

Advice of the Ombudsman for Children on the
proposed changes to the Children Act, 2001

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1. Introduction

Background

In November 2005, I submitted initial observations on the proposed changes to the Children Act, 2001 to the Minister of State with Responsibility for Children. These observations were based on an overview of the proposals of the Youth Justice Task Force presented to me at meetings with the Minister of State with Responsibility for Children and members of the Youth Justice Task Force team in Autumn 2005.

On 20 December 2005, the Heads of the amendments to the Children Act, 2001 for inclusion in the Criminal Justice Bill, 2004, were formally referred to my Office by the Minister for Justice, Equality and Law Reform. Section 7 (4) of the Ombudsman for Children Act, 2002 provides that I shall, at the request of a Minister, give advice on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of any proposals for legislation.

In accordance with this statutory function, my advice on the proposed amendments is set out in this document. My initial observations were conveyed to the Minister of State with Responsibility for Children in November 2005 and are re-stated in this submission for ease of reference.

General comment

I welcome the work of the Youth Justice Task Force and the Report on the Youth Justice Review published in January 2006. The Youth Justice Task Force has brought much needed leadership and vision to the youth justice arena. In particular, I welcome the proposals and recommendations set out in the Task Force's Report which focus on the need for a unified and well coordinated youth justice service.

The proposed changes to the Children Act, 2001, set out in the draft amendments referred to my Office, go far beyond the changes recommended in the Report on the Youth Justice Review (2006). Of particular note are the proposals relating to the introduction of 'anti-social behaviour orders' which were proposed, independent of the review, by the Minister for Justice, Equality and Law Reform.

My observations on the proposed changes to the Children Act, 2001, focus on compliance by those proposals with Ireland's international human rights obligations and the probable effect of the proposals on the lives of children.

Article 40 (1) of the UN Convention on the Rights of the Child (CRC) requires states to treat children in conflict with the law in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for human rights and which takes into account the child's age and the desirability of promoting reintegration. The UN Committee on the Rights of the Child has stated that this principle requires the adoption of child-orientated juvenile justice systems which recognise the child as a subject of fundamental rights and freedoms.¹

Article 3 of the CRC provides 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.

At a policy-making level, the UN Committee has stated that the 'best interests' principle requires that children's interests are considered in policy formulation and that child impact assessments of possible government actions are conducted on a consistent basis.² In other words, it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.

These international human rights obligations are binding international law, ratified by Ireland without reservation. They are obligations which Ireland has committed itself to implement.

The Children Act, 2001, incorporates many of the international human rights standards dealing with children and the administration of justice. The introduction of the Children Act in 2001, to replace and supplant the Children Act of 1908, was a welcome development. The Act was the result of three decades of debate commencing with the Kennedy Report of 1970 and culminating in the passing of the Act. It sets out a range of measures which can be used to deal with children who are at risk and those who have otherwise come into contact with the criminal justice system.

Part 2 of the Act provides that the Health Services Executive (HSE) can establish family welfare conferences in respect of children who are at risk, but have not committed an offence. Conferences can also be established for children charged with offences. This provision enables the relevant agencies, the child and their parents or guardians to sit down and address the circumstances that have led the child to be at risk. The Garda

¹ UN Committee on the Rights of the Child, Report of the ninth session, May/June 1995 CRC/C/43.

² See Implementation Handbook for the Convention on the Rights of the Child, UNICEF, 2002, Chapter 3.

Diversion Programme is provided for in Part 4 of the Act and Part 9 of the Act provides for a range of community-based sanctions which could be used as an alternative to detention. These sanctions include restriction on movement orders and a range of probation orders (including training and intensive supervision orders).

Unfortunately, many of the key provisions of the Act have not yet been implemented and we have not had an opportunity to test the Act as a whole. However, it is my view that the Act already contains the legislative measures needed to deal with 'at risk' children and children who come into contact with the criminal justice system. The approach taken in the Act, focusing on preventative measures and restorative justice mechanisms, is the right approach and the one which best protects the rights of children and young people in conflict with the law in line with Ireland's legal obligations.

What is needed, therefore, is not additional legislative measures but full implementation of the existing Children Act, 2001.

This is a view shared by those involved in the Youth Justice Review. The Report of the Review notes "the consensus view to emerge from the consultation process is that the Children Act, 2001 is a sound piece of legislation which, when fully implemented, will provide for a modern and comprehensive youth justice system"³.

In addition to my view that the current legislative framework is adequate, I have a number of specific concerns relating to compliance by the instant proposals with Ireland's international human rights obligations and the probable effects of the proposals on some of the most vulnerable children in the State.

Children of a young age with parents who do not have the capacity for whatever reason to support their children will be worse off under the proposed scheme than those with parental or other supports. They will be brought closer to the criminal justice system, a development which is contrary to the central ethos of the Children Act, 2001 – the diversion of children away from the criminal justice system.

The Report on the Youth Justice Review points out the number of recorded offences committed annually by young offenders has remained stable in the last 3 years.⁴ We do

³ Report on the Youth Justice Review, Department of Justice, Equality and Law Reform, 2006.

⁴ Ibid, at p 12.

not have any evidence to support the increase in the perceived threat in so called "anti-social" or criminal behaviour by children.

I therefore consider many of the proposed changes, in particular those introduced independently of the Report on the Youth Justice Review, to clearly place the public interest ahead of the best interests of the child.

Interventions are required to deal appropriately with 'at risk' children and children involved in criminal activity in order to protect the best interests of children and to protect the rights of all members of society to the peaceful enjoyment of life and property. However, the interventions set out in the proposed amendments are not the means to achieving this end.

2. Part 4 of the Children Act, 2001 – Diversion programme

2.1 Content of proposals

Section 18 of the Children Act, 2001 provides: “any child who has committed an offence and accepts responsibility for his or her criminal behaviour shall be considered for admission to a diversion programme”. Section 23 of the Act provides that a child must be over the age of criminal responsibility (12 years) for admission to the programme.

Head 8 and Head 11 propose, respectively, that children who have committed ‘anti-social behaviour’ and children aged 10 years or over shall also be eligible for admission to the programme. Section 31 of the Criminal Justice Bill, 2004, provides that a child’s admission to a Garda Diversion Programme can be considered for sentencing in relation to any future criminal proceedings against the child.

2.2 Compliance with international human rights standards and probable effect on children

2.2.1 Extension to ‘anti-social behaviour’

Compliance with international human rights standards

My observations regarding the proposed extension of the Garda Diversion programme to children who commit ‘anti-social behaviour’ are set out in section 9 of this document dealing with the ‘anti-social behaviour’ order proposals. In short, my view is that: in providing additional avenues for children, including children who have not committed a criminal offence, to come into contact with the criminal justice system, the proposal is not in keeping with the relevant international human rights standards which provide that children should be diverted away from formal agencies of social control towards community-based services and programmes for ‘at risk’ children.

Probable effect on children

As regards the probable effects of this proposal on children, there are clearly risks involved in mixing children who have committed offences with children who have not been engaged in any criminal activity in a Garda Diversion Programme. So called “non-offending children” would be exposed to a new environment which could have a negative impact upon them. In my view, ‘at risk’ children should be provided with supports which address the welfare and other issues underlying their behaviour.

2.2.2 *Removal of certain safeguards for children aged 10 and 11 years old*

Compliance with international human rights standards

As regards the extension of the programme to children aged 10 or 11, it is important to note that two safeguards applicable to children aged 12 or over will not apply to this age group.

Currently, Section 23 of the Act provides that, in order to be admitted to a Garda Diversion programme a child must consent to be cautioned and, where appropriate, to be supervised by a juvenile liaison officer (subsection 1(b)) and the Director of the Programme must be satisfied that the admission of the child to the Programme would be appropriate in the best interests of the child and not inconsistent with the interests of society and the victim (subsection 2).

A proposed new subsection 6 provides that these safeguards will not apply to the 10-11 year old age group.

As regards consent to be cautioned, while it is the case that children below the age of 12 will not be cautioned because they are below the age of criminal responsibility, it is also the case that participation in a diversion programme can be considered (in relation to sentencing) in any future criminal proceedings against them (see para 2.2.3 below). As such, children aged 10-11 years old should be made aware of the gravity of the potential future impact of any participation by them in a diversion programme, something which the mechanism of a caution already provides for the older age group. This provision could give rise to issues under Article 6 of the European Convention on Human Rights (ECHR) concerning the right to a fair trial.

As regards the removal of the requirement in subsection 2 that the Director of the programme be satisfied that the admission of a child aged 10-11 years would be in their best interests, the rationale for the removal of this safeguard is less apparent. This requirement should be retained. The Director should give primary consideration to the best interest of children of all age groups when making decisions.

Article 3 of the CRC provides:

"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 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) also provide that the well-being of the juvenile shall be the guiding factor in the consideration of his or her case.⁵

In removing the application of the “best interests of the child” principle to this age group, this provision does not comply with the letter of Article 3 of the CRC.

2.2.3 Impact of admission on any future criminal proceedings

Compliance with international human rights standards

Section 48 of the Act currently provides that evidence of a child’s admission to a Garda Diversion programme, and any acceptance of responsibility for criminal behaviour they may have made in relation to the programme, cannot be used in evidence in any future criminal or civil proceedings against the child.

Section 31 of the Criminal Justice Bill, 2004 already contains an amendment to Section 48 of the Act. This provides that evidence of admission to a Garda Diversion Programme can be considered in relation to sentencing for any future offence committed. This provision would effectively remove the immunity that currently applies in relation to admissions made in the context of the Garda Diversion Programme.

This proposed provision would undermine a child’s right to a fair trial and to due process, set out in Article 6 of the ECHR and Article 40 of the CRC, particularly where the child concerned was not aware of the potential consequences of an admission for any future criminal proceedings. Should the provision be retained, express provision should be made in order to ensure that children are made aware of the potential consequences of admission to a Garda Diversion Programme under the new proposals.

2.3 Other practical considerations

The Garda Diversion Programme is recognised as one of the success stories of the Children Act, 2001. The proposed extension of the programme and proposed new provision regarding admissibility of evidence relating to participation in programmes could serve to undermine the programme. Given the proposed new import to attach to acceptances of criminal or ‘anti-social behaviour’, children may refuse to participate in the diversion programmes of the future.

⁵ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 17.1(d).

I have met with a range of people involved in the Garda Diversion Programmes all of whom have expressed concern at the proposed changes. Managing children involved in criminal behaviour alongside children involved in 'anti-social behaviour', some of whom may be of a very young age, in the same diversion programme, would be a very difficult, if not insurmountable challenge for those involved.

The Committee appointed to monitor the effectiveness of the Garda Diversion Programme has produced two Annual Reports to date. While the information contained in these reports is useful, I would recommend that an independent evaluation of the Garda Diversion Programme be undertaken before the Programme is extended or changed in any way. An independent evaluation would identify the Programme's current strengths and weaknesses and would assist in assessing the suitability of proposed changes to the Programme.

3. Part 5 of the Children Act, 2001 – minimum age for prosecution

3.1 Content of the proposals

Section 52 of the Act provides that no child under the age of 12 years is capable of committing an offence.⁶ It also provides for a rebuttable presumption that children under the age of 14 years are incapable of committing an offence (incorporating the common law *doli incapax* rule).

Head 23 proposes the following changes to the rules relating to age:

- a child under 12 years of age shall not be charged with an offence;
- a child aged 10 or 11 years can be charged with murder, manslaughter, rape, rape under Section 4 of the Criminal Law (Rape) (Amendment) Act 1990 or aggravated sexual assault;
- proceedings shall not be taken against a child under the age of 14 years save by or with the consent of the Director of Public Prosecutions (DPP); and
- a child aged 10 or 11 years, who cannot be prosecuted because they are below the age of criminal responsibility, shall be admitted to the Garda Diversion Programme.

The most fundamental of these changes is the abolition of the *doli incapax* rule and the removal of all language related to capacity. Head 23 provides, in effect, that children aged 10 years and older have criminal capacity, but that proceeding will not be brought against them save in certain instances.

This indicates a significant shift away from the notion of capacity that lies at the heart of Section 52 of the Act as currently drafted - the notion that a child aged under 14 years is incapable of committing an offence because he or she did not have the capacity to know that the act or omission concerned was wrong. Such capacity is necessary for the formation of *mens rea* – the “mental state” – required for the attachment of criminal responsibility under the criminal law.

The removal of the capacity presumptions from Section 52 might be a neat way of dealing with the matter of aiding and abetting by adults under Section 54 of the Act, however, its overall effect is to expose younger children to criminal liability.⁷

⁶ This Section of the Act has not been commenced.

⁷ The note to Head 25 clarifies that, even though a child under 12 years of age can no longer be charged, the child has the capacity to commit an offence and does commit an offence. The special provisions set out in Section 54 of the Act regarding adults who aided or abetted a child below the age of criminal responsibility (and who therefore could not commit any crime) are, therefore, no longer required.

3.2 Compliance with international human rights standards

While international treaty monitoring bodies such as the UN Committee on the Rights of the Child and the European Court of Human Rights have held there is currently no international consensus as regards the exact minimum age for the attachment of criminal responsibility, the UN Committee has criticised jurisdictions in which the minimum age is 12 or less.⁸

As already noted in my observations of November 2005, it is my view that the proposed caveat relating to the commission of certain crimes by children aged 10 or 11 years old risks bringing Ireland outside of current international standards regarding the minimum age of criminal responsibility.⁹ Should this proposed caveat be enacted, it can be expected that the UN Committee might take a similar view at the examination of Ireland's report to the Committee this September. I consider that 10 or 11 year olds accused of the specific crimes listed in Head 23 should be treated the same as children accused of other crimes.

As regards the European Convention on Human Rights (ECHR), while the European Court of Human Rights in the cases of *T and V v the UK* (Bulger Case) held that a minimum age of criminal responsibility of 10 years of age was not, in and of itself, a violation of the Convention, it held that the failure to adapt the court proceedings to ensure the child's right to participate effectively in his trial did violate the Convention. It should be noted that any child of 10 or 11 years of age exposed to proceedings in the criminal courts of this State in which their effective participation and understanding is not guaranteed could find the required ECHR procedural requirements lacking.

3.3 Probable effect on children

In practical terms children under 14 years of age will be doubly worse off under the new proposals; the presumption of lack of capacity is gone and they can be admitted to the Garda Diversion Programme, an admission which can be taken into consideration for sentencing in relation to any future criminal proceedings against them.

There is also uncertainty surrounding the manner in which the DPP might exercise his discretion when deciding whether or not to prosecute a child under 14 years of age. Will the best interests of the child be taken into consideration in such decision making as

⁸ See the UN Committee's Concluding Observations on the Initial Reports of Australia and the United Kingdom.

⁹ Observations of the Ombudsman for Children on the Youth Justice Task Force Team Proposals, November 2005.

required under Article 3 (1) of the CRC? What mechanisms will be put in place to ensure that the best interests of the child are taken into consideration?

It might not be possible to resolve this uncertainty given that the DPP is not required to provide reasons for his decisions.

The central aim of the Children Act, 2001, was to divert children away from the criminal justice system. These proposals go against that aim by bringing children closer to the criminal justice system in practice and by removing the presumption of incapacity.

In order to meet the minimum threshold for the attachment of criminal responsibility indicated by the UN Committee on the Rights of the Child, Section 52 of the Children Act, 2001 should remain as is. No caveats to this minimum age should be introduced.

4. Part 8 – Proceedings in Court

4.1 Attendance of the HSE in Court

Head 29 proposes a new introductory Section to this part of the Act detailing the powers of the Court when dealing with a child charged with an offence. A new Section 76 includes a provision that the Court may request the HSE to send a representative to attend at the Court and that the HSE must comply with such a request.

This proposed provision is welcome. A representative of the HSE familiar with the background of a child may be well placed to inform the Court of any welfare or other issues of relevance to the child's circumstance and the proceedings at hand. This new Section could also assist in the operation of Section 77 of the Act, which provides for the referral of cases before the Court to the HSE (this Section is not yet in operation).

4.2 Remand in custody

4.2.1 Content of the proposal

The Children Act, 2001, currently provides for separate arrangements for the detention of children aged up to 16 and for those aged over 16. Under the proposed changes to the Act, this distinction will be removed and all detained children aged under 18 will be detained in children detention schools under the auspices of the Department of Justice, Equality and Law Reform. A similar distinction in respect of detention on remand is provided for in Section 88 of the Act. Head 30 proposes changes to this Section, in line with the overall changes in the Act.

Head 30 proposes the addition of a new subsection in Section 88 providing that boys aged 16 or 17 years of age can be remanded to St Patrick's Institution until places in a remand centre are available for boys in that age group. I understand that this provision is intended to be of a temporary nature and that the practice of detaining boys on remand or otherwise in St Patrick's Institution will cease when suitable detention facilities for boys of this age group have been built.

4.2.2 Compliance with international human rights standards

St Patrick's Institution is a prison. It is a closed, medium security place of detention for males aged 16 to 21 years of age, serving sentences up to life.¹⁰ The detention of children together with men aged 18 to 21 years of age is contrary to international human rights standards. Please see comments on this matter at paragraph 6.3 below.

¹⁰ Irish Prison Service Annual Report, 2004, p 60.

As regards children on remand, detention alongside convicted adults is an even more serious matter. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty states that untried juvenile detainees should be separated from convicted juveniles.¹¹ I understand that, at present, there is no formal separation of child prisoners from adult prisoners or of convicted prisoners from remand prisoners within St Patrick's Institution.

Mixing children on remand, who are still before the courts and presumed innocent, together with adults convicted of criminal offences in a detention setting is a practice in breach of the relevant UN Rules.

4.3 Restrictions on reports of proceedings in which children are concerned

Head 32 proposes the extension of restrictions on reporting of proceedings in which children are concerned to all courts. At present, the restriction applies to the Children's Court only.

This provision is welcome and in line with Article 40 (2) (b) (vii) of the CRC which states that, in the administration of justice, the privacy of children must be guaranteed at all stages of the proceedings.

However, Head 32 also proposes an expansion of the grounds upon which a Court can relax the restrictions on reporting. My concerns in relation to this proposal are dealt with in section 7 of this document dealing with the 'anti-social behaviour' order proposals. See paragraph 7.2.1. below.

¹¹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 17.

5 Part 9 – Powers of the Courts in relation to child offenders

5.1 Alternative to detention where places unavailable

Section 145 of the Act provides that where a place in a Children Detention School is not available for the detention of a child under 16 years of age, the Court may make an order imposing a community sanction on the child instead of detention order. Head 39 proposes that this provision should extend to children under 18 years of age. This proposal is a consequence of the decision to amend the Children Act, 2001 to provide that all detained children under 18 years of age be detained in Children Detention Schools.

This proposal is welcome. Taken together with Section 156 of the Act, which prohibits the courts from committing a child to prison, this provision should bring to an end the practice of detaining boys in St Patrick’s Institution once the transitional phase envisaged in the proposed changes to the Act comes to an end.

5.2 Length of detention and a child’s education needs

5.2.1 Content of proposal

Section 149 of the Act provides, *inter alia*, that the period of detention a Court may impose on a child shall be not less than 3 months or more than 3 years. Head 41 proposes the repeal of this Section and its replacement with a provision that a period of detention imposed should be no longer than the term that would be imposed on an adult for the same offence. In determining the appropriate length of detention, the Court shall have regard to the child’s educational needs.

The note to the Head explains that “the Court may wish to ensure that the child receives a full term’s education in the school, at least, and tailor the period of detention accordingly.” The effect of this provision could be that educationally disadvantaged children may receive longer sentences.

5.2.2 Compliance with international human rights standards

The principle that the detention of children should be a measure of last resort and that any period of detention be limited to the shortest appropriate time is well established in international human rights law.

Article 37(b) of the CRC provides that the detention of a child “shall be used only as a measure of last resort and for the shortest appropriate period of time”. The Beijing Rules set out a number of guiding principles in this regard¹²:

¹² United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 17(b),(c),(d).

- restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
- deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or persistence in committing other serious offences and unless there is no other appropriate response; and
- the well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

These standards require states to limit both the instances and duration of detention because of the profound negative impact detention can have on young lives. The adverse impact of detention on relationships and the child's well-being are generally recognised as outweighing any positive educational gain which might be achieved while in detention.

In providing only for the consideration of a child's educational needs for the determination of the length of sentence, this proposal does not comply with the strict requirements of the CRC and relevant international standards.

The proposed provision is also somewhat anomalous to Section 96 of the Act which sets out the principles relating to the exercise of criminal jurisdiction over children and incorporates the international human rights principles referred to above.

Section 96 provides that detention should be used only as a last resort and that any period of detention should be limited to the minimum period possible because it is desirable wherever possible:

- a. to allow the education, training or employment of children to proceed without interruption;
- b. to preserve and strengthen the relationship between children and their parents and other family members;
- c. to foster the ability of families to develop their own means of dealing with offending children; and
- d. to allow children to reside in their own homes.¹³

¹³ Children Act, 2001, Section 96(2)(a)-(d).

Clearly, Section 96 requires the Courts to take into consideration matters additional to a child's educational needs when exercising criminal jurisdiction over children.

The proposal in Head 41 does not comply with the strict limitations on the use of detention set out in the CRC. It should be amended to incorporate the international human rights principles set out above and to avoid the generation of confusion *vis a vis* the provisions of Section 96 of the Act.

5.3 Transitional provisions regarding the detention of boys aged 16 and 17 years old

One of the major changes proposed in the amendments to the Children Act, 2001, is the accommodation of all detained children under 18 years of age in Children Detention Schools under the aegis of the Department of Justice, Equality and Law Reform.

The note to Head 48 states that purpose-built children detention schools for 16 and 17 year old male children will not become available for some considerable time and that a transitional provision is required in the interim.

Head 48 proposes the insertion into the Children Act, 2001 of a transitional provision providing for the detention of boys aged 16 and 17 in St Patrick's Institution. This transitional provision will provide a legal basis for the continued detention of children in St Patrick's Institution once the Children Act, 2001 has been implemented in full.

The proposed provision states that, "notwithstanding the provisions of Part 9 of the Act of 2001", boys aged 16 and 17 years of age can be detained in St Patrick's Institution. This overriding provision is required in order to bypass the provisions of Part 9 of the Act, in a particular Section 156 which provides that no Court shall commit a child to prison.

St Patrick's Institution is a prison. It is a closed, medium security place of detention for males aged 16 to 21 years of age, serving sentences up to life.¹⁴

In November 2005, I transmitted my initial observations on the proposed changes to the youth justice system to the Minister of State with Responsibility for Children. These observations were based on the information received at meetings with the Minister and his officials in the autumn of 2005.¹⁵ At that time, I was informed it was envisaged that

¹⁴ Irish Prison Service Annual Report, 2004, p 60.

¹⁵ Observations of the Ombudsman for Children on the Youth Justice Task Force Team Proposals, November 2005.

children would continue to be detained in St. Patrick's Institution until 2010, the earliest date by which it was envisaged the new site at Thornton will be completed.

I expressed concern that, under this timeframe, children would continue to be detained in an adult prison contrary to Ireland's international human rights obligations.¹⁶

The International Covenant on Civil and Political Rights (ICCPR), Article 10(2)(b) states that "accused juvenile persons shall be separated from adults". Similarly, the Standard Minimum Rules for the Treatment of Prisoners, Rule 8(d) requires: "young prisoners shall be kept separate from adults". In a General Comment on Article 10 of the ICCPR, the Human Rights Committee has stated "It is the Committee's opinion that, as is clear from the text of the Covenant, deviation from States Parties' obligations under subparagraph 2(b) cannot be justified by any consideration whatsoever".¹⁷

As regards St Patrick's Institution in particular, it should be recalled that the European Court of Human Rights held that the detention of a particular child in the Institution was in violation of the European Convention on Human Rights.¹⁸ The Inspector of Prisons and Places of Detention has repeatedly called for the closure of St Patrick's Institution and has stated that it is "completely inadequate to provide rehabilitation for the juveniles".¹⁹

It is important to note that children detained in adult prisons do not have access to the complaints function of my Office. Children detained in places other than the Children Detention Schools do not have access to the complaints mechanism as per an express exclusion set out in the Ombudsman for Children Act, 2002, S.11(1)(e)(iii). In my first Annual Report to the Oireachtas in April 2005, I recommended that this exclusion be removed from the Act without delay.

¹⁶ See: The CPT Standards, Substantive Sections of the CPT's General Reports, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) at page 64; "In the view of the CPT, all juveniles deprived of their liberty because they are accused or convicted of criminal offences ought to be held in detention centres specifically designed for persons of this age, offering regimes tailored to their needs and staffed by persons trained in dealing with the young". See also the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), paragraph 26.3: "Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults."

¹⁷ Human Rights Committee, General Comment 9, 1982, HRI/GEN/1/Rev.5, p 119.

¹⁸ See D.G. v Ireland, European Court of Human Rights Judgment of 2002.

¹⁹ See Report of the Inspection of St. Patrick's Institution by the Inspector of Prisons and Places of Detention 2004-2005, at p 74, para 9.3

The report of the Inspector of Prisons on St Patrick's Institution noted that a solicitor who contacted my Office regarding the conditions in St Patrick's Institution was informed that adult places of detention are currently not covered by the complaints function of my Office. The Inspector noted that "this seems to be an extraordinary and deliberate exclusion of our most vulnerable children from her mandate".²⁰

The new arrangements for the detention of boys aged 16 and 17 years of age should be expedited in order that the practice of detaining children in a prison together with adults, in contravention of international human rights standards, be brought to an end as swiftly as possible.

The exclusion in the Ombudsman for Children Act, 2002, pertaining to children detained in places other than the Children Detention Schools should be removed without delay. I would recall that a procedure for the removal of this exclusion is contained in Section 11 (2)(a) of the Ombudsman for Children Act, 2002.

²⁰ Ibid.

6. Part 10 – Children Detention schools

6.1 Transfer of responsibility to Department of Justice, Equality and Law Reform

Head 52 provides for the transfer of responsibility for four of the five Children Detention Schools from the Department of Education and Science to the Department of Justice, Equality and Law Reform.²¹ This proposed transfer was recommended by the Youth Justice Task Force.²²

In November 2005, I transmitted my initial observations on the proposed changes to the youth justice system to the Minister for Children²³. These observations were based on the information received at meetings with the Minister and his officials in the autumn of 2005. My observations noted the need for improvements and change as regards the overall management of the Children Detention Schools. I welcomed the work of the Youth Justice Task Force, and, in particular, its work aimed at elaborating proposals designed to meet the need for change.

However, I also expressed disappointment at the proposal to transfer the task of running the Schools away from an operational department with responsibility for Education. The Departments of Education and Science and Health and Children have a key role to play in delivering child-oriented services to young people who come into contact with the criminal justice system. The focus of any place of detention for young people should be the rehabilitation, education and care of its residents and the promotion of each child's sense of dignity and worth.²⁴

I noted that should the proposed transfer go ahead, inter-departmental coordination structures clearly identifying the respective roles and contributions of the Department of Justice, Equality and Law Reform, the Department of Education and Science and the Department of Health and Children should be drawn up without delay. Notwithstanding any transfer of administrative responsibility, the Departments of Education and Science and Health and Children must meet their obligations in respect of the education, health and welfare of detained children.

In particular, in dealing with children and young people who have come into contact with the criminal justice system, a "whole-child" perspective is required. This means that all the factors leading to the child's current situation and his or her living and family environment

²¹ It is proposed that responsibility for one of the five Children Detention Schools, St. Joseph's Clonmel, be transferred from the Department of Education and Science to the HSE and the Department of Health and Children.

²² Report on the Youth Justice Review, Department of Justice, Equality and Law Reform, 2006.

²³ Observations of the Ombudsman for Children on the Youth Justice Task Force Team Proposals, November 2005.

²⁴ See Article 40 (1) of the UN Convention on the Rights of the Child.

must be taken into consideration when responding to the child's needs. Responding to children in such a holistic way requires effective inter-departmental co-ordination.

Since my initial observations of November 2005, a new Office of the Minister for Children has been established. This is a particularly welcome move and one which should enhance inter-departmental coordination including in relation to the management and running of the Children Detention Schools.

Notwithstanding this development, it is unfortunate that Heads 52-56 concerning the transfer arrangements do not provide clarity as to the role of the Department of Education and Science in the new framework. Head 52 provides that functions relating to the provision of education and training and related programmes will remain vested in the Department of Education and Science. Head 53 provides that a Vocational Education Committee (VEC) shall provide for the education of children detained in a Children Detention School in its functional area. The Head sets out five functions of the VEC in this respect.

While the role of the VEC is set out, the role of the Department of Education and Science is not. Will the Department exercise a supervisory or other quality control role? To whom will ultimate responsibility for quality service delivery rest?

Given the importance of coherent inter-departmental coordination for successful outcomes for children in the Children Detention Centres, the roles of each of the relevant Departments should be clearly set out in the Heads.

6.2 Inspector of Children Detention Schools

6.2.1 Content of proposals

Heads 58-63 propose a range of changes to Sections 185 – 189 of the Act which provide for an Inspector of the Children Detention Schools (these Sections were never commenced). Head 58 provides that the Inspector function set out in the Act will be divided between two bodies: an "authorised person" and an "Inspector". The note to the head states that this function splitting has been designed to facilitate the Social Services Inspectorate (SSI) taking on the role of the "authorised person". It goes on to note that as the SSI's remit does not extend to investigations, this function will be vested in a separate "Inspector".

Head 59 sets out the functions of the "authorised person". The changes, to the existing provisions in the Act, proposed include the following:

- an increase in the minimum period between inspections from 6 months to 12 months;
- the removal of the investigation function;
- the removal of a provision that the Inspector can raise issues of concern arising out of an inspection with the School authorities or the Minister; and
- the removal of a provision that the Inspector shall have regard to the morale of the staff and child detainees.

Head 60 sets out the power to appoint an Inspector. This is the most fundamental of the changes to the Inspector provisions currently contained in the Act. A proposed new Section 186A (1) provides:

“where the Minister is satisfied that in the light of issues of concern –
 (a) raised in a report of an authorised person, or (b) raised publicly or in private with the Minister - it would be desirable to investigate those issues, the Minister shall appoint a person, in this section known as an “Inspector” to investigate and report to him or her on the issues giving rise to the concern.”

Section 186A(4) provides “an appointment under this Section shall be for a specified investigation but such an appointment is without prejudice to the Minister appointing the same person to carry out a further investigation or investigations as the Minister thinks appropriate”.

The note to Head 59 states “Inspections under this head are likely to be rare. Therefore there is no need for a permanent or standing inspectorate”. As regards the appointment of an Inspector the head notes “The Inspector could be a civil servant who would carry out the inspection as part of his or her normal duties”.

Finally Head 63 proposes that Section 189 of the Act providing for an annual report of the Inspector be repealed.

6.2.2. Compliance with international human rights standards

In November 2005, I transmitted my initial observations on the proposed changes to the youth justice system to the Minister for Children.²⁵

²⁵ Observations of the Ombudsman for Children on the Youth Justice Task Force Team Proposals, November 2005.

I welcomed the suggestion conveyed to me in October 2005 that the Chief Inspector at the Social Services Inspectorate (SSI) be nominated as the Inspector for the Children Detention Schools, with a number of caveats: that the SSI be provided with the resources to conduct this role, that the provisions of the Children Act, 2001, which impinged on the independence of the office of the Inspector be amended and an independent inspectorate provided for and finally, that the SSI be in a position to acquire specific expertise in matters relating to the rights of children in detention and the inspection of facilities for the detention of children (including in particular as regards international standards and international best practice). In this context, it should be noted that the competence of the SSI and high quality of work undertaken under its current remit is well recognised. My concerns with regard to the proposed changes focus on proposed textual amendments and, in a particular, those regarding the investigation function.

Although the CRC does not address this matter directly, the UN Committee on the Rights of the Child, which monitors compliance with the CRC, has noted the importance of periodic visits and independent monitoring of institutions.²⁶ In addition, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty provides:

“Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function.”²⁷

Clearly, the proposed changes which remove the power of initiative from the Inspector and envisage that a civil servant could be appointed as an Inspector as part of his or her normal duties are not in compliance with these standards.

Of additional concern is the proposed removal of the provision in Section 186(2)(a) that the inspector shall have regard to the morale of the staff and child detainees when carrying out an inspection. Having visited four of the five Children Detention Schools, it is my view that the issue of morale is an important consideration in respect of any inspection. Indeed, the importance of staff morale was highlighted in the recent review

²⁶ Report on the tenth session, October/November 1995, CRC/C/46, para 229.

²⁷ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990, para 72.

of Finglas Child and Adolescent Centre (one of the five Children Detention Schools) which identified poor staff morale as a principal concern.²⁸

The proposed changes to the Inspector provisions in the Children Act, 2001, do not meet the requirements for independent inspection of youth detention facilities set out in the relevant international human rights standards. Heads 58-63 should be re-drafted in order to provide for an Inspector of Children Detention Schools which complies with the exigencies of the relevant international human rights standards.

²⁸ A Review of Finglas Child and Adolescent Centre, Michael Donnellan, 24 April 2004.

7. Insertion of new Part 14 in the Children Act: 'Anti-social behaviour' orders

7.1 Content of proposed new Part 14

Heads 75-77 set out proposals for the inclusion of measures related to 'anti-social behaviour' in the Children Act, 2001. These measures include good-behaviour contracts and 'anti-social behaviour' orders (ASBOs).

'Anti-social behaviour' is defined as behaviour that "caused or, in all the circumstances, was likely to cause to one or more persons who are not of the same household as the child (a) harassment, (b) serious fear, intimidation or distress, or (c) persistent danger, injury, damage, loss, fear, intimidation or distress resulting in the serious impairment of the enjoyment of life or property by that person or persons". (Section 272(1)).

Section 272 (3) provides that where a child has been deemed to have engaged in 'anti-social behaviour', a Garda will issue warnings to the child. The Garda may then produce a written report on the matter to a Superintendent who may then convene a meeting to discuss the 'anti-social behaviour' of a child where:

- i. the child has behaved in an "anti-social manner";
- ii. is likely to continue to do so;
- iii. the child has not committed previous 'anti-social behaviour' for which warnings were given to him/her by a member of an Garda Síochána; or
- iv. if the child has committed previous 'anti-social behaviour', the Superintendent considers it would be beneficial in preventing further 'anti-social behaviour' by the child.

The child concerned, his/her parents or guardian, the Garda who gave the warnings to the child and a Juvenile Liaison Office, where relevant, will attend the meeting.

Section 272(6) sets out the function of the meeting. It provides that if the child and parents or guardian acknowledge the behaviour that has occurred and the child agrees to stop the behaviour, a "good behaviour contract" will be drawn up and signed by the child and parents. There is provision for the review of adherence to a contract. Contracts shall last for no more than 6 months, but can be extended for a further 3 months. Second or subsequent contracts can be drawn up.

Section 272 (7) provides that where a Superintendent thinks a "good behaviour" contract would not be appropriate or where a child has not complied with the terms of a previous

contract, or where a “good behaviour” contract could not be established because the child, parent or guardian refuse to make the necessary acknowledgements and undertakings, a Superintendent may refer the child to the diversion programme or make an application for an ASBO.

Section 273 provides for ASBOs. Subsection (1) states that a District Court can, on the application of a Garda of at least Superintendent rank, issue an ASBO where the Court is satisfied that: the child is over 12 years and, notwithstanding the application of the procedures set out in Section 272, has continued or is likely to continue to behave in an anti-social manner; the complaint is reasonable in all the circumstances and the order is necessary to protect a person(s) or their property from the child.

The application of the Garda must include the extent to which the child has been subjected to the preventive steps set out in section 272.

In deciding whether the requirements of Section 273(1) are met, the Court shall have regard to:

- i. the particular circumstance of the person affected, and whether the behaviour would have the same effect on a reasonable person in such circumstances;
- ii. the number of occasions on which the behaviour has occurred;
- iii. the likelihood of recurrence;
- iv. the need for a proportionate response; and
- v. the application of the principle of minimum interference.

Section 273(3) provides that an ASBO can prohibit a child from “doing anything described in the order” and “may specify conditions which the child is to adhere to”.

Section 273(4) provides that the order can be valid for a maximum of two years. A temporary order can be made for a period of one month pending the determination of the application for the ASBO.

There is provision for the varying and discharge of an order in Section 273(5) and Section 273(6) lists the notice parties for such applications. There is no requirement that the child concerned be a notice party, however, this could simply be a matter of drafting (see further comment below).

Section 273(7) makes provision for a hearing both for applications for ASBOs and for the varying or discharging of orders. The note to this head states that the aspect of the hearing may need further consideration during drafting.

Any child behaving in breach of an ASBO can be arrested without warrant. Breach of an ASBO is a criminal offence. Section 98 of the Children Act, 2001 sets out the orders a Court may make on finding a child guilty of a criminal offence (including that of breach of an ASBO).

7.2 Compliance with international human rights standards

7.2.1 Privacy

Head 32 proposes amendments to Section 93 of Children Act, 2001, which sets out restrictions on reports of Court proceedings in which children are concerned. It is dealt with in this section of the observations because of its provisions in relation to ASBOs.

Currently, Section 93 provides for restrictions on reporting. Subsection 2 provides for exceptions to those restrictions on a number of grounds. It states:

“The Court may dispense to any specified extent with the requirements of this section in relation to a child if it is satisfied –

- a. that it is appropriate to do so for the purpose of avoiding injustice to the child, or
- b. that, as respects a child to whom this section applies and who is unlawfully at large, it is necessary to do so for the purpose of apprehending the child.”

Head 32 proposes to add two new grounds upon which restrictions can be relaxed:

- a. that it is in the public interest to remove or relax the requirements, or
- b. where the child is the subject of an order under Section 273, the particular nature of the order is such as to make it necessary to do so to ensure that the order is complied with [can be enforced] [can have effect].

These proposals conflict with three provisions in the CRC: the ‘best interests principle’, one of the general principles of the CRC; the right to privacy and the requirements relating to the treatment of children in the administration of justice.

As regards the 'best interests principle', Article 3 of the CRC provides:

"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 Beijing Rules also provide that the well-being of the juvenile shall be the guiding factor in the consideration of his or her case.²⁹

In omitting any mention of the best interests of the child and providing only for the consideration of the 'public interest' or the enforcement of an ASBO, this provision does not comply with the letter of Article 3.

As regards the right to privacy, Article 40 (2) (b) (vii) of the CRC states that, in the administration of justice, the privacy of children must be guaranteed at all stages of the proceedings. The European Court of Human Rights has also recognised the importance of holding proceedings in private so as to protect the interests of children and their right to a fair trial under Article 6 of the ECHR (see the case of *T and V v UK*).³⁰

There is evidence (including from the ECHR case referred to above) that the publication of the details of an ASBO would have a negative impact on a child. In this respect, the proposal fails to take account of Article 40 (1) which provides that, in the administration of justice, children should be treated in a manner that takes account of the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

The Beijing Rules provide that a juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.³¹ The commentary to Rule 8 notes that young people are particularly susceptible to stigmatisation and that research has provided evidence of the detrimental effects resulting from the permanent identification of young persons as "delinquent" or "criminal".

²⁹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 17. 1(d).

³⁰ See *T and V v UK*, where the Court held that unlimited media involvement in the trial of two children was a violation of article 6.

³¹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 8.

In addition to resulting in a potential negative impact on the child in question, the publication of orders could have the opposite effect of that intended. The impact of labelling is addressed in the Riyadh guidelines which warn against it, noting that it often contributes to the development of undesirable behaviour.³²

There are also a number of procedural matters to consider in this regard. The representation of a child in Court proceedings, where a decision under Section 93 is to be taken, should be addressed in this head. Who will represent the child's interests in a debate about what is in the public interest? Could Section 26 of the Child Care Act, 1991 apply? It would be prudent to require judges to put any decisions taken under Section 93 in writing in order to enable review of such decisions taken, in particular in light of the principle of proportionality (at present, the Section merely requires the Court to explain in open court the reasons for its decision).

Finally, a decision to relax the restriction on publication rule in Section 93 on the grounds set out in this head could raise difficulties under Article 6 of the European Convention on Human Rights (ECHR).

For the reasons set out above, I consider this proposal is not in compliance with the State's obligation under international human rights law to protect the right to privacy of children before the courts. Accordingly, I recommend its deletion.

7.2.2 Minimum age

As noted above in section 3 of this document, Head 23 proposes a number of changes to the rules relating to age in Section 52 of the Act including the following; a child under 12 years of age shall not be charged with an offence and proceedings shall not be taken against a child under the age of 14 years save by or with the consent of the Director of Public Prosecutions (DPP).

Head 77, Section 273 of the proposals provides that a Court may issue an ASBO in respect of a child aged 12 years or over. Section 273 (10) provides that breaching an ASBO is a criminal offence.

³² United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), 1990, Section I.

Probable effect on children

Taken together, these provisions may lead to anomalies whereby children aged 12-13 in breach of ASBOs would receive criminal convictions, whereas children aged 12-13 engaged in criminal acts would not be pursued by the DPP in respect of those (potentially more serious) acts.

In other words the proviso that children under 14 years of age charged with an offence will not be prosecuted save by or with the consent of the DPP will not apply to children under 14 years of age charged with the criminal offence of breaching an ASBO.

The probable effect of Section 273 is that children under 14 years of age engaged in 'anti-social behaviour', as defined in the proposals, will be at greater risk of obtaining a criminal record than before.

Head 273 should be reformulated in order to ensure that children in breach of an ASBO are not placed in worse position than children engaged in criminal activity.

7.2.3 Preliminary procedures

Grounds for an application for an ASBO

Head 76, Section 272 (7) sets out the circumstances in respect of which a Superintendent may refer a child to the Garda Diversion Programme or make an application to the Courts for an ASBO. The grounds are:

- where the Superintendent does not think a 'good behaviour' contract would be appropriate;
- where a child has continued to engage in 'anti-social behaviour' notwithstanding a 'good behaviour' contract; or
- where a 'good behaviour' contract has not been established because the child, parents or guardian refuse to make the necessary acknowledgement or to give undertakings to take steps to prevent the behaviour.

This last ground, set out in Section 272 (7)(b)(i), provides that a Superintendent may apply to the Court for an ASBO on the grounds that a child's parent or guardian would not acknowledge the child's behaviour or had refused to give an undertaking that they would take steps to prevent the behaviour.

This provision appears to fall short of the requirement in Article 40 of the CRC that, in the administration of justice, children be “treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others...”. Punishing a child for the omissions of its parents or guardians is not likely to fall within the class of treatment envisaged in Article 40.

Issues also arise in respect of Article 2 of the CRC which requires States to take all appropriate measures to ensure that children are protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of their parents, legal guardians or family members. It should be noted that the principle of non-discrimination is one of the four general principles of the CRC.³³ As such, the Committee on the Rights of the Child insists on strict adherence to its provisions.

Section 272(7)(b)(i) should be amended to ensure that children are not punished for the omissions or incapacities of their parents or guardians. For example, the range of persons referred to in the Section could extend from parents or guardians to an adult relative or other adult reasonably named by the child as per Section 58 (2)(a)(ii) of the Children Act, 2001.

Notice parties

Head 77, Section 273 (6) provides that an applicant for an ASBO or an order to discharge or vary an order shall give notice of the application “where the applicant is a member of the Garda Síochána, to the child, his or her parents or guardians”.

The drafting of this provision is somewhat ambiguous. It would be prudent to re-word the provision in order to provide clearly that a child must always be given notice of an application for an order.

Standards of relevance here include Article 40 of the CRC which states that children should be informed promptly of any charges against them and the Beijing Rules which provide that basic procedural safeguards including the right to be notified of charges must be guaranteed at all stages of the proceedings.³⁴ Although an application for an

³³ The UN Committee on the Rights of the Child has elevated Articles 2,3,6, and 12 of the Convention to the status of general principles. These Articles concern the principles of non-discrimination, best interests of the child, maximum survival and development and respect for the views of the child.

³⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 7.

ASBO is not a 'charge', given the consequences which attach to the breach of an ASBO, these standards should be followed in respect of ASBO applications.

7.2.4 Safeguards relating to the welfare and representation of children

Proceedings before the District Court

Section 273 provides that the District Court shall consider applications for ASBO's. This is a new departure from the Children Act, 2001 which provides that proceedings involving children shall be heard by the Children Court. In particular, the Children Act 2001 recognises the importance of hearing cases against children in a specialised tribunal, which sits at a different time or place to the adult court thereby preventing the mixing of children and adult accused (Section 71 of the Act), and takes place in camera (Section 94 of the Act). It also provides for cases to be arranged in a manner which minimises the time children spend in Court and away from school or training (Section 73 of the Act). These requirements are in line with international standards, particularly Article 40.3 of the CRC which provides:

"States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law".

Those working in the Children Court – judges, solicitors and Gardaí – have particular experience dealing with children and are better placed to consider applications for ASBOs and to ensure that a proportionate response is taken to such applications.

For these reasons, I would query the appropriateness of removing cases concerning ASBOs to the adult District Court and recommend that the Children Court hear both applications for ASBOs and proceedings for the breach of ASBOs in order to ensure compatibility with international obligations.

I recommend that the head be amended to provide that the Children Court should hear applications for ASBOs and prosecutions for the breach of an ASBO and not the District Court as currently provided.

Advocacy arrangements for children and young people

Heads 76 and 77 and the notes to the heads do not provide information on any advocacy arrangements for children during the preliminary procedures ("good behaviour contracts") or before the District Court where an application for an ASBO is made.

International standards emphasise the importance of providing children in conflict with the law with independent support, advocacy and legal advice. While these are rights to which all such children are entitled, as noted above in paragraph 7.2.3., I am concerned that children without supportive parents would be at a distinct disadvantage during the preliminary procedures and before the Courts. In this connection, I have recommended that Section 272(7)(b)(i) should be amended to ensure that children are not punished for the omissions or inabilities of their parents or guardians.

Provision should also be made, in the heads, for providing children with independent advocacy and support throughout the process envisaged in heads 76 and 77.

Training of personnel in contact with 'at risk' children

Head 76 provides that a Superintendent can convene a meeting to discuss the behaviour of a child whose 'anti-social behaviour' is the subject of a report to him or her by a Garda in their operational area. There is no provision that the Superintendent concerned have training or experience in dealing with children and young people. Given that expertise in this area has been developed by the National Juvenile Office and in the context of the Garda Diversion programme, it would be both practical and desirable to provide that a Superintendent acting in this role have expertise in dealing with children and young people.

7.2.5 Diversion of children and young people

Article 40 of the CRC places an obligation on State parties to promote, where appropriate, measures for dealing with children without resorting to judicial proceedings. It also provides that "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstance and the offence".³⁵

Additional international human rights standards provide that States should undertake measures to divert children and young people away from the criminal justice system as long as their rights are protected. The UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) focus primarily on children who have not committed offences and The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) focus on those that have come into contact with the criminal justice system.

³⁵ UN Convention on the Rights of the Child, Article 40(4).

The Riyadh Guidelines point to the need for progressive “at risk behaviour” prevention which avoids criminalising and penalising a child for behaviour that does not cause serious damage to the development of the child or harm to others. The Guidelines call for the development of community-based services and programmes to prevent juvenile delinquency and note that formal agencies of social control should only be utilised as a last resort.³⁶ The Guidelines set out a range of general prevention, socialisation (including education, family and community), social policy and juvenile justice measures.

The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) promote the diversion of juvenile offenders away from ‘formal hearings’ and towards appropriate community or other services.³⁷

Many of these standards and principles are already given expression in the Children Act, 2001 and other pieces of preventative-type but welfare orientated legislation such as Education (Welfare) Act, 2000.

The measures set out in Heads 75-77 provide additional means whereby children can come into contact with the criminal justice system; children can be referred to the Garda Diversion Programme or brought to Court in respect of an application for an ASBO by a superintendent. Most notable of all is the creation of a new criminal offence, that of breach of an ASBO. This new offence has the potential to criminalise children for breaching a civil order relating to civil matters. The extension of the reach of the criminal law and criminal justice system in this manner is a move away from the central ethos of the Children Act, 2001 and is inconsistent with international standards.

In providing additional avenues for children, including children who have not committed a criminal offence, to come into contact with the criminal justice system, these measures are not in keeping with the relevant international human rights standards set out above. As already noted, it is my view that the current legislative framework, if implemented in full, would provide an adequate range of measures to deal with children at risk and those coming into contact with the criminal justice system.

³⁶ United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), 1990, Section I.

³⁷ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 11.

Probable effect on children

As noted in paragraph 2.2.1 above, there are clearly risks involved in mixing children who have committed offences with children who have not been engaged in any criminal activity in a Garda Diversion Programme. So called “non-offending children” would be exposed to a new environment which could have a negative impact upon the child. In my view, ‘at risk’ children should be provided with supports which address the welfare and other issues underlying their behaviour.

See also section 2 of this document for further comments relating to the extension of the Garda Diversion Programme.

7.2.6 Definition

‘Anti-social behaviour’ is defined as behaviour that “caused or, in all the circumstances, was likely to cause to one or more persons who are not of the same household as the child:

- a. harassment,
- b. serious fear, intimidation or distress, or
- c. persistent danger, injury, damage, loss, fear, intimidation or distress resulting in the serious impairment of the enjoyment of life or property by that person or persons” (Head 76, Section 272(1)).

As noted above in the introduction to this section, a District Court may impose an ASBO where three requirements are met. In making this decision the Court will also have regard to five additional factors including the need for a proportionate response and the principal of minimum interference.

In terms of the definition of ‘anti-social behaviour’, should this measure be adopted as is, close monitoring of its application will be required in order to ensure that orders are not used inappropriately. There are examples from the UK of ASBOs being issued inappropriately, particularly in respect of children where a disability or mental illness may have been the underlying cause for the behaviour at issue. While the instant proposals are different from the UK ASBO framework, in respect of, *inter alia*, the procedures to be followed prior to an application for an ASBO and the class of persons who can apply to the Court for an ASBO (Gardaí of at least Superintendent rank), close monitoring of the issuing of ASBO’s will be required. In particular disaggregated statistics should be collected indicating all of the relevant circumstances in respect of every ASBO issued, including the health and other personal circumstances of the child in question.

7.2.7 *Potential interference with rights*

As noted above, Head 77, Section 273 (3) provides that an ASBO may prohibit a child from doing anything described in the order and/or specify conditions which the child is to adhere to.

Given the wide discretion afforded to the Court in this regard, it is significant that Section 273(2) provides that, in deciding upon whether to issue an order, the Court shall have regard to:

- a. the particular circumstance of the person affected, and whether the behaviour would have the same effect on a reasonable person in such circumstances;
- b. the number of occasions on which the behaviour has occurred;
- c. the likelihood of recurrence;
- d. the need for a proportionate response, and
- e. the application of the principle of minimum interference.

It would be important that the Court bear these factors in mind, particularly the last two factors dealing with proportionality and the principle of minimum interference, when deciding upon the content of the order itself.

For example, where the substance of an order consists of a restriction on movement or association, the limitations placed on a child's right to freedom of association or right to family life must conform to the requirements of the European Convention on Human Rights (ECHR) regarding the limitation of rights. The ECHR provides that restrictions can be placed on certain of the rights set out in the Convention where the interference is in accordance with the law and necessary in a democratic society. The restriction must also be justified on one or more of the following grounds:

- the interests of national security;
- the interests of public safety;
- the interests of the economic well-being of the country;
- the prevention of disorder or crime;
- the protection of health and morals; or
- the protection of the rights and freedoms of others.

In this respect, the relevant ECHR provisions are: Article 8, which protects the right to respect for private and family life, Article 10 on the right to freedom of expression and Article 11 on the right to freedom of association. These Articles require that any interference with these rights must be proportionate to the aim sought to be achieved. Accordingly, the interference must serve a 'relevant and sufficient reason' and there must be a reasonable relationship of proportionality between the aim served – stopping the behaviour – and the means used to serve that aim - the interference with the child's rights.

The Courts must have regard to these provisions of the ECHR when dealing with ASBO applications, given that this is required under the ECHR Act, 2003. It would be further in line with ECHR obligations to reformulate this head in order to provide that, in deciding upon the content of an order, the Court should have particular regard to the principles of proportionality and minimum interference. Guidance might also be given to the judiciary to ensure full consideration is given to the proportionality of any potential interference with the rights of the child and their family.

In this connection, the Beijing Rules provide that the juvenile justice system shall emphasise the well being of the juvenile and that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence.³⁸ In addition, Article 3 of the CRC provides that the best interests of the child shall be a primary consideration in all decisions taken concerning the child.

Detention for breach of an ASBO

Section 98 of the Children Act, 2001, which is triggered in the event of a breach of an ASBO, sets out the orders a Court may make in the event of such a breach. These include an order for detention.

Article 37 of the CRC provides that detention shall be a measure of last resort. In addition, the Beijing Rules provide that restrictions on liberty should only be imposed after careful consideration and should be limited.³⁹ The commentary to this rule notes that alternatives to detention should be used to the maximum extent possible. Full use should be made of existing alternative sanctions and new alternative sanctions should be developed.

³⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 5.

³⁹ Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 17.1(b).

In this regard, the detention of a child for breach of an ASBO prior to the full implementation of the Children Act, 2001 (in particular the community-based sanctions provisions) would be problematic. The principle of detention as a last resort can only be given full effect when viable alternatives are available.

The Beijing Rules also provide that a child should not be deprived of their liberty unless found guilty of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.⁴⁰

Court practice in relation to the issuing of orders under Section 98 of the Children Act, 2001, should be monitored in order to ensure that limitations on the use of detention set out in the relevant international human rights standards are met.

7.2.8 Participation rights

Article 12 of the CRC provides that children should be consulted in all matters which affect them. The National Children's Strategy, published by the Government in 2000, sets out three goals, goal one of which is aimed at the implementation of Article 12. It provides that "Children will have a voice in matters which affect them and their views will be given due weight in accordance with their age and maturity".

In furtherance of this goal, the (former) National Children's Office has conducted public consultations with children and young people on a range of matters. There is also a growing body of work, both within Ireland and outside the State on participation practice and techniques which can assist in conducting participation exercises on challenging topics.

Given the potential impact of the ASBO proposals on the lives of 'at risk' children and children who come into contact with the criminal justice system, a consultation with children and young people on the proposals, prior to the advancement of the proposals, would be appropriate and desirable.

⁴⁰ Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 17(1)(c).

