Irish Youth Justice Alliance

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24 May 2006

Dear Committee Member,

Re: Proposed Changes to the Children Act 2001 under the Criminal Justice Bill 2004

Further to our oral presentation and written submission to the Oireachtas Committee on Justice, Equality, Defence and Women's Rights in March 2006, the IYJA wishes to comment further on the proposed changes to the Children Act 2001 contained in the Criminal Justice Bill 2004.

While some of the proposed amendments seek to simplify the implementation of the Act and are welcome, we remain deeply concerned about many of the proposed amendments, particularly the extent to which they roll back on commitments made in the Children Act 2001 and weaken the protections afforded to the rights of children in conflict with the law.

This document contains 3 sections (these should be read together):

We thank you for your attention to this matter.

Yours sincerely,

Jillian van Turnhout, Chief Executive, Children's Rights Alliance
Dr. Ursula Kilkelly, Senior Lecturer, Faculty of Law, University College Cork
Rick Lines, Executive Director, Irish Penal Reform Trust
Mark Kelly, Director, Irish Council for Civil Liberties
Eugene Quinn, Director, Jesuit Centre for Faith and Justice
Liam O'Dwyer, Executive Director, Irish Youth Foundation
Peter McVerry SJ, Director, Arrupe Society
Paul Gilligan, Chief Executive, Irish Society for the Prevention of Cruelty to Children
Mary Cunningham, Director, National Youth Council of Ireland
Fergus Finley, Chief Executive, Barnardos
Declan Jones, Chief Executive, Focus Ireland
Sean Love, Executive Director, Amnesty International (Irish Section)
James O'Leary, Chief Executive, National Association of Travellers Centres
Deirdre Bigley, Copping On
Sian Muldowney, Coordinator, Inner City Organisations Network (ICON)
Michael McLoughlin, Youth Work Ireland
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Dr. Paul O'Mahony, Psychologist and Criminologist, Trinity College Dublin
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Teresa Blake, Barrister
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Catherine Ghent, Solicitor

A. Key Concerns on the Proposed Amendments to the Children Act 2001

The Age of Criminal Responsibility and *Doli Incapax*

- The removal of the concept of 'capacity' and its replacement with a decision to charge a child with an offence;
- The abolition of the *doli incapax* rule, which had the effect of providing an age of criminal responsibility of 14 years;
- The introduction of a separate, lower age of criminal responsibility (10) for serious crimes.

Behaviour Orders and Amendments to the Garda Diversion Programme

- The introduction of Behaviour Orders including a preliminary stage of warnings and Good Behaviour Contracts;
- The extension of the Diversion Programme, under Part 4 of the 2001 Act, to deal with anti-social behaviour and children below the age of criminal responsibility;
- The removal in certain circumstances of the right of the child to have their privacy protected when a Behaviour Order has been made.
- The admissibility of evidence in subsequent criminal proceedings as to involvement in the Diversion Programme.

Detention of Children

- The weakening of provisions for the inspection of Children Detention Schools;
- The insertion of an amendment to require the court to take into account the child's educational needs when deciding on the length of detention;
- The removal of the duty under the Children Act, 2001 to separate children detained on remand from those detained following conviction;
- The failure to make immediate provision for the transfer of children from St Patrick's Institution;
- The application of Prison Acts and Rules to Children Detention Schools, ie the danger that a prison ethos will replace the current educational ethos.
- The privatisation of places of detention for children.

B. Recommendations on the Proposed Amendments to the Children Act 2001

Based on the Second Composite List of Amendments, 16 May 2006 Criminal Justice Bill 2004

Amendment 3
Insert the following subsection (4)

(4) The Minister shall not unduly delay the implementation of the provisions of this Act. Within 3 months of the passing of the Act, the Minister shall lay a schedule of the plan to implement the Children Act, 2001 before both Houses of the Oireachtas.

Amendment 199
In the inserted section 18 insert 'or the interests of the child' after 'the interests of society' and 'over the age of 12 years' after 'any child'.

Also in the inserted section 18, delete section 18 (b), and delete 'or anti-social behaviour' in the following paragraph.

Amendment 201
Reject the amendments to section 23 in their entirety. In the alternative, delete paragraphs (c) and (d).

Amendment 202
Delete the substituted section 48 in its entirety. In the alternative, insert 'if the interests of the child so requires'.

Amendment 204
Delete the substituted section 52 in its entirety.

In the alternative, delete section 52(2) and insert subsection (5) as follows:

(5) In respect of decisions made under this section, the DPP shall at all times have a duty to act in the best interests of the child and in line with the Convention on the Rights of the Child.

Amendment 207
In the inserted section 59 (4) replace 'may' with 'shall'.

Amendment 208
In the inserted section 76A, subsection (2) after 'justice' to insert 'and in the interests of the child'.

Amendment 210
In the inserted section 88, delete 'as far as practicable and where it is in the interests of the child'.

In the inserted section 88, insert a new subsection (14) as follows:

(14) ‘The Court shall remand a child in custody only as a measure of last resort.’

In the inserted section 88, delete subsections 12 and 13.

Amendment 213
In the inserted section 93, subsection (3), insert ‘it shall do so only to the extent that is strictly required to meet the objectives in subsection (2) of this section and’ between ‘this section’ and ‘it shall explain’.

Insert paragraph (4) as follows:

‘The Court shall dispense with the requirements of this section only having considered the right of the child to privacy.’

Amendment 215
In the inserted section 149, delete subsection (2). In the alternative, insert ‘following an assessment of those needs’ after ‘educational needs’.

Amendment 216
In the inserted section 155 (2) replace ‘12’ with ‘6’.

In the inserted section 155 (1) insert ‘consideration shall be given to releasing the child into the community under supervision in accordance with section 151 of the Act of 2001.’after paragraph (c).

Insert ‘Where this is not in the interests of the child or the public’ before ‘the person shall be transferred’ after paragraph (c).

Amendment 217
Delete inserted section 156A.

In the alternative, insert the following subsection (6)

(6) Within three months of the passing of this Act, the Minister shall lay before both Houses of the Oireachtas a schedule for the transfer of all males aged 16 and 17 years from St Patrick’s Institution to Children Detention Schools. This is to take place within 2 years of the passing of this Act.

Amendment 218
Delete the inserted section 156B.

Amendment 219
In the inserted section 157, delete the definition of ‘authorised person’ and delete paragraph (b).

Amendment 221
In the inserted section 159A subsection (4) paragraph (b) insert ‘and includes relevant vocational programmes’ after ‘Minster for Education and Science’;

Insert paragraph (f) as follows:

(f) ensure that the educational needs of each child admitted to a Children Detention School are assessed and an individualised education plan is drawn up to meet those needs;

(g) ensure that relevant vocational programmes are available.

Amendment 222
Delete the inserted section 161.

Amendment 224
Delete the inserted section 185.

In the alternative, in section 185(3) insert 'and experience' after 'expertise' and 'shall be independent of the Department of Justice, Equality and Law Reform and the Children Detention School' after 'residential accommodation'.

Amendment 225
In the inserted section 186(1) delete '12' and substitute '6'.

In the inserted section 186 subsection (2) delete 'have particular regard' and substitute 'pay particular attention'.

In the inserted section 186 subsection (2) paragraph (b), insert 'including emotional and mental health' after 'health,'.

In the inserted section 186 subsection (2) insert (f) and (g) as follows:

(f) policies and practice concerning education and vocational training, and

(g) Policies and practice concerning work on offending behaviour.

Amendment 226
Delete new section 186A or alternatively make the following amendments:

In section 186A (1)(a) delete 'or otherwise' and substitute 'or are otherwise brought to the Minister's attention';

In section 186A(1)(b) insert 'or necessary to vindicate the rights of the child involved' after 'desirable';

In section 186A subsection (3) paragraph (c) insert 'children', after 'interview';

In section 186A subsection (4) insert 'timely' between 'a' and 'report'.

In addition, insert a new amendment to delete section 11 (1)(e)(iii) of the Ombudsman for Children Act 2002.

Amendment 227
In the inserted section 198 (1)(b), insert ‘in the interests of the child and is’ after ‘transfer is’;

Amendment 229
In section 152 of the Bill, delete the proposed amendments to paragraph (a), (b), (c) and (e) of section 227(1) of the 2001 Act. The proposed new paragraph (d) should be inserted in addition to the existing paragraph (c) .

Amendment 230
In the inserted section 230, paragraph (a) delete ‘11’ and substitute ‘12’;

In the inserted subsection (3), paragraph (a) insert ‘with relevant experience of youth justice’ after ‘three persons’; insert ‘or youth justice’ after ‘child care’ in paragraph (c) and insert (e) The Ombudsman for Children or her/his nominee.

Amendment 232
Delete the inserted section 257A in its entirety, or alternatively make the following amendments:

In the inserted section 257A, subsection (2) delete ‘is likely to cause’ after ‘in the circumstances;

In the inserted section 257A, Subsection (3) insert paragraph (c) as follows:
(c) to any behaviour otherwise criminal in nature.

In the inserted section 257A, insert subsection (4) as follows:
(4) This part shall not comment without the approval of both Houses of the Oireachtas, Oireachtas approval only being sought following a 5 year review of the full implementation and operation of the Children Act 2001.

Amendment 233
Delete the inserted 257B in its entirety, or alternatively make the following amendments:

In the inserted section 257B subsection (2), delete ‘or by post’ after ‘personally’;

In the inserted section 257B subsection (3) insert ‘including a description of the behaviour and details of when and where it took place’ after ‘anti-social manner’.

Amendment 234
Delete the inserted section 257C in its entirety, or alternatively make the following amendments:

In the inserted section 257C, subsection (1) delete paragraphs (a) and (b) and substitute the following after ‘if satisfied that:’

the child has behaved in an anti-social manner and is likely to continue doing so, and
the child has received a warning under section 257B, and
holding such a meeting would help to prevent further such behaviour by the child.

In the inserted section 257C, insert ‘and the behaviour’ in subsection (3) after ‘warning’;

In the inserted section 257C, insert the following paragraph (e) into subsection (4) as follows:

(e) an independent advocate nominated by the child;

In the inserted section 257C, subsection (7) paragraph (a) delete ‘simple’ and substitute ‘that the child understands’ after ‘language’;

In the inserted section 257C, subsection (7) insert paragraph (d) as follows:
(d) The child shall be entitled to legal aid to seek legal advice prior to and subsequent to the meeting referred to in this section;

In the inserted section 257C, subsection (13) paragraph (b) (i), delete ‘or the parents or guardian’.

Amendment 235
Delete the inserted section 257D in its entirety, or in the alternative make the following amendments:

In the inserted section 257D subsection (1) paragraph (a) delete ‘and is likely to continue’ after ‘continued’;

In the inserted section 257D subsection (1) paragraph (b) insert ‘and is likely to be effective’ after ‘necessary;

In the inserted section 257D subsection (1) paragraph (c) insert ‘and on the child’ after ‘other persons’;

In the inserted section 257D subsection (3), delete ‘appropriate’ and substitute ‘proportionate’;

In the inserted section 257D subsection (4) paragraph (a) delete ‘or in the vicinity of’ after ‘behaving at’;

In the inserted section 257D subsection (4) paragraph (b) (i) insert ‘or other educational, work or vocational activities’;

In the inserted section 257D subsection (4) paragraph (b) (ii) delete ‘in a school’;

In the inserted section 257D subsection (6) paragraph 1 delete ‘2 years’ and substitute ‘6 months’;

In the inserted section 257D delete subsection (9);

Amendment 237
In the inserted section 257E section (1) delete ‘21’ and substitute ‘28’;

In the inserted section 257E, delete subsection (2);

In the inserted section 257E insert subsection (9) as follows:

(9) In proceedings under this section, the Circuit Court shall at all times bear in mind that the appellant is a child;

Delete the inserted section 257F in its entirety.

In the alternative, delete subsection (1) paragraph (a).

In the alternative again, insert in subsection (3) the following paragraph (c):

(c) The means of the child and his parents or guardian will be taken into account before an order is made under this section;

New Amendments Proposed

A. Insert the following subsection (6) into section 96 of the Children Act 2001:

(6) A Court when dealing with a child in any matter shall explain the reasons for its decision in open court in language that is appropriate to the child's age and level of understanding and shall operate so as to vindicate the rights of the child recognised in subsection 1(a) above.

B. Insert the following sentence into section 3 of the Children Act 2001, which should read as follows:

'court' in Parts 7 and 8 means the Children Court with the exception of section 93 where the court means 'all courts'.

C. The Compatibility with Ireland's International Obligations of the Changes to the Children Act 2001 under the Criminal Justice Bill 2004

The Criminal Justice Bill 2004 substantial amendment to the Children Act 2001. Some of these are positive in nature and these are to be welcomed. However, the Irish Youth Justice Alliance has deep concerns in relation to many of the proposed amendments. Apart from the lack of wisdom involved in substantially amending a piece of legislation which has not yet been fully commenced, it is submitted that many of the proposed amendments are incompatible with Ireland's obligations under the UN Convention on the Rights of the Child and the European Convention on Human Rights, and with international best practice. Many others will duplicate current practice, complicate procedures and are simply unworkable.

This document is a revised and updated version of the document submitted to the Committee on March 27. Please note that section 1.5 (Application of the Prison Acts) and section 1.6 (Privatisation of detention of children) are new and section 1 has been expanded (in relation to the removal of *doli incapax*).

1. Age of Criminal Responsibility and *Doli Incapax*

The Proposed Amendments

Part 5 of the Children Act 2001 raises the age of criminal responsibility from 7 to 12 years and places the principle of *doli incapax* on a statutory footing. This part was never commenced. The Irish Youth Justice Alliance welcomes the fact that under the amendments, Part 5 of the Children Act 2001 is to be commenced within three months of the coming into force of the Criminal Justice Bill 2004.

A number of other amendments to Part 5 of the Children Act 2001 raise serious concern however:

- First, section 127 of the Bill replaces the title of Part 5 of the 2001 Act ('Criminal Responsibility') with the title 'Restriction on Criminal Proceedings against Certain Children'. Accordingly, the Bill proposes to remove the concept of criminal responsibility from the Act (and from Irish law) altogether replacing it instead with a restriction on the prosecution of children for certain offences. In addition, section 128 (amendment 205) of the Bill inserts a new section 52(1) in the Children Act 2001 (which previously held that 'it shall be conclusively presumed that no child under the age of 12 years is capable of committing an offence') to provide instead that 'a child under 12 years will not be charged with an offence'. The reference to 'capacity' has been removed.
- Second, section 128 of the Bill amends s 52 (2) of the 2001 Act further to provide that section 52(1) does not apply to children charged with murder, manslaughter, rape or aggravated sexual assault. This effectively means that children aged 10 or 11 can be charged with these serious offences but not with other, minor offences.

Doli Incapax

- Third, the rule of *doli incapax* has been abolished. This principle, set out in section 52 (2) of the Children Act 2001, placed on a statutory basis the common law presumption that a child between the age of 12 and 14 years is incapable of committing an offence because he/she did not have the capacity

to know that the act or omission concerned was wrong. As a rebuttable presumption, this provision had the effect of raising the age of criminal responsibility to 14 years. However, section 128 abolishes this principle altogether (including from the common law). Instead, the new section 52(4) replaces *doli incapax* with a requirement that no proceedings shall be taken against a child under 14 years charged with an offence except by or with the consent of the DPP. It appears that children under 14 years are all to be charged first, before the DPP's takes the decision or consents to prosecution. This gives the power to the DPP to prosecute a child, rather than to reserve to the Children Court the matter of whether the child had capacity to commit the offence in question. The IYJA is concerned, however, that there is no statutory obligation placed on the DPP to act in the best interests of the child, or to uphold the principles of youth justice in the fulfilment of its duties in this area. The IYJA expressed concern during its oral presentation to the Committee on March 28 that the proposal is in fact more regressive than was apparent in the original draft.

- Fourth, despite raising the age of criminal responsibility to 12, the amendments propose to admit to the Diversion Programme children aged 210 and 11 years who meet the normal criteria for admission (accepting responsibility for the behaviour and consenting to be cautioned). This constitutes further net-widening.
- Finally, section 54 of the Children Act 2001, which provides that where a child under 14 years is responsible for an act or omission which would constitute an offence (where he is proven to be *doli incapax*) any person who aids, abets, counsels or procures the child shall be guilty of an offence – has been repealed.

Compatibility with International Standards

The age of criminal responsibility is a complex issue which raises issues of law, regarding the question of capacity (when does a child has the legal capacity to commit an offence) and policy (at what age does Ireland as a society deem the criminal justice system the appropriate place for dealing with young offenders). Ireland's low age of criminal responsibility (seven years at common law) has been roundly criticised by

national and international bodies, including the UN Committee on the Rights of the Child in 1998[1] and the recommendation to raise the age to twelve years has been made by many bodies following lengthy deliberation and careful consideration of the issue.[2] Despite this, the proposed amendments, which are far reaching, do not appear to be based on any reasoned or evidence-based analysis of the psychological development of children in Ireland, or the level of serious crime among this age group. In fact, they are clearly political decisions.

Article 40(3)(a) of the Convention on the Rights of the Child requires that states establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law. The proposed amendment to the 2001 Act, which proposes effectively to remove the concept of criminal responsibility from Irish law is thus in clear contravention of this provision.

While neither the CRC nor the Beijing Rules,[3] advocate a particular age, the Beijing Rules provide that the age of criminal responsibility 'shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity'. It also advises that there is a 'close relationship' between the notion of responsibility for criminal behaviour and other social rights and responsibilities (such as marital status and civil majority). These principles clearly advocate an age of criminal responsibility at the higher end of the scale and it is clearly inconsistent with them to provide different ages for different crimes.

The Committee on the Rights of the Child expressed concern at Ireland's low age when considering Ireland's implementation of the CRC in 1998. During its meeting with the Government delegation, the Committee criticised the Government's decision under the then Children Bill 1996 to raise the age to 10 years saying it was 'insufficient' given the 'drastic consequences' that children may face when they come into contact with the criminal justice system.[4] The Committee's view is unlikely to have changed when Ireland next meets the Committee in September 2006.

In addition to the inconsistency with the Convention on the Rights of the Child, there is a serious issue as to whether setting the age of criminal responsibility at 10 will be compliant with the European Convention on Human Rights (ECHR).[5] In this respect,

the European Court of Human Rights has left open whether trying a young child could constitute inhuman and degrading treatment under Article 3 of the Convention. Moreover, it is also difficult to see from the judgments of the Court (see T v UK, V v UK in 1999 and SC v UK in 2004) how an adult court (such as the Central Criminal Court) can be adapted sufficiently to ensure that children as young as 10 receive a fair trial and are sentenced in accordance with the principles of youth justice and the requirements of the ECHR.

The current proposals are problematic for all of these reasons. They are out of line with international approaches to the age of criminal responsibility – other than England and Wales, very few states use an age under 12 years – and give little consideration to what is in the child's best interests or what the child has the capacity to understand. They also appear to be inconsistent with Article 40 (1) of the CRC which provides for the right of every child charged with or convicted of infringing the penal law to 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 rights and freedoms of others, and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. Behaviour Orders and Amendments to the Diversion Programme

The proposals in the Criminal Justice Bill 2004 regarding anti-social behaviour raise a number of concerns. There are three issues here:

1. The introduction of Behaviour Orders including a preliminary stage of warnings and Good Behaviour Contracts;
2. The extension of the Diversion Programme, under Part 4 of the 2001 Act, to deal with anti-social behaviour;
3. The removal in certain circumstances of the right of the child to have their privacy protected when a Behaviour Order has been made.

2.1 Behaviour Orders and Good Behaviour Contracts

The Proposed Amendments

The 2004 Bill proposes to insert a new Part 12A into the 2001 Act to deal with anti-social behaviour committed by children and young people. The new section 257A (2) defines anti-social behaviour as behaviour that caused or was likely to cause one or more persons:

(a) harassment,

(b) significant or persistent alarm, distress, fear or intimidation, or

(c) significant or persistent impairment of their use or enjoyment of their property.

A new section 257B introduces the concept of a 'behaviour warning' which can be issued by a Garda to a child who has 'behaved in an anti-social manner'. This may be done orally or in writing, including by post and warns the child that failure to stop the behaviour may result in a second warning or the application for a Behaviour Order. Section 257B(4) provides that the Garda may require the child to give his/her name and address for the purposes of the warning and section 257F(1) makes it a criminal offence for the child to fail to do so or to give a false or misleading name or address.

A new section 257C provides that based on a report to him/her by the Garda who issued the warning, the Superintendent may convene a meeting to discuss the anti-social behaviour of a child where that would help to prevent further such behaviour by the child. The meeting shall involve the child, his/her parents, the Garda who gave the warning and the Juvenile Liaison Office (JLO) (if the child is in the Diversion Programme) and the Superintendent can request the attendance at the meeting of anyone he thinks would be of assistance to the child and also a member of the local policing forum.

Under section 257C (6) the meeting shall discuss the child's behaviour. If the Superintendent is of the view that the child has committed anti-social behaviour he shall explain to the child and his parents in simple language what the behaviour is and what its effects are. The child shall be asked to acknowledge the behaviour has occurred and be asked to stop. The parents shall also be asked to acknowledge the

behaviour and to undertake to take steps to prevent it. If this happens, a Good Behaviour Contract, shall be drawn up and where practicable signed by parents and the child. It shall be for a period of no more than six months but may be extended by a further three. The adherence of the child shall be reviewed by the Superintendent at a time and at such frequency as seems appropriate in the circumstances. If the child has not committed any further anti-social behaviour, no further action may be taken. If he has, or in the opinion of the Superintendent and the parents, is in danger of doing so, the meeting can be reconvened and the terms of the Contract renewed if the parents and the child agree. Nothing shall prevent a second or subsequent Good Behaviour Contract being drawn up.

In certain circumstances – where a Good Behaviour Contract would not be appropriate or a meeting was convened but the child or parents would not agree or where the child breached the contract by committing anti-social behaviour – the Superintendent may refer the child to the Diversion Programme or, where this would not be appropriate, make an application to court for a Behaviour Order.

A new section 257D provides for Behaviour Orders. On application to the Children Court a Garda of at least Superintendent rank (application must include the extent to which the child has been subjected to the preventive steps under section 272) the Court may make an Order if it is satisfied that: the child is over 12 years, notwithstanding the application of the above procedures has continued or is likely to continue to behave in an anti-social manner, the order is necessary in the circumstances. These proceedings are civil in nature. Such an order may:

(a) prohibit a child from behaving in a specified manner and where appropriate from behaving at or in the vicinity of a specified place;

(b) require the child to comply with specific requirements including those relating to

(i) school attendance;

(ii) reporting to a member of An Garda Síochána, or a teacher;

and

(c) provide for the supervision of the child by a parent.

The order can be valid for a maximum of two years although a temporary order can be made for a period of one month pending the determination of the application for the

ASBO. The Order can be appealed under section 257E and under section 257G legal aid is to be made available to children without means and where by reason of the gravity of anti-social behaviour the child's lack of representation would result in injustice.

Compatibility with International Standards

While the above amendments address some of the concerns previously expressed by the IYJA and others, some serious problems remain. In particular, the introduction into the Children Act of a further layer of Garda diversion is likely to duplicate unnecessarily the work of An Garda Síochána in this area. In our view, they are meaningless, bureaucratic and unworkable initiatives which will bring children and young people into the criminal justice system who have not committed a criminal offence and will require members of An Garda Síochána to issue warnings and hold meetings and monitor Good Behaviour Contracts purely as preliminary steps to the application for a Behaviour Order. There are elements to the proposals which also raise children's rights concerns: first, the warning can be posted to the child concerned: what defence does the child have if he/she does not receive it? Second, there is no duty to hold the meeting with the child in a neutral venue or for the child – who will be alone at this meeting with his/her parent and possibly three Gardaí – to have independent support or legal advice prior to, during or after the meeting. Making it a criminal offence to give a Garda a false or misleading name or address in this context is extremely punitive given the nature of youthful behaviour, and its effect will be felt most disproportionately by members of the Traveller community and young asylum seekers or refugees. There are also difficulties regarding the limited availability of legal aid – this will have a disproportionate effect on those who cannot afford to pay for legal representation – and although the restrictions on the publication of information likely to lead to the child's identity are to be limited 'to ensure that the order is complied with', the failure to take into account the child's right to have his/her privacy protected in this analysis reflects the fact that the balance is tipped away from vindication of the child's rights.

The integration of Behaviour Orders into the Children Act, 2001 equates them with criminal behaviour and sanctions despite the fact that they address (or are supposed to address) behaviour which is less than criminal. The fact that they are accompanied by

a further system of warnings and the overall extension of the Diversion Programme means that what is proposed has the potential to be even broader in reach (and in net widening effect) than Anti-Social Behaviour Orders in the UK.

The IYJA also submits that these provisions are inconsistent with the European Convention on Human Rights and the Convention on the Rights of the Child for the following reasons:

- They are contrary to the UN Guidelines for the Prevention of Juvenile Delinquency, 1990 (the Riyadh Guidelines). Paragraph 5 of the Guidelines highlights the need for progressive delinquency prevention policies, which avoid criminalising and penalising a child for behaviour that does not cause serious damage to the development of the child or harm to others. Rather than adopting punitive responses, states are encouraged to adopt measures to address such behaviour which should be consistent with respect for the rights of the child, should be a holistic, multi-agency response which supports the child and his/her family and should protect the privacy of the child;
- They involve the imposition of penal sanctions for the breach of an order made in civil proceedings (without the protections of due process) thereby blurring the line between the civil and the criminal law;
- Courts making Behaviour Orders are under no duty to ensure that the conditions attached are proportionate and they may thus involve unjustified interferences with the child's and the child's family's rights;
- They are contrary to international standards on youth justice which require the diversion of young people not just from further offending but also from the criminal justice system, of which An Garda Síochána are part;
- Provisions allowing the Court regarding the lifting of the protection afforded to the privacy rights of young people run contrary to international provisions which recognise the child's right to have his/her privacy fully respected at all stages of proceedings.

2.2 Extension of the Diversion Programme

The Proposed Amendments

The Bill amends section 19 of the 2001 Act to extend the Garda Diversion Programme in two ways: the first is the extension of the Programme to include children aged 10 and 11 years, who cannot be prosecuted, and the second is the expansion of the Programme to those who have committed anti-social, rather than criminal behaviour. Apart from whether JLOs currently operating the Diversion Programme have the capacity to deal with greater numbers of children, extending the scheme in these two fundamental ways represents net-widening of the most extraordinary kind.

Compatibility with International Standards

International standards – notably Article 40.3 of the UN Convention on the Rights of the Child and the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) – promote the diversion of young people from the criminal justice system as long as their rights are protected. Moreover, Rule 4 of the UN Guidelines for the Prevention of Delinquency (the Riyadh Guidelines) states that 'policies for the prevention of delinquency… should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others'. The Guidelines go on to recognise that in the predominant opinion of experts, labelling a young person as 'deviant' or 'delinquent' often contributes to the development of a consistent pattern of undesirable behaviour by young persons. These international standards also recommend that community-based services and programmes be developed for the prevention of juvenile delinquency and that formal agencies of social control, ie the police, are utilised only as a means of last resort. Rule 5 requires that policies and measures designed to address the disruptive behaviour of young people should take into account that youthful behaviour that does not conform to overall social norms and values is often part of the maturation and growth process, and tends to disappear spontaneously in most individuals with the transition to adulthood. Similarly, the Beijing Rules highlight the principle that formal intervention in the lives of young people should be minimised (Rule 1.3).

Extending the remit of the Diversion Programme is clearly inconsistent with these principles and risks bringing into the criminal justice system – of which An Garda Síochána are part – very young children who have not committed a criminal offence. This formal extension of the Programme thus has serious net-widening potential, given that it means that children who have not committed a criminal offence will be brought into formal contact with An Garda Síochána. Evidence internationally makes it clear that once children are in the criminal justice system – of which An Garda Síochána is part – it is more difficult to get them out. In this way, these amendments risk exacerbating rather than alleviating the problem of youth crime.

2.3 Admissibility of Evidence as to Involvement in the Programme

The Criminal Justice Bill 2004 also proposes to amend s 48 of the Children Act, 2001 by making it admissible to introduce evidence as to the child's involvement in the Diversion Programme in subsequent criminal proceedings. Tampering further with the Diversion Programme is extremely unwise and no case has been made out for it. The quid pro quo – the child accepts responsibility for his or her behaviour and agrees to be cautioned under the Programme while the State agrees not to prosecute him or her in respect of the offence – is at the heart of any diversion scheme, the Garda Programme included. This approach encourages young people to submit to the Programme by guaranteeing that the offence in respect for which they were admitted to the Programme (usually a first and minor offence) will not be held against them. It is an important first chance to stay out of the criminal justice system which recognises the harm that such involvement may cause. The proposed amendment thus has the potential to undermine the entire basis of the Diversion Programme insofar it allows information regarding offences for which the child was neither charged nor convicted to be admitted in evidence in subsequent criminal proceedings. This is also arguably contrary to the child's right to due process under both Article 40 of the Convention on the Rights of the Child and Article 6 of the European Convention on Human Rights. More importantly, perhaps, it threatens to undermine an effective part of the Irish youth justice system to pursue an objective that is unclear.

2.4 The Right to Privacy

The Proposed Amendments

Under amendment 213, section 93 of the Children Act, 2001 has been replaced with a provision. It effectively prevents the media from publishing or broadcasting details as to the child's identity with respect to 'proceedings before any court' and to the extent that this extends the protection currently afforded to those in the Children Court to those in the Circuit and Central Criminal Courts, this is extremely welcome. The provision provides that a court may dispense, in whole or in part, with the requirements of the section in certain circumstances including to avoid injustice to the child, where the child is unlawfully at large for the purposes of apprehending the child and where it is in the public interest. A further exception is permitted where the child is subject of a Behaviour Order 'to ensure that the order is complied with'.

Compatibility with International Standards

According to Article 40.3 of the CRC, children convicted of a criminal offence have the right to have measures taken that are in their best interests and that promote the chances of their successful rehabilitation and reintegration into society. More specifically, Article 40 (b) (vii) of the CRC provides that juveniles have the right to have their privacy respected 'at all stages of the proceedings'. Moreover, Rule 8 of the Beijing Rules provides that the 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, and also requires that no information that may lead to the identification of a juvenile offender be published. The Commentary to Rule 8 explains the importance of protecting the juvenile from stigmatisation and the detrimental effects resulting from the permanent identification of a young person as 'criminal'. It also highlights the adverse effects that may result from the publication in the media of details of the case including the names of young people against whom there has been either an allegation or conviction. Rule 17 supplements Article 3 of the CRC insofar as it provides that the well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

Further issues arise in the context of Article 6 of the European Convention on Human Rights, which provides that the press and public may be excluded from all or part of

the trial where the interests of juveniles so require. This is clear recognition of the negative impact that publicity may have on the rights of a juvenile. Evidence from the UK where the decision to reveal the identities of the two boys convicted of the murder of James Bulger resulted in a subsequent, life-long injunction to protect their privacy demonstrates the damage that can be caused by publicity and the extreme measures that may be required to undo this harm.

The release to the public of information revealing the identity of a young person convicted of crime thus runs counter to Ireland's international obligations and breaches a number of international standards. If it is inconsistent with Ireland's international obligations to fail to protect the rights of the child charged with a criminal offence, it is even clearer that revealing the identities of children against whom an ASBO has been made (in relation to behaviour that is not criminal) is, similarly, in breach of these standards.

In addition, 'naming and shaming' children against whom an ASBO has been made may place the child at risk. In particular, revealing the identities of children found to have committed anti-social behaviour may place the child at risk of bullying or punishment in his or her community. It may also place his or her family, including siblings at risk of harm, including eviction.

While it may be in the public interest to reveal the identity of a young person convicted of a serious crime, this should not be undertaken with express consideration being given to what is at stake for the child and his/her family now and in the future. The impact on the prospects of the child's rehabilitation of revealing the child's full identity must also be considered.

3. Detention of Children

3.1 Inspecting Children Detention Schools

The Proposed Amendments

Amendment 219 (section 142) proposes to replace section 185 of the Children Act, 2001 (establishing an Inspector of Children Detention Schools) which was never commenced, with a provision to allow inspections be carried out by an 'authorised person' (who shall have expertise in inspecting residential accommodation for children) appointed by the Minister for Justice, Equality and Law Reform (The principal changes proposed appear to be that 'the authorised person' must only carry out an inspection every 12 months (the Inspector of Children Detention Schools was to carry out inspections every six months). Whereas the Inspector had to 'pay particular attention to the conditions, the treatment of the child and the facilities', now the authorised person must only 'have particular regard to' those factors. The emphasis in the new proposal is on policies and practice whereas in the previous provision it was broader in focus. The question of the morale of staff and children is omitted from the proposed amendment. This is a serious weakening of the Children Act, 2001 particularly given the absence from the complaints remit of the Ombudsman for Children of those detained in detention.

Compatibility with International Standards

While the CRC does not contain specific provisions relevant to the inspection of detention facilities, the UN Rules for the Protection of Juveniles deprived of their Liberty are unequivocal about what is required. Rule 72 provides that:

> '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. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities.'

While the 'authorised person' would appear to have the necessary power to access the facility, its records, its staff and its young people as part of his or her annual inspection duties, the proposed amendments do not require that the 'authorised person' is independent from the facility.

The proposal to repeal section 189 regarding an annual report of the inspector is problematic. While the 'authorised person' may hear complaints by children in carrying out his or her functions under section 186, he or she does not appear to have a duty to speak to the children as part of the annual investigation or when requested to carry out an investigation by the Minster.

Contrary to Rule 77 of the UN Rules, which requires the establishment of an independent office (ombudsman) to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of equitable settlements, the proposed amendments do not remedy the exclusion in the remit of the Ombudsman for Children whose office cannot investigate complaints made by children in detention. Nor do the amendments give this role to the 'authorised person'.

3.2 Length of Detention and the Child's Educational Needs

The Proposed Amendments

Amendment 215 requires that children sentenced to detention serve a sentence of between three months and three years. In addition, the court is required to take into account the child's educational needs when deciding on the length of detention. This would appear to suggest that children who have experienced educational disadvantage could receive longer sentences in order to have their educational needs addressed in detention. The fact that all those in detention have experienced educational disadvantage of some form means that this could lead to a lengthening of sentences of detention across the board.

Compatibility with International Standards

The most well established principle of youth justice is that children must be detained only as a measure of last resort and for the shortest appropriate period of time. This is

recognised in Article 37(b) of the CRC, as well as Rule 19.1 of the Beijing Rules. Underlying this principle is the recognition that the adverse influences of detention on young people cannot be outweighed by treatment efforts. Moreover, the negative effects, not only of loss of liberty, but also of separation from family, community and the usual social environment, are more acute for young people than adults because of their early stage of development. For these reasons, international treaties and guidelines restrict detention in both quantity ('last resort') and in time ('minimum necessary period') and assert the basic guiding principle that a young person should not be detained unless there is 'no other appropriate response'.[6] Standards also provide that the deprivation of liberty shall not be imposed unless the child is convicted of a serious act involving violence against another person or of persistence in committing other serious offences.[7]

Section 96 of the Children Act, 2001 sets out mandatory sentencing principles for courts concerned with children and require that, during the sentencing process, they take into account a whole range of factors relating to the child's educational needs, his or her need to maintain contact with family etc. The principle of detention as a last resort is a further mandatory principle in this respect, central to the court's choice of sanction. The Act sets out no guidance as to the duration of the sanction chosen although it is to be presumed that constitutional principles of proportionality – achieving a balance between the offence and the circumstances of the accused – apply.

In this context, it is not clear how the proposed section 149(2), which requires the court to take into account the child's educational needs when deciding the length of detention, fits with the requirements outlined. Moreover, it would appear to be contrary to Ireland's international obligation to minimise the duration of a child's detention. It would also appear to undermine the duty of equal protection of the law insofar as two children convicted of the same offence may get different sentences because of their educational backgrounds. Similarly, it is contrary to best practice which advocates that using the juvenile justice system primarily to try to re-educate young offenders is not realistic and causes too many problems with regard to legal safeguards.

3.3 Detention of Children on Remand

The Proposed Amendments

Amendment 210 proposes to amend section 88 of the Children Act, 2001 which required the establishment of separate places of detention for children detained before trial and instead makes provision for children of all ages to be remanded to a place so designated by the Minister for Justice, Equality and Law Reform. The duty to keep children on remand separate from committed children is limited to 'as far as possible' and 'where it is in the interests of the child' while specific provision is made to allow children to be remanded to St Patrick's Institution.

Compatibility with International Standards

Rule 17 of the UN Rules for the Protection of Juveniles Deprived of their Liberty provides that pre-trial detention shall be limited to exceptional circumstances. When it is used, the Rules require that such children be separated from convicted juveniles. With respect to the use of St Patrick's Institution for pre-trial detention, Article 37 of the CRC, to which Ireland did not enter a reservation, prohibits the detention of children alongside adults. Both proposed amendments are incompatible with these standards.

3.4 St Patrick's Institution

The Proposed Amendments

Part 10 of the Children Act, 2001 provides for the establishment of Children Detention Centres to detain those over 16 years of age and for the removal of children from adult prisons and places of detention. However, this part of the Act was never commenced. The Criminal Justice Bill 2004 proposes to amend the Children Act, 2001 to eventually place all children in detention facilities – principally Children Detention Schools – under the remit of the Department of Justice, Equality and Law Reform.

While it is welcome that all children are finally to be detained separately from adults in line with Ireland's international obligations, the Bill make a number of changes to the Children Act to facilitate the interim period. In particular, the new section 156A

provides that children of 16 and 17 years may be detained in St Patrick's Institution or other place of detention (prison) until places suitable for admission of children of those ages become available or they have completed their detention. The new section 88 also allows for the detention of children on remand in St Patrick's Institution (subsection 12).

Compatibility with International Standards

The present detention of young people under 18 years alongside adults (between 18 and 21 years) in St Patrick's Institution is in direct contravention of Ireland's obligations under Article 37 of the Convention on the Rights of the Child as is the proposal – a clear derogation from the commitment not to imprison children – that they may be detained in a 'place of detention'. While section 156A is described as a 'transitional provision' it is extremely worrying that no time scale has been given for the removal of children from St Patrick's Institution to Children Detention Schools and nothing to suggest that it will not be another decade before this part of the Children Act 2001 is fully implemented. The fact that the proposed amendments, unlike the Children Act itself, include express reference to St Patrick's Institution makes it highly unlikely that the facility will be closed in the near future. In this regard, it has been suggested that transferring boys currently in St Patrick's Institution to the Children Detention Schools is a process which will take at least ten years. Apart from the concerns voiced by the Inspector of Prisons, among others, for the educational and physical welfare of young people in St Patrick's, Ireland is operating in continuous breach of its international obligations.

3.5 Application of Prison Acts to Children Detention Schools

The Proposed Amendments

The Criminal Justice Bill includes provisions which serve to implement the proposal of the Youth Justice Review to bring all detention facilities for children under one government department, namely the Department of Justice, Equality and Law Reform. However, the new section 156B, inserted by amendment 218, provides that pending the making of rules for the management of Children Detention Schools, the Prison Acts and Rules are to apply to them. Despite commitments given that the

educational ethos of the Children Detention Schools would prevail, the new section 156B makes it clear that the prison ethos will dominate.

Compatibility with International Standards

It is clear that the Convention on the Rights of the Child applies to children in detention as well as children in the community and in this way, children deprived of their liberty also have the right to education, to maintain contact with their families and to be protected from harm. The application of these rights to children in detention is reinforced by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty which place emphasis on the need to maximise the potential of a young person's time in detention to address his/her educational, health and other needs. Anything which threatens to undermine the educational and rehabilitative model with a punitive one is out of line with these obligations. These proposals are extremely worrying in this regard.

3.6 Privatisation of the Detention of Children

The Proposed Amendments

Amendment 222 inserts a new section 161 into the Children Act provide that the Minister for Justice, Equality and Law Reform may enter into arrangements with any person or body for the provision of a place where children found guilty of offences shall be detained. While it comes with the stipulation that this will only arise in respect of provision extra to the Children Detention Schools, nonetheless this appears to facilitate the privatisation of detention facilities for children.

Compatibility with International Standards

While there are many reasons, including economic ones, why privatisation is a misguided penal reform policy, it is the inconsistency of private prisons with international standards that concerns the IYJA here. While international obligations do not prohibit prison privatisation per se, it is clear that this process cannot be used to take direct or indirect responsibility for the care and treatment of children in detention away from Government. Safeguards and close monitoring mechanisms must thus be put in place to ensure that the rights of children and young people, no matter where they are detained, are fully vindicated.

References

United Nations Convention on the Rights of the Child, 1990

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) adopted by General Assembly resolution 40/33 of 29 November 1985.

United Nations Guidelines for the Prevention of Juvenile Delinquency (*The Riyadh Guidelines*), adopted by General Assembly Resolution 45/112 of 14 December 1990.

United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.

Endnotes

[1] Committee on the Rights of the Child, *Concluding Observations: Ireland*, 4 February 1998, CRC/C/15.Add 85 (available at www.ohchr.org)

[2] In 1970, the Kennedy Report recommended the age be raised to 12; the 1981Task Force on Child Care Services were split on the matter and the 1992 Dáil Select Committee on Crime also recommended 12 years.

[3] Rule 4, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)* adopted by General Assembly resolution 40/33 of 29 November 1985 (available at www.ohchr.org)

[4] UN Doc CRC/SR437 Summary Record of the 437th Meeting of the Committee on the Rights of the Child: Ireland 03/02/98, para 8.

[5] This age was not found to breach article 3 of the European Convention on Human Rights in the cases of T v UK and V v UK, 16 December 1999. However, five judges dissented from the judgment of the Court on this issue with reference to the relatively higher ages applied by other ECHR states.

[6] See the commentary to Rule 19 of the Beijing Rules.

7 Rule 17 (1)(c).