOI; costs in the Secure Training Centres are similarly high, and the Board does not have resources to buy them.¹⁰ While the YJB pursues a policy of placing under-15s in local authority homes, the shortage of places and costs encourages the transfer of 15-year-olds to YOIs, and the cost of places in the STCs has resulted in a similar policy of transferring 16-year-olds, who are no longer considered as vulnerable, to YOIs. Proposals exist (including changing the central funding of secure institutions) that would provide financial incentives for YOTs to find alternatives to custody, and encourage local authorities, schools and magistrates to take responsibility for their own young people (NACRO 2003, 2005).

The Action Plan took a cautious step forward here, suggesting consultation on whether local authorities should bear the cost of court-ordered secure remand, and how to make the costs of custody more visible as part of a debate on whether, in the long term, the local authorities should be responsible for and fund placements in custody.

Reassessing the policies

So what has the radical new approach of *No More Excuses* achieved? More than ten years later the government could point to declining crime figures (but it did not claim that this was because of these policies), and to a speeding up of the time between arrest and sentencing for persistent offenders, but more young people were coming before the courts (was that a good thing?), double the number of children were in custody, and recidivism upon release remained in the order of 75 per cent.¹¹ The policies of the previous ten years had swept up all into the criminal justice system. Ten-year-olds and 17-year-olds, first-time offenders and persistent offenders, serious offenders and ‘pranksters’: all in the eyes of the government, could ‘too easily become tomorrow’s hardened criminals’. Yet the fact that a small percentage of offenders were responsible for a disproportionate amount of crime had not changed. In 1997 the government had estimated that 3 per cent of young offenders were responsible for 26 per cent of youth crime; in 2008 the estimate was that 5 per cent of young offenders were responsible for 50 per cent (*Youth Crime Action Plan* 2008). The minority of persistent offenders was still very much there.

In 2007 the news was dominated by the shooting of 11-year-old Rhys Jones, as he walked home from football practice. This appalling murder brought a summit at No. 10, emotional statements from the Home Office minister that those responsible will 'be put away', and promises of a rapid legislative response in yet *another* Criminal Justice bill. Rhys Jones's death stands out among a wave of teenage killings that rolled forward through 2008. The other victims of gun or knife crime were older, many of them caught up in gang warfare, some just in the wrong place at the wrong time, and the murders are highly concentrated in particular districts of London, Liverpool, Manchester and Birmingham. The figures, set against an overall decline in the murder rate, are alarming and indicative of a vicious circle of deprivation and drugs that traps a section of youth, and not only youth, living in deprived areas of cities whose economies have been booming over the past ten years.

Again the Labour government felt it must act. For adults the answer was to follow the American example and build new Titan prisons to house an expanding prison population. For youth, the response was more ambivalent. On the one hand the Criminal Justice and Immigration Act of 2008 reintroduced 'the emphasis on out of court diversions' but simultaneously it affirmed:

When sentencing a young offender under the age of 18 the Court must have regard to the following:

- the principal aim of the youth justice system (to prevent offending and reoffending)
- the welfare of the offender
- the purposes of sentencing, which are: punishment; reform and rehabilitation; protection of the public; reparation to persons affected by offences.

The message for the judge is surely confusing. The evidence of the past ten years (and more) is that custody does not prevent offending or reoffending, it does not further the welfare of the offender, it does not reform and rehabilitate the offender, nor allow reparation to victims. So should we expect to see less use of custody? Or does punishment and, perhaps, temporary protection of the public, count for more?

Two months later the new strategy paper, the *Youth Crime Action Plan* 2008 with a ministerial foreword by Jacqui Smith, Home Secretary, Ed Balls, Secretary of State for Children, Schools and Families, and Jack Straw, Lord Chancellor and Secretary of State for Justice, was published. We have referred in the preceding pages to some of its findings and recommendations. Here we place it in a wider context, and try to assess whether it heralds change.

Government papers or Acts produced between the beginning of the last century and the 1990s all emphasized the link between the social environment (deprivation) and youth crime, and the welfare of the child was seen as a priority. By the 1960s the importance of support from social services for children at risk and their families was a key theme; the use of cautioning by the police, and supervision in the community, whether by social services, probation officers or charitable agencies was emphasized as an alternative to using the criminal justice system. Until the 1980s, the ending of custody was seen as the longer-term aim, but there was a strong commitment to institutional care, with education and training. *No More Excuses* signalled a change. It did not deny the connection between deprivation and crime but its focus was not on how to be 'tough on the causes of crime', rather on how to be 'tough on crime', and its instruments were the courts and tougher sanctions. Custody 'as punishment' was to be combined with education and rehabilitation of serious and persistent offenders; new local panels, which included police, social services and community representatives, would assess and work with less serious offenders, who would serve a variety of sentences in the community.

The authors of *Youth Crime Action Plan* were faced with an unenviable task. The government was anxious to argue that its radical and tougher approach, initiated in 1997, had been successful, and the Plan needed to emphasize this. At the same time, the results were far from encouraging, and this could not be wholly ignored. Yet, a serious change of course, when sections of the media were clamouring for tougher, not softer, sanctions, was considered not to be politically feasible. The result is a disappointing document, which relies on tough language to cloak its cautious content. It lacks the conviction and clarity of earlier Papers, including that of *No More Excuses*, whose recommendations are easy to follow. Perhaps its contradictory messages reflect the different views of the three ministries, and ministers, involved. It is hugely repetitive; long on sometimes cloudy statements of intent, short on concrete measures. It reads like a consultancy

report, a new style of writing that has come to dominate reports or assessments demanded by government departments and international agencies. While it revives some earlier beliefs or ideas on how to keep children out of the criminal justice system, and slips in some welcome counters to media-fanned public fears, it simultaneously uses tough language to placate the punishers. Implicitly it recognizes that the last ten years have failed the children who have been locked up. They have not been re-educated, retrained or sent back into the world with skills and support. Yet it contains no new ideas.

The opening paragraphs set the tone.

The Youth Crime Action Plan is a comprehensive, cross-government analysis of what further we need to do *to tackle youth crime*. It sets out a *'triple track' approach of enforcement and punishment* where behaviour is *unacceptable, non-negotiable support and challenge* where it is most needed, and better and earlier prevention. It makes clear that *we will not tolerate* the behaviour of the minority which causes *misery and suffering* to others, especially their victims who, more often than not are other young people. [my emphasis – MM]

The key elements in this triple-track approach are enforcement and punishment, prevention, and support. The analogy is unfortunate. These cannot be tracks that run parallel because they feed into each other. Perhaps blocks, building blocks, where one begins with support, which in itself supports prevention, and this is topped by a smaller and lighter enforcement set of measures?

The Plan claims that the reforms since 1997

have had positive effects on youth crime and its causes. The frequency of youth re-offending has fallen and we have halved the average time from arrest to sentence for persistent young offenders from 142 days in 1997 to 58 days in April this year.

As we noted (see n. 11) the decline in reoffending, and then only for certain categories of offenders, has been very slight since 2000, while reducing the time between arrest and sentencing, laudable in itself, is surely not as important as bringing down numbers in custody.¹²

The achievements that the Action Plan cites are very modest. There can be no claim that custody has reduced reoffending. Instead the claim is for ‘*significant* improvements’ to the juvenile secure estate. The Youth Justice Board has:

- provided more accommodation in the South East for boys aged 15–17; and
- built a new unit for more vulnerable 15–16 year olds boys at Wetherby Young Offenders Institution (YOI) which is due to open in October to ensure they receive the specific support they need.
- announced plans for a new YOI at Glen Parva in Leicestershire which will increase provision in the Midlands and enable young people to be accommodated in smaller living units.¹³

Success, it seems, is measured in terms of building more secure accommodation. Yet, also, in identifying persistent offenders at an early age:

But a minority of young people continue to blight their communities by breaking the law and behaving in an anti-social way. We estimate that 5% of young people are responsible for over half of youth crime. We believe that we are increasingly able to identify these young people early and can intervene to address the root causes of their behaviour, which includes supporting and challenging their parents to meet their responsibilities.

The Plan makes a strong pitch for resources and efforts to be put into targeting and supporting failing families:

This should involve schools, health services and specialist services, sharing information and working together for young people at risk, young people already drawn into crime or anti-social behaviour and parents in need of support and challenge.

It states that

all of the 110,000 families with children identifiably at risk of becoming prolific offenders will receive a targeted intervention as a result of these measures

but, later on, we are told:

By 2010 we aim to have reached 20,000 families across the country, and Our systems for identifying and intervening early to tackle problems need to be much more robust.

It is going to need more than this to help young people defend themselves against adult influences and criminal behaviour (often drug-related), but at least it recognizes that young people need help. Even more encouraging, perhaps, is the recognition that steps need to be taken to reduce numbers entering the criminal justice system. We have already mentioned the Youth Conditional Caution, to be piloted in 2009. The Action Plan argues:

Reductions in youth crime will principally come about if we reduce the flow of young people entering the criminal justice system. Each year around 100,000 young people aged 10–17 enter the criminal justice system for the first time. Our new goal is to reduce the rate by one fifth by 2020.

Local area agreements are seen as the clue:

Local authorities and their partners can help reduce the numbers of young people entering the criminal justice system and *the demand for custodial places*. [My italics – MM] Courts can also help shape local provision and improve outcomes by requesting welfare assessments and requiring information on the services and support they have in place locally.

So now we talk of ‘the demand for custodial places’ as though this was similar to ‘the demand for university places’ or ‘the demand for hospital beds’? Who is doing the demanding? What determines the level of demand? Yet in the following sentence, we hear an echo of the principle underlying the 1982 Act:

no young person should be sent into custody unless the court is able to specify why dealing with him or her within the community is not appropriate.

But then comes a swift reminder:

as the Lord Chief Justice has made clear, anyone caught using a knife should expect to receive a custodial sentence; and those caught carrying one are also increasingly likely to receive a custodial sentence (three times more likely than ten years ago).

In chapter 3 we suggested that the legislation that reached the statute books was often a compromise, arrived at after hard bargaining between a variety of interested parties, and that could present problems. The Action Plan is only a statement of intent, yet the reader is left with the impression of listening to discordant voices, even at this stage. There seem to be no guiding principles, instead an attempt to include a range of measures, based on very different assumptions, a post-modernist credo.

In summary, we are proposing immediate action through a package of measures to be rolled out in all areas across England and, for certain measures, Wales. It includes:

- more searches and search equipment to help take weapons off our streets, and now for the first time, everyone over the age of 16 who is found carrying a knife can expect to be prosecuted and those under 16 can expect to be prosecuted on a second offence;
- increasing the proportion of ASBOs accompanied by Parenting Orders;
- expanding provision of youth centres at times when young people are likely to offend, including Friday and Saturday nights;
- using existing police powers more, including measures to tackle anti-social behaviour and underage drinking;
- making permanent exclusion from school an automatic trigger for a Common Assessment Framework (CAF) assessment of needs;
- encouraging the expansion of Safer Schools Partnerships which link police officers with schools;
- increasing the take-up of parenting support by parents of young offenders, including using parenting orders if this does not happen voluntarily;
- giving the public the chance to identify what reparation work they would like young people on community sentences to carry out; and
- closer working between Neighbourhood Policing Teams and young people....

There is nothing that, in the short term, will bring down numbers sentenced to custody. Most European governments, as did the UK government until the 1990s, accept that custody should be used as sparingly as possible for children. How then can we explain the cruel, ineffective and costly policies of the past fifteen years?