

Response from the Children's Commissioner to the Home Office Consultation Paper on Strengthening Powers to Tackle Anti-social Behaviour

1. Introduction

The Children's Commissioner was established by the Children Act 2004. In accordance with his statutory function,¹ the Children's Commissioner welcomes the opportunity to represent the views and interests of children in this important consultation on Strengthening Powers to Tackle Anti-social Behaviour. In considering what constitutes children's interests, the Commissioner must have regard to the standards in the United Nations Convention on the Rights of the Child (1990), to which the UK Government is a state party.²

UK Government policy on anti-social behaviour is a key area of concern for the Children's Commissioner. Over the last year and a half, we have monitored the impact of the anti-social behaviour agenda on the rights of children and young people in England, with particular reference to ASBOs and dispersal orders.³ While we have reservations about the use of ASBOs per se against any child or young person, we are especially concerned to regulate the inappropriate and disproportionate use of orders that has been widely documented.⁴ Recent evidence⁵ shows that ASBOs have been issued to children and young people with no history of offending, in circumstances where a less punitive response would not only have been more proportionate to the class of behaviour, but beneficial in terms of preventing the risk of early criminalisation associated with ASBOs. A new study by the National Audit Office has produced further evidence which questions the effectiveness of ASBOs at preventing anti-social behaviour among young people and points instead to the success of informal warning letters.⁶

¹ Children Act 2004, s.2.

² Children Act 2004, s.11.

³ See the 2005/2006 Annual Report of the Office of the Children's Commissioner.

⁴ See for example, *Anti-social Behaviour Orders*, Youth Justice Board, 2006; Varnfield, K. 'Vulnerable young people and the misuse of ASBOs' *Community Safety Journal*, Vol 4, Issue 1, January 2005; Squires, P and Stephen, D., *Rougher justice: anti-social behaviour and young people*, 2005, Cullimpton: Willan; Case studies from the Citizens Advice Bureau at www.citizensadvice.org.uk, from ASBO Concern at www.asboconcern.org.uk and from the British Institute for Brain Injured Children at www.bibic.org.uk.

⁵ Youth Justice Board (2006), p9.

⁶ *Anti-social Behaviour Interventions*, National Audit Office, (2006). The report found that informal warning letters were the most effective form of anti-social behaviour intervention given to young people under the age of 18, in terms of preventing further offending.

Given our concerns, coupled with the ever rising numbers of ASBOs that are being issued to children and young people,⁷ the Children's Commissioner supports the key principles of this consultation in regard to: diverting children and young people from the criminal justice system; encouraging a genuinely tiered response to offending behaviour; and equipping the police with less punitive and more proportionate responses to low level anti-social behaviour. We have considerable doubts however that the three main proposals that the Home Office puts forward to achieve this end – namely, new front-line police powers, deferred Penalty Notices for Disorder (PNDs) and premises closure orders – have the potential to make a reality of these principles. Rather, we support the commitment to strengthen existing reparative and restorative justice approaches to low level anti-social behaviour by children and young people, as outlined in Chapter 3 of the consultation.

In the sections which follow, we explain our reservations to the consultation's three main proposals in terms of the potential negative impacts on children's rights. In particular, we express concern that insufficient consideration has been given to distinguishing children from adults in formulating new response to anti-social behaviour. We seek further information from the Home Office on the detail of some of the proposals and how the risks to children's rights may be mitigated. We conclude with some general remarks and recommendations.

2. New Front-Line Preventative Powers for the Police

The consultation paper seeks views on the necessity and desirability of granting the police new preventative powers to impose temporary restrictions on behaviour. This would effectively give the police enhanced dispersal and curfew powers to use against individuals, including children and young people, whose presence or behaviour had resulted in, or was likely to result in, a member of the public being harassed, intimidated, alarmed or distressed. It is envisaged that this proposal would operate in circumstances where the individual's behaviour would not be of a degree to merit an ASBO but where action by the police would nonetheless be necessary to prevent such nuisance behaviour from recurring. It is suggested that the proposed new power would allow police officers greater flexibility and would not be hampered by restrictions that currently pertain to the use of dispersal orders – that is, the requirement that an area must first be designated as a dispersal zone and that a curfew may last a maximum of 24 hours.

Concerns of the Children's Commissioner

Clearly the lack of detail in terms of the shape of this proposal and how it will operate in regard to children and young people makes full commentary

⁷ Home Office Statistics, at www.crimereduction.gov.uk. The figures for recorded ASBOs given to children aged 10-17 show an increase of 198 orders between 2004 and 2005, bringing the recorded total number of ASBOs issued to children to 1,467 in 2005.

impossible. There are however four areas of general concern that the proposal, in its current detail, raises:

1. the necessity of a new power given that the law already provides for dispersal powers, injunctions, Local Child Curfews and Child Safety Orders;
2. the proportionality of serious restrictions (such as the proposed geographical exclusions in excess of what is legally permissible under current dispersal powers) to behaviour which does not reach the level that would merit an ASBO and which may only indicate a *risk* of anti-social behaviour as opposed to actual anti-social behaviour;
3. how such a power would be regulated and subject to effective oversight;
4. the consequences for breaching the restrictions imposed under this power.

The law already provides a range of mechanisms whereby individuals, including children and young people, can be excluded or moved on from certain geographical areas where their behaviour warrants such action. Some of these powers, such as ASBOs, dispersal orders and injunctions can be used against adults and children alike while others, such as Local Child Curfews⁸ and Child Safety Orders⁹ are reserved specifically for children below the ages of 16 and 10 respectively.

In regard to children and young people, the restrictions imposed by these orders typically prohibit the child from entering a certain area between 9pm and 6am without the company of a responsible adult or, in the case of ASBOs, impose more extensive geographical and non-association restrictions. We know however from recent research by the Youth Justice Board on the use of ASBOs in regard to children and young people, that exclusion zones and curfews were the prohibitions most likely to result in accidental or deliberate breach.¹⁰ The research also found that geographical exclusions were disproportionate to the behaviour that resulted in the ASBO being imposed and were in some cases counterproductive, such as where the restrictions resulted in young people becoming depressed or indulging in drugs and alcohol.¹¹ The report authors concluded therefore that exclusion orders should be used more sparingly in ASBOs. Any proposal to extend police powers to impose exclusions or curfews on children and young people would have to take full account of this and all other available evidence in order to argue the necessity and proportionality of further interference with children's rights.

Given the gravity of the restrictions imposed on individuals' behaviour by the use of exclusion and curfew powers and the consequences for human rights infringements, all existing curfew and dispersal powers (as listed above) are subject to either court authorisation, senior police authorisation or, in the case

⁸ Crime and Disorder Act 1998, ss. 11-13, as amended by section 48 of the Criminal Justice and Police Act 2001.

⁹ Ibid. ss. 14-15.

¹⁰ Youth Justice Board (2006), p57, p66.

¹¹ Ibid. p85.

of Local Child Curfews, authorisation from the Secretary of State. It is alarming therefore that the consultation paper does not provide any indication of the level of oversight that would be in place to regulate police discretion in using these new proposed powers. A general assertion in the consultation paper that the new powers will be used “proportionately and appropriately”¹² is totally inadequate for a power that can be exercised on the basis of *perceived risk* of anti-social behaviour, as opposed to *actual* anti-social behaviour. It is essential therefore that the Home Office provides assurances for how the subjective decisions of police officers can be monitored and appropriately challenged. The Prime Minister’s policy of “rebalancing the criminal justice system”¹³ in favour of the victim cannot operate to override the rights of those accused of, or found responsible for, anti-social behaviour, particularly where these are children and young people.

A further issue raised in the consultation paper was the appropriateness of sanctions for individuals who breach the proposed new powers. Given the Commissioner’s views that the powers, as currently described, are not justified for use against children and young people, the issue of sanctions attaching to those powers becomes redundant. As a matter of principle however, we would argue that sanctions should only be used where necessary and should be proportionate to the original offence. It is on this basis that we have existing concerns about the use of sanctions against children and young people who breach dispersal orders given that breach is a criminal offence, liable to a fine and potential custody.

Summary of Views

- In the absence of further detail, the Children’s Commissioner does not consider the proposed new frontline police powers as appropriate for use against children and young people.
- There are a range of existing measures that allow police to disperse and impose curfews on children - these already give rise to serious concerns regarding children’s rights;
- Powers should not be extended without robust evidence of necessity and an evaluation of the proportionality of interference with children’s rights;
- Effective oversight and control must be guaranteed for the use of all summary police powers which substantially restrict children’s rights;
- Sanctions which criminalise young people and can result in a custodial sentence should meet the tests of necessity and proportionality;
- The Children’s Commissioner should be consulted on proposals should they develop and time should be set aside to consult directly with children and young people.

¹² Para. 1.1, p4, *Strengthening powers to tackle anti-social behaviour*, Consultation Paper, Home Office, November 2006.

¹³ *Our Nation’s Future – Criminal Justice System*, June 2006, accessed at www.number10.gov.uk.

3. Penalty Notices for Disorder

The concepts of both Penalty Notices for Disorder (PNDs) for children and young people above the age of criminal responsibility and the proposed deferred PNDs (whereby an offending individual agrees a voluntary contract of behaviour with the police rather than pay a £50 or £80 fine) are portrayed in the consultation document as essentially diversionary responses to what is considered as lower level anti-social behaviour. At one level, the Children's Commissioner would accept this principle and would welcome an approach which provides a more proportionate response to anti-social behaviour by children and young people. We are concerned however as to how 'Youth PNDs' and deferred PNDs will operate in practice and their potential for undermining existing diversionary and restorative approaches.

The consultation seeks views primarily on deferred PNDs and the arrangements that would apply in using this approach on children under the age of 18. As legislative provision has already been made for the future introduction of Youth PNDs for 10-15 year olds,¹⁴ (subject to the approval of both Houses of Parliament) we appreciate that views are not explicitly sought on this aspect. However, given that we are still awaiting publication of the findings of the Youth PND pilots, we feel it necessary to preface our comments on deferred PNDs for children and young people by some general remarks on the operation of Youth PNDs.

3.1 Youth Penalty Notices for Disorder

A Home Office commissioned evaluation of pilot PNDs for over 18s in 2004 made a number of findings which are relevant to extending PNDs to children aged 10-15.¹⁵ A key finding was that the use of PNDs was having a negative effect on the numbers of cautions issued to individuals for minor infractions. The evaluation also indicated that PNDs were having a net widening effect by bringing into the system individuals whose behaviour would not previously have been dealt with by either caution or prosecution. This latter finding appeared to relate to the fact that some of the grounds on which PNDs could be issued were essentially areas of "new business" for the police in the pilot zones; namely, PNDs issued for "causing harassment, alarm of distress" and for "disorderly behaviour while drunk in a public place".¹⁶

Applying this evaluation of PNDs to the proposal to introduce youth PNDs, raises a number of important questions which we hope will be answered in the forthcoming evaluation. First, we feel that consideration must be given to the impact that PNDs may have on the use of cautions, namely reprimands and final warnings, for young people. 2004 figures on the use of cautions for summary offences for children aged between 10-18 show that the offence

¹⁴ Section 2 of the Criminal Justice Act, 2001, as amended by section 87(3) of the Anti-social Behaviour Act 2003 enables the Secretary of State, by Order, to reduce the minimum age for receipt of a PND.

¹⁵ *Findings 257: Penalty Notices for Disorder*, Home Office, 2004.

¹⁶ *Ibid.* p3.

attracting the second highest number of cautions was public disorder (15,362), with cautions also being given for drunkenness, disorderly behaviour, playing in the street and railway offences.¹⁷ Should 'Youth PNDs' become law, as is provided in the Criminal Justice Act 2001,¹⁸ the majority of these offences could alternatively be dealt with by PNDs.

The question therefore is how can the Home Office ensure that the introduction of Youth PNDs does not negatively affect the use of both informal and formal cautions, which we know are an effective and child-focused response to dealing with low-level offending?¹⁹ Clear guidance has a critical role to play and the latest Home Office circular on the Final Warning Scheme and its interplay with PNDs does not provide the clarity that is needed.²⁰ Without clear guidance, as well as measures to ensure that such guidance is adhered to in practice, there is a risk that the use of cautions will slowly fade out or become the subject of increasingly inconsistent practice across police forces.

The possible net-widening effect of PNDs is a second substantial concern. Statistics on the PNDs issued to 16 and 17 year olds in 2004, mirror the findings of pilot PNDs on adults by showing that virtually all of the 3793 issued PNDs were given for causing "harassment, alarm or distress" and drunken disorderly behaviour.²¹ Almost as many of these young people paid their fines within the 21 day period (1548) as failed to pay (1468) and consequently registered a fine.²² Given the broad definition of "harassment, alarm or distress" the Children's Commissioner is concerned that public perception of anti-social behaviour will drive police responses to behaviour by children and young people rather than clear and objective law. While this same argument has been advanced and rejected by the Home Office in regard to the lack of legal certainty over the same definition of behaviour which leads to an ASBO,²³ it is argued that the authorisation of the court in this instance should, in theory, provide a check against inappropriate ASBO applications. Conversely, the ease at which PNDs can be summarily imposed by police may encourage ready use of the power, with negative consequences for children and young people whose behaviour may not, under an objective interpretation, merit such a punishment. The Children's Commissioner believes that punishments of any sort, no matter how small, should only be issued when it is clear that a definable offence has been committed.

¹⁷ Home Office Statistics 2004, Cautions Issued for Summary Offences by Age and Offence.

¹⁸ C/f note 12.

¹⁹ For an overview of the effectiveness of cautions see NACRO, Youth Crime Briefing, September 2005. Note also the findings of the NAO Report 2006 which found informal warning letters the most effective response to anti-social behaviour by young people.

²⁰ Home Office Circular 14/2006, The Final Warning Scheme.

²¹ Home Office Statistics, Penalty Notice for Disorder (PNDs) Issued by Police Force Area and Offence, Issued by 16-17 year olds only, 2004.

²² Home Office Statistics, Penalty Notices for Disorder (PNDs) – Payment Rate by Police Force Area, 16-17 year olds only, 2004.

²³ Home Affairs Select Committee Inquiry into Anti-social Behaviour, 2005.

Deferred Penalty Notices for Disorder

The new proposal, outlined in the consultation document, of deferring the fines attaching to PNDs by agreeing contracts of behaviour between the police and offending individual, raises further concerns for the Children's Commissioner. These concerns centre on:

- the form of the contract;
- the conditions of the contract agreed between the young person and police officer;
- the proposed duration of the contract;
- the ability of the young person to elect a PND over a Deferred PND;
- the potential disproportionate impact of Deferred PNDs on poorer families and
- the sanctions that apply for breach of a Deferred PND.

The consultation paper suggests that contracts of behaviour for Deferred PNDs will be similar in form to Acceptable Behaviour Contracts (ABCs). The evidence on the effectiveness of ABCs in managing children's and young people's behaviour is however divided. A recent report from the National Audit Office found that ABCs were the least effective form of anti-social behaviour intervention;²⁴ a view that also received some support in the recent Youth Justice Board research on ASBOs.²⁵ This contrasts with a more positive evaluation from research commissioned by the Home Office in 2004 on the use of ABCs for young people in Islington.²⁶

The alleged ineffectiveness of ABCs for young people may be due in part to the heavy use of geographical exclusions and non-association clauses. As mentioned already in this response, research from the Youth Justice Board has shown that conditions of ASBOs which impose geographical exclusions or non-association clauses are known to be particularly difficult for children to keep and may be potentially counterproductive.²⁷ Whilst the differences between ASBOs and ABCs, (notably the greater length of ASBOs) make a direct comparison impossible, this evidence would nonetheless caution against imposing restrictions of these kind.

Another issue which is not clear from the consultation document is whether the child or young person at the centre of the alleged anti-social behaviour is given free choice as to whether to accept a regular PND over a Deferred PND. One would assume that if, as the consultation proposes, parents are liable for payment of a Youth PND for children aged 10-15, then the choice of whether to accept a PND will lie with the parent rather than the child. The difficulties of negotiating a *voluntary* contract with the child of a parent who refuses to pay the fine straight out hardly need explanation. For poor families

²⁴ National Audit Office (2006)

²⁵ Youth Justice Board (2006)

²⁶ Bullock, K. and Jones, B. *Acceptable Behaviour Contracts addressing anti-social behaviour in the London Borough of Islington*, Home Office Online Report, 02/04.

²⁷ C/f n.8.

such problems are exacerbated because they may be unable to pay PNDs, thus potentially placing the children of these families in a position where they feel obliged to accept a Deferred PND. This risk is likely to grow if the proposals in the Respect Action Plan, to increase fines to £100 for offences which mainly involve children – drinking under the age of 18 in a licensed premise and throwing stones at trains – actually go ahead. The Children's Commissioner would argue against this increase which we consider will have a disproportionate effect on children and families with children.

The Commissioner also strongly disagrees with the idea in the consultation of introducing new legislation to incrementally increase, by doubling and trebling, the fines liable for PNDs following breach of a behaviour contract. In recognition of how onerous it can be for children to keep to some of the terms of behaviour contracts,²⁸ we feel that it would be wholly disproportionate to increase fines above the rate attaching to the original PND and to impose shorter time frames for paying the fine. This would, in our view, amount to double punishment and could not be justified. It is also contrary to evidence which suggests that default payments increase the heavier the fine.²⁹

Summary of Views

- Based on the results of an evaluation of adult PNDs in 2004, the Children's Commissioner is concerned about the potential net-widening effects that may accompany the introduction of Youth PNDs for 10-15 year olds. We are also concerned that there is currently insufficient guidance to police on the use of cautions as opposed to PNDs for those aged 16-18. Should this trend continue following the planned extension of PNDs to 10-15 year olds, we may witness a decline in the use of cautions which we know are extremely valuable diversionary tools for treating low level offending among young people.
- The Children's Commissioner has serious reservations about the use of proposed Deferred PNDs for children and young people. We feel that these may impose disproportionately onerous restrictions on children's behaviour that do not reflect the nature of the original anti-social behaviour and which seem inconsistent with the Final Warning Scheme for low level offending by children and young people.
- Rather than introduce what is, in the Commissioner's view, a flawed scheme for deferring PNDs for children, we would instead support the commitment made in the joint Home Office paper, *Delivering Simple, Speedy, Summary Justice*,³⁰ and repeated in the consultation document, to increase the use of restorative and reparative justice practices, such as on-the-spot reparations.

²⁸ Youth Justice Board (2006). There is also evidence that children and young people with learning and behavioural difficulties are especially disadvantaged by these conditions – see www.bibic.org.uk.

²⁹ *Findings 257: Penalty Notices for Disorder*, Home Office, 2004.

³⁰ Home Office, Department for Constitutional Affairs, and Attorney General's Office, (2006), *Delivering Simple, Speedy Summary Justice*. See paragraphs 7.16 - 7.20.

4. Premises Closure Orders

The proposal to temporarily close publicly and privately owned domestic property that is the centre of anti-social behaviour was signalled in the Respect Action Plan. The consultation paper provides that this measure will be one of last resort and that special care will be taken to ensure that the implications for any children in the affected household are fully considered before action is taken to close a premise. It also makes a commitment that, in the event of closure, the local authority will be responsible for ensuring that a care plan is implemented to safeguard the children involved.

The Children's Commissioner welcomes the assurance by the Government that the local authorities and responsible agencies will intervene at an early stage to prevent families becoming "intentionally homeless" as a result of anti-social behaviour and subsequent refusal of mandatory support and rehabilitation. We are concerned however that local authorities have the necessary capacity to provide quality support, on a voluntary basis, for families with often multiple needs.

Should families become "intentionally homeless", we are also extremely concerned about the limited duties of local authorities to the children in that family. The authorities are not under any obligation to house families for the period of the property closure (12 weeks with a possible 12 week court-approved extension) but must simply provide advice and assistance in obtaining accommodation and provide the family with temporary accommodation for a period which would give them reasonable time to find alternative housing – normally 28 days, as we understand.

The concern of the Children's Commissioner is that for some families, time to make alternate housing arrangements is not necessarily the issue. Having the financial means to find new accommodation is the more pertinent matter, particularly as families will continue to be liable for payment of rent and charges on the premises subject to the closure. It is likely that payment of a second premises will be virtually impossible for poorer families who will clearly suffer most under this proposal. The same concerns would apply to young people, between the ages of 16 and 18, who are living independently in assisted housing. In such circumstances, the Children's Commissioner seeks assurance that Housing Benefit will be unaffected by premise closures.

5. Concluding Comments and Recommendations

- The Children's Commissioner supports the principles of this consultation to divert children and young people from the criminal justice system and to enable police to respond more proportionately to acts of anti-social behaviour.
- To achieve this end, the Commissioner advocates a restorative justice approach, such as is set out in the proposals for on-street reparation in chapter 3 of the consultation and in the joint Home Office paper *Delivering*

Simple, Speedy, Summary Justice. Evidence of the benefits to the victim as well as to the young person, in terms of reducing future offending, is compelling.

Restorative justice approaches should be coupled with the appropriate use of informal cautions – shown by the National Audit Office to be the most effective form of anti-social behaviour intervention for children – as well as the consistent and regular use of formal reprimands and final warnings. We fully support the commitment in the consultation paper that police targets, such as the *Offences Brought to Justice* target, must be amended to incentivise and reward police for the use of diversionary and restorative approaches to anti-social behaviour by children and young people.

- Punitive interventions such as ASBOs and Dispersal Orders should only be used when alternative measures have failed and then, only where the behaviour clearly warrants such intervention, bearing in mind the particular circumstances and needs of the child or young person concerned.
- In regard to the proposed new front-line police powers, we do not believe that a case has been made which demonstrates the necessity for granting the police further curfew and exclusion powers against children. Sufficient powers already exist and these continue to give rise to concerns on human rights grounds. The risk to children's rights of introducing increased powers without a robust regulatory framework would be in breach of the Government's obligations under the United Nations Convention on the Rights of the Child, and potentially of the European Convention on Human Rights. Full detail on effective oversight arrangements should therefore be provided. Any further action to develop these proposals must involve consultation with children and young people.
- We await with interest the forthcoming evaluation of the Youth PND pilots, with particular attention to any findings in regard to net-widening and any negative impact on the use of informal and formal cautions. We reserve final judgment on the suitability of these powers for children and young people until this time.
- It is the view of the Children's Commissioner that the proposed Deferred PNDs do not offer a viable alternative response to anti-social behaviour by children and young people. The evidence on the effectiveness of ABCs is mixed and we are concerned that the content and length of contracts may be disproportionate to the original infraction and may thus be difficult for children to keep. From the detail given in the consultation, Deferred PNDs also pose significant operational difficulties in terms of the implications of parents' liability for Youth PND fines, for agreeing a *voluntary* behaviour contract between the affected child and the police. This is likely to be the case in particular for parents from poorer families who may, on financial grounds, choose or be forced into accepting liability for a Deferred PND on behalf of their child.

- Finally, in regard to Premises Closure Orders, we seek assurances that local authorities are sufficiently resourced to provide quality support, in a voluntary framework, to families who are at risk of receiving a closure order. Should a family become “intentionally homeless”, further consideration must be given to the duties of the local authority to children of affected families and to vulnerable 16-18 year olds who are living independently. The Children’s Commissioner also seeks assurance that Premises Closure Orders will not affect the rights of individuals to Housing Benefit.