

# the Howard League for Penal Reform



## To devolve or not to devolve?

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The pros and cons of making local authorities financially responsible for children in penal custody



**To devolve or not to devolve: should local authorities be made financially accountable for children in penal custody?**



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## Introduction

England and Wales lock up more children than any other country in Western Europe. Figures from the Council of Europe (2007) show that the population of children in prison in England and Wales is 2,440 compared to 646 in France, 1,422 in Germany, 10 in Norway and 143 in Portugal. Only Turkey and Ukraine lock up similar numbers of children to England and Wales, with 2,060 children in Turkey and 3,001 children in Ukraine in custody. The figures also show that children in England and Wales comprise a larger percentage of the total prison population, 3.1 per cent compared to 1.8 per cent in Germany, 1.1 per cent in France and 0.2 per cent in the Netherlands.

England and Wales have one of the lowest ages of criminal responsibility in Europe: The age of criminal responsibility in England and Wales is 10 years old, compared to 13 years in France, 14 years in Germany and Italy, 15 years in Norway and 16 years in Spain (The Howard League for Penal Reform, 2008). On 6 March 2009, there were three children aged 12, 22 children aged 13 and 123 children aged 14 in penal custody.

Against this background of large numbers of children in custody, and at a young age, there has been much discussion as to what can be done to reduce the use of custody and what factors might encourage its use. One factor, which is being widely debated, is the introduction of financial incentives to reduce the use of custody.

Local authorities are required to identify and support children in need in their areas, including those who come into conflict with the law. They also have a duty to prevent youth crime under the Crime and Disorder Act 1998. Youth Offending Teams (YOTs), who are part of the local authority, are responsible for working with children who have committed offences and providing a range of community programmes. However, once a child is sentenced to custody, the local authority makes no contribution to the cost of the placement. They pay only a third of the cost for children who are remanded to custody to a local authority secure children's home (LASCH) or a secure training centre (STC) by the court.

At the moment, it has been argued that the local authority is not financially responsible for a child once they go into custody and cannot be held fully accountable for that child's outcomes. It has also been argued that when children in need are sentenced to custody, it equates to a cost saving to the local authority and allows them to 'wash their hands' of the child for the short term. Making local authorities financially responsible for children in custody, it has been argued, would incentivise them to invest in prevention and to develop alternatives to custody.

The issue as to whether local authorities should bear the cost if young people in their area are placed in custody has been widely debated recently. In a recent interview with Children and Young People Now magazine (2009), Chair of the Youth

Justice Board, Frances Done stated that “there is a powerful case to charge local authorities for the cost of custody”. She stated that there was no financial incentive for local authorities to ensure there were alternatives for young people who were seriously offending and “the costs should lie where responsibilities for those services lie”.

Martin Narey, chief executive of Barnardos, has recommended that local authorities should bear the cost of children in custody. The Justice Secretary Jack Straw also stated that he would consider incentivizing local authorities to improve the way they treat young people who offend.

The Howard League for Penal Reform supports the broad principle that local authorities should take a lead in working with children in conflict with the law. We have concerns however that any proposed solution is properly thought through and that a simple transfer of budgets would create new perverse incentives even as it removes others. This briefing paper considers the pros and cons of devolving youth custody budgets and asks a fundamental question: to what extent can altering the financial arrangements effect real change for the better or is this in reality a problem of law, policy and attitudes?



## **The current system**

Prior to the Crime and Disorder Act 1998, local authorities were responsible for assessing whether a child should be remanded to secure accommodation, and were responsible for paying for that placement. This policy was amended in the Crime and Disorder Act 1998 when courts were given the power to require a young person to be detained in secure accommodation by the local authority, who were then required to meet a third of the cost. The remaining two thirds of the cost are met by central government funding, via the YJB.

The Youth Crime Action Plan (YCAP) (2008) proposed making local authorities responsible for the full cost of court-ordered secure remands, to help local authorities make the case for local investment in alternative forms of remand such as fostering. It also proposed making the costs of custody more visible in order to inform the debate as to “whether, in the long term, local authorities should be responsible for the placement and funding of custodial placements”. The government is currently reviewing responses to its consultation on YCAP.

## The case in favour

- **Making local authorities financially responsible for children in penal custody would provide a financial incentive for local authorities to prevent children ending up in custody**

In the current system, the costs of placements for children sentenced to custody are met centrally, via the Youth Justice Board (YJB). The only financial responsibility that local authorities have is to contribute towards the cost of court ordered secure remands (COSR) to a LASCH or an STC.

Making local authorities responsible for the cost of all children in penal custody could help to drive down the numbers of children placed in custody and provide an incentive to ensure that local authorities intervene early to prevent children ending up in custody.

- **Making local authorities pay for all children in custody would prevent children in the criminal justice system being treated differently to children in need.**

The current system has created a silo scenario for children, depending on which local authority service is working with them. Children who are in need of care and support come under the auspices of Children's Services, whereas once a child ends up in the criminal justice system, they tend to be perceived as an issue for YOTs and there is a tendency for Children's Services "wash their hands" of the child.

Local authorities are required by law to regard young people in the criminal justice system as young people first and foremost. However, it is often perceived that responsibility for that child is taken out of the local authorities' hands once a child ends up in custody.

The majority of children in care and who are considered to be looked after under section 20 of the Children Act 1989, lose their looked after status on entering prison custody. The only children who retain their care status while in custody are children under a full care order under s31 of the Children Act 1989, children who are classified as in need under s17 of the act, children remanded to secure training centres and secure children's home and 16 and 17 year olds who have spend enough time in care to be considered 'relevant'.

In relation to looked after children, whilst a child is in custody, the local authority does not have to pay for that child's placement. They would also save money as they no longer have to pay for the child's accommodation, care and education. However, the cost saving to the local authority is short term. The local authority may have legal obligations to support the child on release, depending on the child's status and needs under the Children Act 1989.

It has been argued that making local authorities pay for the custodial placement would ensure they take more responsibility for children who go into custody.

**• A change in the commissioning and purchasing arrangements for youth custody may help to drive up standards**

The Youth Justice Board is currently responsible for the commissioning and purchasing of places in the secure estate, as well as for setting standards and monitoring the performance of custodial facilities. Since the YJB was established, there has been no reduction in the number of children in custody. There has been criticism of the fact that conditions for children in custody have seen little improvement, despite the YJB's role. The UN Committee on the Rights of the Child (2008) expressed concern about the use of physical restraint and the high levels of self-injury among children in custody. An independent inquiry by the Lord Carlile of Berriew QC (2006), published by the Howard League for Penal Reform, criticised the continued use of pain-compliant methods of restraint, strip searching and segregation for children in custody.

It has been argued that a change in the commissioning and purchasing arrangements could help to drive up standards as local authorities will pay for those offering the best care. However, this is debatable.

If custody budgets were devolved to local authorities, the YJB might no longer have a role to play regarding placements. If the YJB was no longer responsible for the central commissioning and purchasing of places in secure establishments, it could become a national body of excellence, enforcing standards, similar to the role of the National Institute of Clinical Excellence (NICE) who enforce healthcare standards.

**• Encouraging local authorities to have more responsibility for children in the criminal justice system and to work with parents could help to reduce the use of youth custody.**

The Youth Crime Action Plan (2008) stated that it was exploring ways of engaging parents with children in the youth justice system, including requiring them to “take more responsibility for their children” (para 2.23). However, parents currently have few legal rights over the care their child receives while in custody. For example parents have no control over their child's diet, their education or their physical treatment while in custody.

It is unclear as to whether parents would be able to take more responsibility for their child in custody if the local authority, rather than central government, paid for the placement.

Currently, the government is not penalized for failing to take responsibility for children in custody, for example by failing to ensure that a child receives education in prison.

Local authorities, through their Children's Services, are the best placed to work with children and their families and a devolution of budgets should be accompanied by training for all council members, and not merely the lead member for children, on children's rights and related issues. If elected members are encouraged to see children in the local authority as ‘their children’, then devolved budgets can be used to find alternatives to custody and lasting solutions to youth crime.

## The case against

- **The assumption that giving local authorities financial responsibility will drive down numbers and increase the quality of care might be flawed. In fact the opposite could happen.**

One of the arguments for devolving custody budgets to local authorities is that it will incentivise them to reduce the use of custody. Using the same argument, we could see local authorities pursuing other actions which reduce custody costs, such as placing children in YOIs, which are much cheaper than secure training centres and local authority secure children's homes.

In 2007/08, the average annual cost of holding a young person in a juvenile prison was £38,817 (HM Prison Service, 2008). The cost of a place at a secure training centre (STC) for the same period was £191,618 (Hansard, 2008) and the cost of a place in a secure children's home was around £185,000 (Barnardos, 2008). If local authorities chose to place young people in YOIs as opposed to LASCHs or STCs, they would save around £150,000 per child.

If local authorities were responsible for commissioning and purchasing places in the secure estate, it may lead to a plethora of small privately-run institutions offering cut price placements to local authorities.

- **There would need to be clear ringfencing of any devolved budget if local authorities are to be empowered, yet such a restrictive move is arguably against the spirit of devolution in the first place.**

If budgets were ring-fenced it would prevent local authorities from choosing the cheapest option. However, taking away the local authority's ability to choose the placement would also take away the financial incentive.

- **Devolving custody budgets would cost more.**

Devolving budgets for youth custody to local authorities is not a budget neutral proposal and would in fact cost more, particularly in the short term. If the money that would have been spent on custody is given to local authorities as an incentive to reduce its use, it will mean that in the short term, more money will be spent on a reduced number of children in custody.

- **Making local authorities responsible for the commissioning and purchasing of custodial places could drive down standards.**

Currently the YJB has responsibility for commissioning places and deciding where children are placed. The YJB placements team maintain a national overview of all children in custody and aim to ensure national standards are adhered to. The YJB placements team aim to place the most vulnerable children and those with specific needs in a secure placements which best suits the child's needs.

If responsibility for the commissioning and purchasing of places was passed to local authorities, it could lead to more children being sent to cheaper providers such as prisons or privately-run facilities.

**• Alternatives to custody can be more expensive than custody, which might serve to negate any budgetary initiatives.**

The presumption behind devolving budgets is that alternatives to custody are cheaper and would save the local authority money. However, this is not always the case. Schemes which work with small numbers of children, have a low staff to child ratio and are tailored to the child's individual needs might cost more than a placement in a YOI. Intensive foster care, which has been promoted by the government and the YJB as an alternative to custody, can cost more than placement in a YOI.

Devolving custody budgets might actually discourage local authorities from investing in alternatives to custody, if for example, placement in a YOI is cheaper. This could lead to an increase in the numbers of children in custody.

**• Holding local authorities responsible for youth custody could provide them with an opportunity to raise funds and lead to an increase in the market for custodial places.**

Devolving youth custody budgets could lead to an expansion in the number of custody places available for children. In the past, providing secure accommodation proved to be a net earner for local authorities. As a result greater numbers of children were placed in secure accommodation at an earlier age, via the civil route. In order to prevent inflation in the number of places for children there would need to be a set limit on the number of places available to sentencers.

**• Devolving budgets to local authorities as an incentive to drive down numbers ignores the fact that the courts, and not local authorities, are responsible for deciding whether children are sentenced to custody.**

At present, it is the courts and not the local authority that makes the decision as to whether a child is sentenced to custody. It would be potentially unfair to penalise local authorities financially for decisions made by the court, and over which they have little or no control. Courts should not be left out of the equation when looking at financial incentives to reduce the use of youth custody.

There are wide geographical disparities in sentencing patterns and rates of custody for children. In a study of 20 YOTs, the YJB (2002) found that custody rates for children varied from 2.4 per cent to 21.8 per cent. Even if local authorities were committed to providing alternatives to custody, they may be unable to persuade sentences in areas with high custody rates to use to use them.

Court jurisdictions and local authority catchment areas also differ. Children are not always sentenced to custody in the area in which they live. Some local authorities could have a high or low number of children in custody but this may bear no relation to the number of children who live in their area and commit crimes. This might particularly be the case in large cities like London.

**• Making local authorities pay for custody could have an adverse impact on welfare budgets for children.**

Local authorities could find that their budget for children is consumed by paying for

custodial places, particularly in high custody areas. This would leave local authorities with less money to invest in children's welfare and youth crime prevention. It may also lead to an increase in the numbers of children who end up in custody as the local authority finds it lacks the finances to fully support children and families.

**• There is a lack of evidence that the high numbers of children in custody is solely a result of local authorities failing children or allowing them to drift into crime.**

Other factors such as public and media attitudes towards children who commit crimes, government policies and the law all have an impact on the numbers of children who are placed in custody.

There is a punitive attitude towards children in trouble in England and Wales and this is reflected in the media. According to a recent report by the UK Children's Commissioners (2008), 71 per cent of media stories about young people in the UK are negative and a third of the articles about young people are about crime. The report states that "the incessant portrayal of children as thugs and jobs not only reinforces the fears of the public but also influences policy and legislation".

The publicity surrounding anti-social behaviour contracts (ASBOs) and the naming and shaming of young people have attracting international criticism by the UN Committee on the Rights of the Child (2008), as well as increasing the fear of young people. Until this attitude towards children changes, there is little hope of a reduction in the number of children sentenced to custody

In addition, while local authorities may have responsibility for local issues and for children in the locality, they have no control over policy and the law. It is central government who set this.

The rise in the numbers of children in custody can be attributed in part to an increase in the number of custodial sentences available for children, the number of custodial facilities which hold children and the number of crimes for which children can receive a custodial sentence. Successive governments have contributed to this increase. In order to reverse this trend, it would require changes to policy and legislation.

**• Although there are different factors which impact on whether a child ends up in custody, the relationship between disadvantage, poverty and custody is well recognised.**

The vast majority of children in custody come from disadvantaged backgrounds. Many live in areas of high deprivation and have experienced high levels of neglect, abuse, violence and drug misuse. Research by HM Inspectorate of Prisons and the YJB (2006) found that 29% of boys and 44% of girls in custody had been in care. It also found that 81% of boys and 76% of girls had been excluded from school. YOT managers have estimated that up to 1,000 young people per year are remanded to custody because they lack somewhere suitable to live (The Audit Commission, 2004).

If budgets for youth custody were devolved, it could lead to more prosperous local authorities, with fewer children in custody, taking advantage of the transfer of budgets. Conversely, local authorities with a poorer catchment area and higher numbers of children in custody would be more heavily penalised.

The socio-economic context cannot be ignored. Budget devolution could lead to the local authorities least able to pay being the most heavily penalised.

**• There is little or no evidence, either historical or international, that shifting the financial responsibility for youth custody from the centre to the locality will drive down the numbers of children in custody.**

Periods of lower rates of youth custody in England and Wales, for example the early 1990s, have occurred when the budget was centrally controlled. Other countries, which have lower numbers of children in custody, have centrally controlled budgets. Devolving youth custody budgets to local authorities should not be regarded as a magic bullet to reduce the use of custody for children.

**• To reduce the debate on youth custody to who pays for it ignores human rights issues and the moral agenda.**

It is already well-established that all agencies in the criminal justice system, including local authorities, are required as a matter of law to place the interests and the welfare of the child first. A judicial review brought by The Howard League for Penal Reform in 2002 successfully determined that the Children Act 1989 does apply to children in YOIs. Mr Justice Munby stated that

*“The functions, powers, duties, responsibilities and obligations conferred or imposed on local authorities by the Act (and, in particular, by sections 17 and 47 of the Act) do not cease to arise merely because a child is in a Young Offender Institution or other Prison Service establishment”*

(The Queen (on the application of the Howard League for Penal Reform) v the Secretary of State for the Home Department and the Department of Health [2002] EWHC 2497 (Admin))

The judgment affirmed that the responsibilities of local authorities do not end once a child goes into prison custody, but that local authorities continue to have a duty of care towards children in custody.

Article 3 of the UN Convention on the Rights of the Child, to which the UK is a signatory, states that:

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*

The requirement for local authorities to place first and foremost the best interests of the child, including the child in custody, is non-negotiable and is not subject to resources. To suggest that local authorities do not have a duty to support children in custody because they do not have financial responsibility for that child is wrong in law.

## Recent developments and alternative approaches

The government has already consulted on proposals to make local authorities responsible for the full cost of court-ordered secure remands in STCs and SCHs. YCAP (2008) argued that this would enable local authorities to invest at a local level in alternative forms of remand such as fostering. No changes to the current system have been made to date but responses to the consultation are being evaluated by the government.

### Non-secure remands

Currently, the local authority has considerable discretion as to where they place children requiring non-secure remands by the courts. A child can be placed with a family member, a remand foster carer or in a residential children's home. It has been argued that if the courts decide to remand a child to the care of the local authority, the child is more likely to be placed back at home, provided that the court does not stipulate that the child cannot be placed with the parent. The local authority is already responsible for the full cost of non-secure remands. Placing a child with the family will cost less than placing them with remand foster carers or in a residential home.

Provision for non-secure remands has declined dramatically and local authorities have concentrated on children placed via the civil route while YOTs have dealt with those in the criminal justice system.

### Court ordered secure remands

The case for reversing the current financial incentives regarding court ordered secure remands is straightforward. Local authorities currently pay a third of the cost of secure remands and the full cost of non-secure remands. The proposal in YCAP (2008) to make local authorities pay the full cost of COSR would mean there is no longer a disparity between the cost of secure and non-secure remands.

However, there remain fundamental inconsistencies within the current system with regard to the age and gender of the child. Girls aged 12-16 are normally placed in non-prison custody whereas boys aged 15 and 16 are remanded to prison, unless deemed to be extremely vulnerable. This has implications regarding whether a child acquires looked after status while on remand, as currently only children in STCs and LASCHs accrue the rights of a looked after child during their placement.

The courts should be able to remand a young person to the care of the local authority but it should then be up to the local authority to decide on a placement for that child, which could include fostering or intensive fostering, such as the scheme run by Action for Children, being piloted in Wessex.

### Sentenced children

YCAP (2008) suggested that making the costs of custody more visible would inform the debate as to whether, in the long term, local authorities should be responsible for the placement and funding of all custodial placements.



Transferring budgets for children who are sentenced to penal custody is more complex. As this briefing shows, there is currently some debate as to how the centrally held youth custody budget might be allocated to local authorities with their differing levels of need and their differing levels of use of custody for children. It is clear that developing a formula for devolving the custody budget is complicated and could unfairly penalize or reward particular local authorities.

Basing a formula on a local authority's previous annual record of numbers of children in custody would mean that authorities who have more children in custody get more money. Conversely, local authorities who have strived to keep custodial figures down would receive less money.

Court jurisdictions and local authority catchment areas may differ. Some local authorities could have a high or low custody rate but this may bear no relation to the number of children who live in their area and commit crimes.

One solution might be to have no formula at all.

There is a lack of clarity about who is responsible for a child when the court deprives them of their liberty. However, this problem is wider than budgetary issues. The Howard League for Penal Reform legal team has represented numerous children who are entitled to support under the Children Act 1989 yet children's services departments have failed to recognise this, despite requests from the YOT. Older children have been passed over to the housing department on leaving custody, when they have been entitled to accommodation and support under the Children Act 1989.

### **An alternative approach**

Rather than devolving budgets for youth custody, there are other simpler changes to the law which could be made and which would involve a more "organic" devolution of budgets. Such changes would give local authorities more financial responsibility for children in custody and ensure continuity of care for the child.

One example would be to ensure that children who have looked after status under section 20 of the Children Act 1989 do not cease to be looked after on entering custody and remain entitled to all the benefits of being looked after, bar the provision of accommodation by the local authority. This would require local authorities to continue to support that child while in custody and to provide suitable accommodation and support to them when they leave (The Howard League for Penal Reform, 2008).

Currently, children who are remanded into the care of the local authority for a period of 13 weeks or more, provided the period began after the child reached 14 years old and ended after reaching the age of 16, become eligible children under the Children (Leaving Care) Act 2000 and qualify for leaving care assistance. This includes children held in secure units and secure training centres but not in YOIs. If the legislation was amended to ensure that children remanded to prison custody also became eligible, it would help to safeguard the longer term provision of support

for vulnerable children leaving custody.

Another simpler option would be to ensure that all children who enter penal custody, either on remand or under sentence, accrue the rights of a looked after child, thus requiring the local authority to support them, if the child or parent so wishes.

Such legislative changes would help to avoid the current silo scenario as looked after children who end up in custody would remain the responsibility of Children's services and would not be passed over entirely to the YOT. These changes would have budgetary implications for local authorities that would arguably lead to organic shifts between central government's spending priorities and the local government finance settlement.

The creation of a separate magistracy service for children would help to ensure that children who commit crimes are regarded as children first and foremost. Magistrates should be able to specialise in solely working with children. Currently, JPs have to gain experience in the adult court before they can work in the youth court. Youth courts should be more child-centred and more consistent. A separate children's magistracy service would encourage closer links with other children's services and ensure a more holistic approach to children who commit crimes.

There should be legislative change to introduce a custody threshold for children. The UN Committee on the Rights of the Child (2008) stated that the high number of children in custody indicated that detention was not always applied as a measure of last resort. It recommended that the UK government "establish the principle that detention should be used as a measure of last resort and for the shortest period of time as a statutory principle". Children should only be placed in secure custody if they have committed a serious violent offence and pose a serious immediate risk to the public.

Finally, raising the age of criminal responsibility in England and Wales would bring us into line with international standards. It would prevent the criminalisation of children, end the use of penal custody for children as young as 10 and arguably lead to a reduction in crime. Children who do something wrong should be dealt with by children's services rather than the criminal justice system.



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