



They couldn't do it to a grown up:
Tagging children without due process

the **Howard League** for **Penal Reform**

Key points

- The Howard League for Penal Reform has discovered that around 1000 children last year were given an additional punishment at the midpoint of their Detention and Training Orders (DTOs), when they could not be further detained without a court order
- The punishment is known as 'intensive supervision and surveillance' (ISS). It involves 25 hours of specified activities a week, electronic monitoring and a night time curfew
- The decision to release a child on ISS at this point is not made by a judge and the child has no say in it. If the child does not comply, he or she can go back to jail
- Data in this research briefing is based on Freedom of Information requests made to every local authority in England and Wales
- 26 local authorities tagged 10 or more children in the last year, and 26 tagged none at all. Five local authorities used this for 20 or more children
- This punishment is not available for adults. It is part of a confused criminal justice system that muddles punishment with welfare for children
- Private companies profit from the tagging arrangements, but the ISS does not reduce reoffending. Instead, it results in excessive punishment and sets children up to fail.

Introduction

Detention and Training Orders (DTOs), the most common jail sentence given to children, allow some children to be released early but require all children to be released at the 'midpoint' of the Order under supervision. Children can be given an additional punishment at the midpoint of their DTO known as 'intensive supervision and surveillance' (ISS). This punishment involves 25 hours of specified activities a week, electronic monitoring and a night time curfew. The decision to release a child on ISS is not made by a judge and the child has no say in it. There is no due process in the decision to put a child on ISS. If the child does not comply, a court can order a return back to jail. ISS can be imposed as a community sentence by a court and, apart from prison, it is seen as the harshest sentence.

The Howard League has represented children who have experienced excessive punishment arising from the inappropriate use of ISS programmes. Some of the children we represent were placed on ISS when they had already failed similar ISS programmes before and served the whole of their custodial term. In their eyes a further ISS on release was a third punishment for the original offence. Others have unsurprisingly failed to comply with the conditions of their ISS on release and been returned to prison, resulting in a fourth punishment for the original offence.

While responsibility for this type of ISS technically lies with the Justice Secretary, it is effectively made at a local level by the Youth Offending Team (YOT). In several cases, the children who sought our help had not been informed of their worker's recommendation for an ISS until a few days before release. None of the children we have worked with knew they were entitled to challenge this decision. They were not offered legal advice or help to ensure their wishes and feelings were taken into account. Our casework prompted us to carry out a review of the prevalence of the use of ISS programmes on children across local authorities in England and Wales.

The research

Information on the total number of children released on ISS with a tag at the midpoint of the DTO is not available centrally from the Ministry of Justice (MoJ) (Hansard, 2013). Therefore, the Howard League contacted every local authority in the England and Wales with a Freedom of Information (FOI) request, to ascertain how many children had been subjected to this double, or even triple, punishment in the

Table 1. Numbers of children released on ISS at midpoint in last year by local authority

Local authority	No. of children
Birmingham City Council	78
Liverpool City Council	32
Leicester City Council	25
Leeds City Council	21
Sheffield City Council	21
Kent County Council	19
Hertfordshire County Council	18
London Borough of Lambeth	18
Salford City Council	18
Cumbria County Council	16
Suffolk County Council	16
London Borough of Enfield	15
Calderdale Metropolitan Borough Council	15
Doncaster Metropolitan Borough Council	15
London Borough of Ealing	14
Wolverhampton City Council	14
Durham County Council	13
Stockton-on-Tees Borough Council	13
Nottinghamshire County Council	12
Hampshire County Council	11
London Borough of Brent	11
Manchester City Council	11
Southampton City Council	11
Derbyshire County Council	10
London Borough of Barking and Dagenham	10
Royal Borough of Greenwich	10

last year. The data showed that between 903–918 children had been released at the midpoint of their DTO on ISS and tag in the last year.

Analysis of the figures reveals that children are victim to a post-code lottery: 26 local authorities supervised ten or more young people with an ISS at midpoint in the last year (Table 1). A further 26 had no children released at the midpoint on ISS. There is no discernible pattern to account for this variation.

The Howard League has found through its casework that although the responsibility for authorising ISS at the midpoint, with the risk of further jail that this

Examples of good practice: local authorities where no children were released on ISS at midpoint in the last year

Bracknell Forest Borough Council
Bristol City Council
Buckinghamshire County Council
Cardiff County Council
Ceredigion County Council
City of London
Gloucestershire County Council
Isles of Scilly
London Borough of Haringey
London Borough of Hillingdon
London Borough of Hounslow
London Borough of Islington
London Borough of Richmond upon Thames
London Borough of Sutton
Oxfordshire County Council
Portsmouth City Council
Rutland County Council
Shropshire Council
Slough Borough Council
Southend-on-Sea Borough Council
South Gloucestershire Council
Thurrock Council
Torbay Council
Trafford Metropolitan Borough Council
West Berkshire Council
Wokingham Borough Council

entails, lies with the Justice Secretary rather than a court, the most determinative factor appears to be the recommendation of the YOT (coordinated by the local authority).

The Youth Justice Board's (YJB) operational guidance (2010) provides little assistance as to when a post-custody ISS should be recommended, stating that it should only be used 'where a risk assessment indicates serious risk of serious harm to others or high likelihood of reoffending' (2010: 36). This latest version of the guidance issued in 2010 has dispensed with the advice to workers in the 2009 edition that 'YOTs should use professional judgement to decide if ISS should be added on to their Notice of Supervision as not all young people meeting any one of the above categories will need ISS' (YJB, 2009: 14).

The enormous variation in how the policy is applied across England and Wales suggests

that the policy is too vague to be either lawful or helpful. It also discriminates against children who are mentally ill or have a learning disability, as these children are likely to have a higher 'risk' score but are also least likely to cope with the requirements of the ISS.

The figures are striking as data from the MoJ show that between 30 to 50 per cent of children on ISS programmes are breached, with around 50–55 per cent of those breaches resulting in custody (Bateman, 2011). Children are at a higher risk of breaching conditions than adults due to a constellation of factors including a lack of control over their own lives and the fact they are still learning and maturing. Children breached for a midpoint ISS could account for a significant proportion of the child prison population which stood at 1,222 as of July 2014 (MoJ, 2014). The high number of children in prison for breaching conditions explodes the myth that all children in prison have committed serious offences or are dangerous.

Legal framework and best practice

Our research reveals that even within the current legal framework the risk of excessive punishment can be reduced through practice, as some local authorities used the mechanism extensively whereas 26 local authorities did not use it at all.

Most children who are sent to custody are given a DTO. This sentence is only available to children and is comprised of an initial punitive element followed by a rehabilitative element in the community under supervision. Children must be released after they have spent half the sentence in jail. Most children serving sentences of over eight months or more should be released one or two months early on an electronic tag, depending on their behaviour.

Whenever a child is released before the end of the full DTO, conditions of supervision apply. The notice of supervision can include virtually anything, including electronic tagging. The electronic tagging is provided by private companies and paid for centrally. The full cost of tags for DTOs is around £1.4m per annum (this figure was provided by the MoJ in response to an FOI request).

There is no legislative requirement for a YOT to recommend an ISS on a child being released

Case study: Kevin

Kevin was a child in care with a poor school history and significant mental health problems, including severe ADHD. Kevin spent two spells in the community under the ISS programme and two periods in jail – all for the one offence.

Kevin was very vulnerable, having experienced a significant bereavement and witnessed domestic violence and alcohol abuse within his family. He was given a Youth Rehabilitation Order (YRO) with an ISS for his original offence but found it difficult to keep up with all his appointments on the programme. He was breached and taken back to court which imposed a DTO.

In recognition of his vulnerability he was sent to a secure training centre for young or vulnerable children. At the centre, medical staff observed the extent of his mental health problems. Shortly before release at the end of his punishment term, he was told that he would again be placed on an ISS with a tag. Kevin was extremely distressed by this and felt it would be very difficult for him to cope on the programme. He felt he had served his punishment term and it was not fair. The same local authority that demanded he be released onto the programme failed to tell him where he would be living until just before his release. Instead of preparing for a positive release under supervision he was filled with fear and anxiety, living in an unknown location with intensely restrictive conditions: he felt he was being set up to fail.

Kevin was released on an ISS and subsequently breached for a second time. A court returned him to jail to complete the remainder of his DTO in custody. When he was finally released after having served an additional three months, he had no supervision at all.

at the midpoint. The decision will always result from the YOT worker exercising discretion to recommend the imposition of the ISS. There is very little guidance for YOT staff about when it is appropriate to seek an ISS at midpoint. The only stipulation is that the child must be considered a high risk of serious harm or be managed under multi-agency public protection arrangements. However, even where this applies, the decision to seek an ISS is still at the discretion of the YOT. The requirement must be requested by the YOT and authorised by the

Secretary of State for Justice, either through a member of the YJB, the National Offender Management team or the governor if the child is in a Young Offender Institution.

The practice of tagging children at the midpoint of their DTO sentence is a legal black hole with no proper lines of accountability or redress. While it may be intended to help change lives and manage risk, the reality is that ISS conditions are sometimes so lengthy and onerous that children, especially those with mental health problems, find it almost impossible to comply. Since 2008 the law has recognised that being under an electronic curfew is the equivalent of being locked up.

If a child cannot cope with the conditions, this leads to another court hearing and sometimes to a second custodial sentence. Once they have served their further prison term, these children may either be released on supervision and once again placed on an electronic tag or released at the very end of their sentence with no supervision at all.

A child such as Kevin (see case study) whose original offence was not serious enough to warrant a jail term can end up with four separate punishments, including two spells in jail.

Each year hundreds of children experience spells in prison as a result of the failure of community supervision and not because their original offence warranted it, and many more experience prison a second time because of the failure of authorities to manage them properly in the community.

This tangled web of punishment is specific to children and is not applied to adults. In the case of an adult, only the most serious offenders can be electronically tagged and there is no equivalent to the intensive activity requirement on the ISS.

What do children say about ISS?

In 2011, the Howard League U R Boss participation project worked with children who had been released from custody to give them the opportunity to share their experiences of returning to their communities, being on licence and routes back into custody; and make recommendations for change in the publication *Life outside* (Howard League, 2011).

Case study: Robert

Robert was convicted of a street robbery. A DTO, to be served half in jail and half in the community under the supervision of the YOT, was imposed.

Robert was locked up in a secure training centre and not a prison because it was recognised that he was particularly vulnerable. In the centre, he started to engage in education and found that he liked it and was good at it. Although he got into some trouble at the beginning of his sentence, by the end of his time there all of the professionals working with him recommended that he should be released early on an electronic tag until the midpoint of his sentence, the tag reflecting that he was still in the punishment part of his sentence. There is a presumption that the Secretary of State will grant one or two months' early release on tag to all young people serving DTOs. In Robert's case, however, the Secretary of State decided he should spend the whole punishment term in jail, because of an incident at the beginning of his sentence.

Robert was disappointed but decided to make the best of it and was gearing up for a fresh start in the community. He asked to be placed in a new area to remove himself from negative peers and had plans to go to college. However, at his final pre-release meeting before his midpoint release, his community justice officer informed him that he would be released on an electronic tag anyway as part of another ISS programme. Robert had no idea that he could challenge this. It later appeared that this decision may have stemmed from the fact that the original plan had been for him to be released early on tag. Later on it was suggested that he required the tag to provide him with 'structure' in the absence of any planned education or activities as things had not yet been put in place.

Robert was released on tag to a new area under the ISS programme. Due to poor planning, he did not get the planned activities that form part of the programme for several months. Robert felt he had been set up to fail.

For the children we worked with there was a clear pattern that the youth justice system reinforced their collective identity as an 'other' from society, placed them in failing prisons and then released them into a one-size-fits-all model that further criminalised and excluded them. The overarching finding of *Life outside* was that children felt they were being 'set up

to fail', onto the inevitable path back into prison. As part of their licence conditions, many of the children we worked with were either on, or had experience of ISS. Although they were mostly positive about the contact and relationships they had with the ISS workers, they were extremely negative about the programme itself. One child went as far as to say, 'I'd prefer a couple of months in jail than a year here'.

The majority of the ISS programme is delivered in group work sessions with other children. Although one child pointed out the benefit that 'you can talk about stuff that you've done together; you know people have been there and that you can talk about it', many questioned the rationale behind bringing young people who had offended together. Some children noted that as ISS forced them together for the group work, they 'end up being together after coming here' often encouraging each other into committing crimes.

Bringing the same children and young people together for 25 hours a week as part of their supervision requirements continues this negative reinforcement of their criminal identities and segregates them into a group apart from the rest of society, when the aim is to reintegrate them positively back into it.

The content of the ISS sessions was the subject of much criticism in every group we worked with. As one young person put it, 'you get taught the same crap over and over again, it starts to repeat'. Young people provided many suggestions of alternatives to group work, from 'do an apprenticeship instead of wasting time coming here' such as 'painting and decorating', 'catering', 'anything' or simply tailoring the session to 'something you've got an interest in and be able to see the impact of it'.

Given that children can be subject to breach and recalled to custody if they fail to attend sessions, the practical barriers they face appear to support young people's feelings that they are being set up to fail. Many children felt that it was not their fault when they failed to comply with the requirements imposed on them, such as missing a bus to attend an appointment or being locked out of the house when they should be inside as part of a curfew.

Does ISS work?

The YJB commissioned a two-stage evaluation, which found that the 12 month reconviction rate was 91 per cent and the comparison sample was 76 per cent (Gray et al., 2005). As Ellis et al. (2009: 399) point out 'such results can, at best, be regarded as very poor, and at worst, failure'. Despite this, the YJB has continued to invest in the programme to fulfil one of the original aims that it appears 'tough on crime', making it popular with both the public and sentencers, regardless of whether it addresses children's needs or reduces reoffending.

Ellis et al. (2009: 408-409) summarise what the scheme has not done:

'[it has] not: reduced predicted reoffending; ensured adequate surveillance to ensure public protection; ensured rigorous enforcement; had a positive impact upon offenders' attitudes; provided supervision sessions specific to individual needs or offender age; improved young offenders' life chances; ensured adequate incapacitation; brought structure to young offenders' lives; provided strong boundaries and separation from damaging environments or peer groups.... The whole regime for dealing with such offenders needs a radical and urgent over-haul, and a review which focuses on the evidence of what does work or is likely to work, rather than on political expediency, is long overdue.... It is time to stop flogging the dead horse!'

Who is to blame and who is to gain?

One of the problems with the imposition of the ISS at the midpoint is that nobody seems to take full responsibility for the decision. It is not imposed by the courts, although the court

will be involved in the final decision to return children who breach to custody. Technically it is the Justice Secretary, through the prison governors, the National Offender Management Service and the YJB, who must authorise the condition as a matter of law. However, in practice the condition is usually imposed on the recommendation of the YOT worker who is part of the child's home local authority.

The only winners appear to be the private companies that profit from the tagging arrangements. The MoJ has confirmed via an FOI request that private companies tag persons under the age of 18 at the midpoint of their sentence when they are released from custody and the MoJ foots the bill. In 2010/11 the MoJ spent £1.4m on tagging children on DTOs.

What next?

The Howard League for Penal Reform believes the government should end the use of midpoint ISS. The system is not working. It creates injustice and costs a vast amount of money.

A full list of references is available at:
<http://www.howardleague.org/publications-youngpeople/>

About the Howard League for Penal Reform

The Howard League is a national charity working for less crime, safer communities and fewer people in prison.

We campaign, research and take legal action on a wide range of issues. We work with parliament, the media, criminal justice professionals, students and members of the public, influencing debate and forcing through meaningful change.

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