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‘The Irish Juvenile Justice System: Positive Approaches to Young People in Conflict with the Law?’

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The Irish Juvenile Justice System: Positive Approaches to Young People in Conflict with the Law?

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Introduction

For many years, juvenile justice in Ireland attracted little attention. The area was governed by the out-dated Children Act 1908 and few resources were spent on any part of the system. It was characterised by a low age of criminal responsibility (7 years at common law) prosecution of all offences committed by children over that age with little involvement of social services. The main sanction was set out in section 107 of the 1908 Act, which allows a case to be dealt with by placing the offender under the supervision of a probation officer (probation bond), ordering the offender to pay a fine, damages or costs, or declaring the offender to be unruly or depraved so as to enable him to be detained. Generally, under the 1908 Act, there was 'relatively extensive recourse to the use of adult prison' for children,¹ and the Act also established the system of certification for industrial and reformatory schools. These were the centres to which many children deemed out of control, unruly (and thus not convicted of any offence) were sent. The Act was amended many times in a piecemeal manner.² However, despite its apparent inability to keep pace with modern social and legal conditions, the Children Act 1908 is widely accepted to have served Ireland well.

There has never been an official enquiry into juvenile crime or the juvenile justice system generally in Ireland.³ Much of the focus has centred on the industrial and

¹ Dáil Select Committee on Crime, *Juvenile Crime – its Causes and its Remedies* (Dublin, Stationery Office, 1992), p. 19.

² The most important amendments were made by the Children Act 1941, the Children (Amendment) Act 1957 and the Criminal Justice Act 1960. See Walsh, D., *Juvenile Justice*, (Dublin: Round Hall Press, 2005) p. 2.

³ *Ibid.*, p. 465.

reformatory school system, although the recommendations made in this context also concerned the wider issue of juvenile delinquency and addressed its causal factors. This was the focus of the Kennedy Report (on the Industrial and Reformatory Schools) in 1970,⁴ the Henchy Committee *Report (of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons)* in 1974⁵ and the Task Force on Child Care Services in 1980. All of these reports made important recommendations about the administrative structures needed to ensure an inter-disciplinary response to youth crime and an efficient youth justice system to respond in an individual way to young people in conflict with the law. Despite the pragmatic nature of these recommendations, further political inertia followed. Ten years later, it was a Dáil (Parliament) Report that prompted the Government to finally undertake the task of replacing the 1908 Act. In 1992, this Report considered the matter of juvenile crime, its causes and its remedies having decided that it needed ‘urgent attention as a social problem’.⁶ The Report made a number of recommendations for reform but also identified what it saw as significant underlying principles that should inform the system – detention as a last resort, the importance of a multi-faceted response to youth crime, the importance of efficient administration of the youth justice system, the desirability of key decision makers having a brief exclusively concerned with children and the importance of the Irish system conforming to international standards and practices.⁷ The Committee recommended that a substantial number of far-reaching reforms be undertaken including both the organisation of the juvenile justice system, and substantive matters of criminal law. Some of these were included in the legislation that was adopted subsequently – these are outlined below – but many were not. In particular, the report recommended that the new law articulate the goals and objectives of the juvenile justice system, strongly recommended the creation of specialisation within the public bodies which operate in the juvenile justice system and recommended the creation of special juvenile courts with appropriately trained judges.

⁴ *Report of the Committee on Reformatory and Industrial Schools Systems* (Dublin: The Stationery Office, 1970) PRL 1342 (The Kennedy Report). See further Walsh, D., *ibid.*, pp. 468-72.

⁵ *First Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons* (The Stationery Office, Dublin 1974) PRL 4688 in Walsh, D., *ibid.*, pp. 472-4.

⁶ Dáil Select Committee on Crime, ‘*Juvenile Crime – its Causes and its Remedies*’.

⁷ Walsh, D, *Juvenile Justice*, pp.38-9.

The Children Act 2001

After many attempts, the new legislation was finally adopted in 2001. This was very much the beginning of its history, however, and not its end as the Act is not only being gradually implemented – it is not yet all in force – it has recently been amended substantially. I will return to this later.

The Children Act 2001 undertakes the most comprehensive reform of the Irish youth justice system in one hundred years.⁸ In addition to replacing the Children Act 1908, it puts in place a modern statutory framework for the treatment of children in conflict with the law. Although the Act has been on the political landscape for a decade, its full implementation is still several years away. The area received new impetus in 2005 when the *Youth Justice Review*, carried out by the Department of Justice, Equality and Law Reform, focused attention on what is needed to implement the Act in full. The recommendations of the Review included putting in place administrative structures to co-ordinate the Act at a local level and drawing up much needed policies on youth justice in Ireland. While these are positive developments – and they are still in their infancy - they have taken place against the backdrop of political decisions substantially altering the Children Act in the Criminal Justice Act 2006. First, the positive measures:

The Garda Diversion Programme

Part 4 of the Children Act 2001 put on a statutory basis the long-standing programme of diversion operated by An Garda Síochána (the Irish Police). To date, over 100,000 children have been through the Programme. The Garda Diversion Programme offers a child who has committed an offence an opportunity to be cautioned in lieu of prosecution before the Children Court.⁹ The system operates as follows: when a child first comes to the attention of An Garda Síochána he/she is referred to the local Juvenile Liaison Officer, who is a specially trained Garda. If the child fulfils the

⁸ See Kilkelly, *Youth Justice in Ireland: Tough Lives Rough Justice* (Dublin: Irish Academic Press, 2006).

⁹ Section 49 of the Act provides that a child shall not be prosecuted for the criminal behaviour, or any related behaviour, in respect of which he or she has been admitted to the Programme.

eligibility criteria for admission to the programme – the child must be over the age of criminal responsibility and under 18 years, he/she must have accepted responsibility for the offence committed and must consent to being cautioned under the programme – the JLO may recommend to the Director of the Programme at the National Juvenile Office that the child be admitted to the Programme. Once admitted, the child will be cautioned formally or informally. Informal cautions, for usually minor or first offences, are administered by the local JLO and this is normally done at the child's home and in the presence of his/her parents. A formal caution, on the other hand, is administered by the Garda Sergeant normally and takes place at the Garda station in the presence of the child's parent or guardian. This type of caution may be restorative in nature if the victim of the child's offending behaviour is invited to attend. In such cases, the objective is to 'confront the child with the consequences of his/her offending' 'in a low key atmosphere'.¹⁰ When the victim attends, there must be a general discussion among those present about the child's criminal behaviour and the Garda administering the caution may invite the child to apologise and offer some form of compensation to the victim. In this way, the formal caution may operate as a mini-conference where a full conference is neither justified nor required.

Supervision of the child in the community will normally occur following a formal caution, and it generally means that the child will be monitored or mentored in the community by a JLO for a period of 12 months, although this can be varied by the Director. The level of supervision required, which can also be varied by the Director, is decided by the JLO, who must take into account the seriousness of the criminal behaviour, the level of support to and control of the child by his/her parents or guardian, and the likelihood of the child committing further offences.

The Children Act 2001 also introduced a conference into the Diversion Programme, which has been described as a 'major innovation in Irish criminal law'.¹¹ In respect of a child who is being supervised, the JLO may convene a conference in order to bring

¹⁰ As explained by the Minister for Justice, Equality and Law Reform in his introductory speech at the Second Stage, Dáil Debates, Vol 517, Col 36 (29 March 2000).

¹¹ McDermott, P.A. & Robinson, T., *Children Act 2001* (Dublin: Thomson Round Hall, 2003), p. 65.

together, on a voluntary basis, the child, his/her family and others to establish the reasons for the child's criminal behaviour and discuss how the family can help the child not to re-offend. The JLO is responsible for organising the conference and must both explain the procedures to the child and his/her guardian and ascertain the wishes of the child and the victim with regard to the conference. The JLO also has a particular function to mediate between the child and the victim JLOs receive special mediation training for this purpose.¹²

One of the principal functions of the conference is to provide a forum within which the child and his/her parents can draw up an action plan with the assistance of others (e.g. the child's teacher, social worker or youth worker) to try to prevent the child from re-offending. The plan may provide for any course of action that would be in the best interests of the child or would make the child more aware of the consequences of his/her criminal behaviour, including requiring the child to make reparation to the victim, participate in sporting or educational activity, stay at home at certain times and away from certain places or people. While there are no sanctions for non-compliance with the action plan, one or more people may monitor the child's compliance with it and the conference may be reconvened to review compliance. The action plan thus takes the form of a contract between the child and those present at the conference and, although it is not legally enforceable, the consent of the parties is required in most circumstances. The seriousness of the plan is reinforced by the requirement that the child must sign the action plan, which is to be written in plain language that he/she can understand.

Age of Criminal Responsibility

After many years of recommendations, the Children Act finally raised the age of criminal responsibility from seven to 12 years. This came into force on 16 October 2006. While the original legislation also placed the principle of *doli incapax* on a statutory basis, this was subsequently amended in 2006 when changes to the 2001 Act included the abolition of this principle as a rule of law. The changes introduced at this

¹² JLOs receive ten days generic mediation training to Level 1 accreditation from Mediation Institute Ireland delivered over a four month period. In addition, fourteen JLOs are reportedly receiving mediation training to MMI Level 2. *Report of the Committee appointed to monitor the effectiveness of the Diversion Programme, 2003*, p. 7.

time also included the removal of the test of capacity from the concept of criminal responsibility and replaced it with a decision to prosecute. A further exception introduced to the age of 12 years is that in the case of murder, manslaughter and aggravated sexual assault the age of criminal responsibility is set at 10 years. This is very obviously a discriminatory and retrograde step which will see 12 year olds prosecuted for theft or public order offences, but children as young as 10 prosecuted for serious crime.

Other positive initiatives in the 2001 Act include the fact that where a child under 12 years comes to the attention of the police they can be taken to their parents or to the Health Service Executive (HSE) if the Garda has reasonable grounds to believe that the child is not receiving adequate care or attention. This should make sure that children who are at risk can have their needs met.

The Children Court

Children who re-offend or are refused admission to the Diversion Programme will be prosecuted and brought before the District Court, sitting as the Children Court. Before this, a child can be questioned at a Garda station but only within the strict terms of Part 6 of the Act, which sets out the child's right to be treated with respect, to have his/her parent or an appropriate adult present at questioning, and to consult a solicitor. Part 6 was also commenced on May 1, 2002.¹³

According to Part 7 of the Act, the Children Court must sit at a different time or place to the ordinary District Court. The child's parents are required to attend the proceedings, which must be held in private with restricted reporting in order to protect the child's identity. At this stage of the process, the Act offers a wide range of approaches and sanctions designed to address, if not also punish, a child's offending behaviour.¹⁴ Section 77 is a key provision which aims to bridge the gap between the

¹³ S.I. No.151 of 2002. Children Act 2001 (Commencement) Order 2002. Section 59, which requires the HSE to attend a Garda station where a Garda has concerns about the welfare of a child in custody, was not commenced however.

¹⁴ For a full analysis of the operation of the Children Court see Kilkelly, *The Children's Court: A Children's Rights Audit*, 2005 available at www.ucc.ie/law.

justice and welfare systems for children, found to be in need or at risk, who come before the Children Court. In such circumstances, the court can divert the child to the attention of the HSE, which is then required to undertake a family welfare conference with a view to deciding the best course of action to be taken to address the child's needs. This may include taking action under the Child Care Act 1991. Section 77 has not yet been commenced and there have been problems in some areas securing the attendance of the HSE at criminal proceedings in which children in its care are involved.¹⁵ However, the Act has now been amended to require the HSE to attend such proceedings and this should facilitate this provision to be implemented.

Family Conferencing with the Probation Service

If the child accepts responsibility for his/her behaviour before the Children Court, he/she may be directed to the attention of the Probation Service for the purposes of a family conference—similar to that under the Diversion Programme—designed to devise an Action Plan to prevent the child from re-offending. The Action Plan is subject to the supervision of the court, which, depending on the child's compliance with its terms, can dismiss the charge or resume the proceedings.

This family conference adds an entirely new layer to the Irish youth justice system. Unlike the Garda conference, this form of the family conference is court-directed and supervised by the Probation Service. It can be ordered by the Children Court where a child accepts responsibility for his/her behaviour, the child's parent/guardian agrees to participate in and support the activities of the conference and the Court believes that it may be the appropriate response. The conference is thus convened as an alternative to proceeding to a finding and it thus gives the court 'an important discretion to achieve a balance between issues of accountability and the best interests of the child'.¹⁶ The

¹⁵ As a result of these problems, the Criminal Justice Act 2006 introduced a new s.76B to the effect that where it appears to the court that the HSE may be of assistance in dealing with a child charged with an offence, it may request the HSE to be represented in the proceedings. If, having heard the HSE, the court decides to dismiss the charge against the child, the HSE must, where appropriate, exercise its powers under the Child Care Act 1991.

¹⁶ The Law Society's Law Reform Committee, *Rights-based Child Law: The case for reform – Part 1*,

(Dublin: Law Society, December 2005), p. 98

advantage for the child is that it offers an opportunity to avoid a conviction, while at the same time aims to address the causes of his/her offending.

According to the Act, the Probation Officer convenes the conference by bringing together the child, his/her family and any other person (teacher, community worker, representatives of state agencies) likely to contribute to an attempt to address the child's offending behaviour. This comes in the form of the action plan, which the conference supports the family to draw up, which is designed to help prevent the child from offending. The action plan formulated by the family conference and consented to by the child is approved and supervised by the court. If it is completed according to the court's satisfaction, the charge against the child may be dismissed. If the child has failed to comply with the action plan, the court may resume the proceedings against the child.

The provisions relating to this model of the family conference were commenced in July 2004¹⁷ and so are still only in the early stages of implementation. Many factors are important to their success not least that the Children Court must have sufficient awareness of and confidence in the mechanism to use it. The success of the family conference also depends on the good working relationships between all the state agencies involved, as well as their ability to support the family, particularly those who may have difficulty communicating and working together.¹⁸ Finally, the successful implementation of an action plan requires the availability of those resources and services that the conference believes should be directed at the young person's offending. If the action proposes counselling for addiction problems, therapeutic intervention for mental health difficulties, vocational training or education or a new hobby or leisure activity for the young person, and none of these services is available within a reasonable timescale and convenient to the child's home, fulfilment of the terms of the action plan will be very difficult. The fact that these measures are court-

¹⁷ SI no 468 of 2004.

¹⁸ See the proposal to develop a pilot in this area. The Law Society's Law Reform Committee, *Rights-based Child Law*, p. 98.

ordered, by its sanctioning of the action plan, may facilitate the arrangements necessary here. Ultimately, however, if the peripheral services are not available then the family conference, and the young person whose offending it is addressing, will fail. The stakes are high if that happens, particularly for the child against whom the criminal proceedings will be resumed.

Sentencing under the Children Act 2001

One of the most important provisions of the Children Act 2001 is section 96 which sets out the sentencing principles for all courts. Section 96 details the factors that they must take into account when sentencing children and young people. In particular, it recognises that it is desirable wherever possible to prevent interruption of a child's education, training or employment, to strengthen the relationship between children and their families and to allow children to reside in their own homes. For these reasons, it provides that any penalty imposed on the child for an offence should

- take into account as mitigating factors the child's age and level of maturity;
- interfere as little as possible with the child's education, training or employment;
- take the form most likely to maintain and promote the child's development;
- take the least restrictive form appropriate in the circumstances and in particular, be no greater than that imposed on an adult for the same offence;
- respect the principle of detention as a last resort, and
- have due regard to the interests of any victims of the child's offending.

To this has been added the requirement that the Court take into account the best interests of the child during sentencing, although it also balances this with the public interest and the interests of victims (see last point above).

In order to put these principles into effect Part 9 of the Children Act sets out a wide range of community-based sanctions as alternatives to detention. When a court finds a child guilty of an offence, therefore, it may impose one or more of the sanctions out in sections 108-141 of the Act. The sanctions can be categorised as follows:

- *An order for fines, costs or compensation* (ss. 108-110): the court must have regard to the ability of the child to pay a fine, compensation or court costs;
- *An order imposed on parents, such a parental supervision order or an order that a parent be bound over* (ss. 111-114): Binding over the parent requires him/her to enter into a recognizance to exercise proper and adequate control over the child. Forfeiture of the bond (up to £250) occurs if child commits another offence within the period of the order and the court is satisfied that the failure of the parents to exercise adequate control was a factor. A parental supervision order may be imposed also where the court is satisfied that a wilful failure of the child's parents to control the child contributed to the child's criminal conduct. It may require the parent to comply with any instruction of the court including to participate in a substance abuse programme or a parenting course and a probation and welfare officer is appointed to supervise, assist and monitor the parents. Failure to comply will be treated as a contempt of court;
- *A community sanction, such as a probation order, a day centre order, an order requiring supervision by a suitable person or mentor or an order restricting movement* (ss. 115-141): the court may impose a variety of community sanctions and attach conditions such as attending school, limited contact with specified individuals, attending certain places and staying away from alcohol or drugs. The community sanctions include the basic Probation Order, where the child agrees to be supervised by a Probation and Welfare Officer and three variations on this order. The first of these is the Probation (training or activities programme) Order where a child can be referred to a specific programme with the agreement of the programme manager. The second is the Probation (intensive supervision) Order where the child is closely supervised, must attend an educational or training course or undergo

treatment, and reside at a specific address for a period up to 60 days. The third is a Probation (residential supervision) Order which provides for residence in a place other than the child's home, such as in a hostel approved by the Probation and Welfare Service. Two further orders provide for the child to be placed in the care of a person other than a family member – the Suitable Person (care and supervision) Order according to which the court may, with the parents' consent, assign an offender to the care of a suitable person where the parent is unable to cope or the home environment unsuitable and the Mentor (family support) Order which allows the offender to stay in the home but receive help and advice from a suitable person while under the supervision of a Probation and Welfare Officer. A Restriction on Movement Order is similar to a curfew¹⁹ insofar as it prevents the child from attending certain places and requires him/her to be at home between certain hours and a Day Centre Order provides for attendance at a day centre (for the purposes of leisure, sporting or other constructive activities) to be approved by the Minister for Justice. A maximum attendance of 90 days, not necessarily consecutive, can be required;

- *An order placing a child in detention or combining detention and supervision in the community (ss. 142-156):* In addition to placing a child in detention, the Act introduces an important sanction, which requires the offender to serve half his sentence in detention and the other half in the community. It is to be hoped that this would develop as the normal type of sentence to be imposed where detention is deemed appropriate given its potential to successfully reintegrate the offender into the community on release.

When choosing between these available sanctions, the Children Court may take into account, as mitigating factors, the child's age and level of maturity and it must ensure that the measure interferes as little as possible with the child's education, training or employment. Furthermore, the measure should take the form most likely to maintain and promote the development of the child, and be the least restrictive form

¹⁹ See further Kilkelly, U, *Youth Justice in Ireland*, Chapter Seven.

appropriate in the circumstances, respecting the principle of detention as a last resort. However, few of these sanctions have been enacted with the exception of the order for costs, compensation and damages, and the restriction on movement order, which were both commenced on May 1, 2004.²⁰ When these measures are all finally in place, it will allow the Children Court to tailor the sentence for each child to his/her individual circumstances and needs as well as being proportionate to the crime committed.

Detention

The Act prohibits the detention of a child in prison and makes particular arrangements for the detention of children providing that those under and over 16 years would go to different units operated by different government departments. These provisions – set out in Part 10 of the Act – never came into force. They were changed in June of this year when responsibility for detention was moved to one government department – the Department of Justice, Equality and Law Reform. There are serious problems with the detention of children (particularly those over 16 years) in Ireland. These problems should be addressed by the impending overhaul of children detention services, although this change has not yet been planned and thus is at a very early stage.²¹

Introduction of Behaviour Orders

As I mentioned at the outset, the Children Act has been substantially amended in 2006 with the introduction of the Criminal Justice Act 2006. Among the many changes is the introduction into Irish law of Anti-Social Behaviour Orders.

Section 272 defines anti-social behaviour as behaviour that caused or was likely to cause to one or more persons:

- (a) harassment;

²⁰ S.I. No.151 of 2002. Children Act 2001 (Commencement) Order 2002. It is submitted that the failure to enact these provisions has made it impossible to enact s.96, which contains the principle of detention as a last resort.

²¹ On detention of children in Ireland see further Kilkelly, U, *Youth Justice in Ireland*, pp 194-253.

- (b) significant or persistent alarm, distress, fear or intimidation; or
- (c) significant or persistent impairment of their use or enjoyment of their property.

Under these provisions, two courses of action are available to respond to children who commit anti-social behaviour. The first relates to the new regime of Behaviour Warnings and Behaviour Orders. The second, which will not be dealt with in any detail here, allows such children to be admitted to the Diversion Programme already explained.

Behaviour Warnings

Section 257B of the Children Act 2001 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 an 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 s.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. Those who work in the system will understand the detrimental impact which this provision is likely to have on young people from the Traveller community and asylum seekers, not to mention young people who simply fail to appreciate the seriousness of giving a false name to police. Moreover, the removal of the concept of “capacity” from the definition of criminal responsibility may mean that such children will be without a defence here.

Where the child continues to commit anti-social behaviour despite receiving a warning, and the Garda brings this to the attention of the Superintendent, he/she may convene a meeting to discuss the child’s behaviour. The meeting is intended to involve the child, his/her parents, the Garda who gave the warning and the Juvenile Liaison Officer if the child has already been admitted to the Diversion Programme. If the Superintendent is of the view that the child has committed anti-social behaviour, he shall explain to the child and his/her parents in simple language what the behaviour

is and what its effects are. The child and his parents will be asked to acknowledge that the behaviour has occurred and to take measures to stop it. If this happens, a Good Behaviour Contract, lasting no more than six months, is drawn up and signed by both parents and child. Subsequently, if the child has, or is in danger of committing further anti-social behaviour, the Superintendent may reconvene the meeting, consider admitting the child to the Diversion Programme or apply for a Behaviour Order.

A number of issues arise here. First, with regard to the effectiveness of a Behaviour Warning, the fact that it can be posted to the child concerned suggests that it is likely to have the same effect on a teenager's behaviour as a bad school report—not to mention the child's defence that they did not receive the warning at all. Second, there is no duty on the Superintendent 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 as many as three Gardaí—to have independent support or legal advice prior to, during or after the meeting. Given that parents may not always be on their child's side in these situations, there is a real need to ensure that the child is supported by an independent, appropriately trained advocate. Yet, Ireland continues to operate without such a scheme.²²

However, in practical terms, the most important factor here is the almost entire duplication of the highly successful Diversion Programme: the Behaviour Warning is broadly similar to the caution under the Diversion Programme; the Superintendent's meeting mirrors the Garda conference; and there appears to be little to distinguish an Action Plan under the Diversion Programme from a Good Behaviour Contract. The difference, however, is that the Diversion Programme has been in place since the 1960s and has developed into a successful and modern diversionary scheme. It is operated by trained JLOs who have built up a wealth of experience in mediation, relating to young people and the diversion of young people from crime. While not perfect, decision-making regarding admission to the Programme is centralised and

²² *Ibid.*, pp.100-122.

operates within a statutory framework.²³ By any standards, the Programme is extraordinarily successful at diverting young people from further offending - approximately 86% of young people are successful diverted from offending behaviour - why then introduce to this mix another layer of Garda intervention without the positive elements of the Diversion Programme, but with all the bureaucracy?

Behaviour Orders

Behaviour Orders have been introduced into the 2001 Act in the new Part 12. They may be made by the Children Court under s.257D following the application by a Garda, of at least Superintendent rank (application must include the extent to which the child has been subjected to the preventive steps under s.272). The court may make an order if it is satisfied that the child is over 12 years, and, notwithstanding the application of the above procedures, he/she has continued or is likely to continue to behave in an anti-social manner. The court must also be satisfied that the order is necessary; requirements in an earlier version of the Bill which required the court to have regard to a range of factors when making the order—including the circumstances of the child concerned, the nature of the behaviour and the application of the principles of proportionate response and minimum interference—have been removed.

The Act lists conditions that may be attached to the order including:

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

(b) requiring 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) providing 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

²³ *ibid.*, pp.73-75.

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

The proposal to introduce ASBOs into Irish law was met with considerable opposition.²⁴ Criticism of the model in the UK—whose effects have fallen harshly on young people—led to fairly substantial changes to the model introduced in Ireland.²⁵ Fortunately, the Irish model has been watered down in response to these criticisms. They are renamed Behaviour Orders, they are orders of the Children Court rather than the District Court, and attempts have been made to incorporate them into the Diversion Programme. Problems still remain: first, according to s.257D(9), the legal proceedings for an ASBO are to be civil in nature meaning that the Children Court will be administering civil justice regarding anti-social behaviour while at the same time applying the rules of criminal law in respect of offences. Although technically these proceedings cannot overlap, it is highly likely that they will involve the same young people—this is certainly the UK experience. This blurring of the lines between civil and criminal procedures and jurisdiction, which will conceivably be operating in parallel if not together, is a dangerous step not least because it will create uncertainty for the young people involved regarding the rules being applied. Second, the admissibility of hearsay evidence will make the application for the order practically indefensible, as in the UK where only a handful of applications have ever been refused. Third, the amendment to s.93(2) to allow restrictions to be lifted on the publication of information likely to lead to the child's identification will result in the naming and shaming of children in their communities, notwithstanding that it is to be limited to the extent necessary "to ensure that the order is complied with". Finally, there are also difficulties regarding the limited availability of legal aid; free legal aid can only be granted where the anti-social behaviour is serious, which will have a

²⁴ See the Irish Youth Justice Alliance Case against ASBOs, available at www.iprt.ie and the submissions of the Ombudsman for Children (www.oco.ie) and the Irish Human Rights Commission (www.ihrc.ie) on the Criminal Justice Bill 2004. See also Kilkelly, *Youth Justice in Ireland*, pp.180-188.

²⁵ See further Squires and Stephen, *Rougher Justice Anti-social Behaviour and Young People* (Devon: Willan Publishing, 2005). On the Irish position, see the Coalition against ASBOs, *Case against ASBOs*, available at www.iprt.ie (September 26, 2006).

disproportionate effect on those who cannot afford to pay for legal representation. Overall, it is submitted that the introduction of ASBOs into Irish law and their integration into the Children Act is a retrograde step, not least because of the changes to the Act necessitated to accommodate them. These involve, principally, changes to the Diversion Programme.

Conclusion

Unprecedented attention has been focused on the youth justice system in Ireland in recent years. The adoption of the Children Act 2001 represented a move towards a new legislative framework. It introduced the family conference into Irish criminal law and put in place a range of community sanctions to make sure detention was imposed as a last resort. However, these measures remain largely unimplemented and at the same time, the law has been changed to allow 10 year olds to be prosecuted for serious crime, and to introduce a range of measures targeted at the less than criminal anti-social behaviour of young people. Similarly, there has been a significant failure to address the rights of children in detention and their successful return to their families on release.

Unfortunately, while the 2001 Act contains many positive initiatives, its adoption was not matched with adequate planning or resources to ensure it was brought into force quickly and funded appropriately. The establishment of the (non-statutory) Irish Youth Justice Service has the potential to address these shortcomings by putting the necessary policy framework and administrative structures in place to ensure that the Act is finally fully implemented and resourced. The Service should also improve the delivery of services to young people in conflict with the law by bringing together services for young offenders under one governance and management structure. The Service which is placed in the Department of Justice – although this will be reviewed in five years - is responsible for putting in place multi-disciplinary teams at local level but also for providing leadership to all the agencies involved in the delivery of youth justice. The objectives of this office also include the development of a specific youth justice policy from a single unified perspective and having responsibility for services

for young offenders including detention, community sanctions, restorative justice conferencing and diversion projects. Only time will tell whether this will be a success.