

## **CHILDREN ACT, 2001**

### **INTRODUCTION**

I am very honoured to be asked to launch the publication by the Irish Association for the Study of Delinquency of the conference papers from the 2003 Conference on the subject of the Children Act, 2001. The Association provides a very valuable meeting ground for people from different backgrounds who have an interest in delinquency. This interaction between the different professions is reflected in the variety of papers which were given at the 2003 Conference and are published today.

### **THE CHILDREN ACT, 2001**

The enactment of the Children Act, 2001, was a major achievement. The replacement of the Children Act, 1908, had long been sought by childcare workers and legal practitioners.

At a press conference to announce the publication of the Children Bill, 1999, the then Minister for Justice, Equality and Law Reform, John O'Donoghue said that it struck "a fair balance between the needs and interests of the child offender with the protection of the community and what is good generally for society". The Act itself was widely praised for its innovation and for the conscious attempt made by the legislators to ensure that in the future detention would only be used as a last resort when dealing with juvenile offenders. It provides for the introduction of a number of measures to combat juvenile offending in Ireland. The Explanatory Memorandum to the Bill said that its primary purpose was to

“replace the remaining provisions of the Children Act, 1908 and associated legislation with a modern comprehensive statute. First and predominantly it provides the framework for the development of the juvenile justice system. Second, it re-enacts and updates provisions in the 1908 Act protecting children against persons who have the custody, charge or care of them. Third, it provides

for a family welfare conference and other new provisions for dealing with out of control non-offending children”<sup>1</sup>.

However, the enactment of the Act in itself means nothing if it is not implemented. Not only is the Act a long and complex piece of legislation, but it seems that its implementation may also be long and complex. A complicating factor in implementing it is that there are no less than three Government Departments responsible for aspects of the Act although this problem is ameliorated to an extent by the fact that a Minister of State is responsible for coordinating the whole supported by the National Children’s Office.

## **THE CONFERENCE PAPERS**

Martin Tansey, the Chairman of the Irish Association for the Study of Delinquency, in his opening address to the 2003 Conference, referred to the phased implementation of the Act and queried whether in 2008 the conference will be titled “The Children Act, 1908 – 100 years on”? Included in the report of the 2002 IASD Conference was a timetable for of the proposed implementation of the Act for 2002 according to the National Children’s Office. According to this list Part 10 which deals with Children Detention Schools, Part 11 which provides for setting up the Special Residential Services Board and Part 2 providing for the Family Welfare Conferences run by the Health Boards were all scheduled to have been implemented fully or in part by the end of 2002. To the best of my knowledge the establishment of the Residential Services Board is the only one of these to have been fully implemented and that occurred in November 2003.

Minister Lenihan in his address to the Conference summarised the present position regarding implementation of the Act. He made reference to the planned commencement of Parts 2, 3 and 11. He did not refer to the introduction of Part 5 which deals with the age of criminal responsibility, the duty of the Garda Síochána in relation to under age children who offend and the law in relation to the aiding of under age children to commit an offence. However, the National Children’s Office in its presentation explained that

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<sup>1</sup> Children Bill 1999. Explanatory Memorandum. p. 1

there is yet no commencement date fixed for the implementation of Part 5 as currently the Health Boards are not ready to provide services for children aged under 12. It did not give any indication when these institutions will be in a position to provide these services or if there is any planned date for its implementation. Interestingly enough according to the presentation the Department of Justice is responsible for the implementation of Part 5 of the Act yet it is the Department of Health that will then have the responsibility of managing these children.

To date, therefore, it would appear that the only implementation on target relates to the programme of restorative cautions and conferences operated by the National Juvenile Office of the Garda Síochána provided for in Part 4. Although there are no statistics in relation to the success of the program at this early stage, an evaluation of the pilot programme completed in October 2001 reported re-offending by just over a third of participants.<sup>2</sup> The statute based programme has been in operation since the 1 May 2002 and is currently being evaluated by the Garda Research Unit<sup>3</sup>.

Jim McGrath from Netcare Consultancy who has been involved with Family Conferencing in Ireland since 1995<sup>4</sup> highlighted the risk factors that can lead to “a dysfunctional and troubled adolescence”. He said that all of these factors have to be tackled early and unfortunately this is something that the Act does not do. He referred to research showing that children who are absent from school are more likely to become involved in criminal activity during that time. He advocated restorative practices such as conferencing which can have a positive effect on attendance at school, violent behaviour in schools and other unacceptable behaviour, and referred to his own experience in England where early intervention to deal with school absenteeism has had remarkably good results – indeed, his own word was “astounding”.

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<sup>2</sup> O'Dwyer, K. (2001) “Restorative Justice Initiatives in the Garda Síochána: Evaluation of the Pilot Programme”, Garda Research Unit Report No 4/01, Templemore: Garda Síochána College.

<sup>3</sup> O'Dwyer, K. (2002) “A Programme of Restorative Cautioning by the Police in the Republic of Ireland”. Paper prepared for the Second Conference of the European Forum for Victim-Offender Mediation and Restorative Justice, 10-12 October 2002.

<sup>4</sup> Information from the Netcare Website, [www.netcare-ni.com](http://www.netcare-ni.com)

## **FAMILY GROUP CONFERENCING AND RESTORATIVE JUSTICE**

The introduction of the group conference into the juvenile justice system in Ireland has been widely welcomed as a move away from detention and towards a focus on the needs of the individual offender. The Act provides for three different types of conference: the Family Welfare Conference operated by the Health Boards, the Juvenile Conference operated by the Garda Síochána as part of the Juvenile Diversion Programme and the Family Conference operated by the Probation and Welfare Conference.

The concept of the Family Conference originated in New Zealand and since then has been adapted to the management of juvenile offenders in many jurisdictions throughout the world including Australia, Canada, England, North America and most recently our own. A consultation document published in July 2003 by the British Government<sup>5</sup> reported that the introduction of conferencing and restorative justice methods for dealing with youth offenders had had very positive effects on re-offending and re-conviction rates.

I strongly welcome the introduction by the Act of restorative conferencing as a method of dealing with offending children. This has provided a welcome alternative to detention as well as a method of monitoring young offenders and allowing them to have a role in the determination of their future, which unfortunately many of them may never have had up to that point. The key factor in all three types of conferences that the Act provides for is that in every case the parents or guardian of the child are involved in the family conference. However, the reality is that many children who come to the attention of the DPP's Office or of the Children's Court already have had numerous convictions and are no longer under the supervision or care of parents or guardians, or else come from situations of lack of adequate family support.

During one of the question and answer sessions of the Conference the question of whether conferencing would have a role to play in managing juvenile sex offenders was discussed. The answer given was that the Garda Diversion Programme is open to all

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<sup>5</sup> Justice Research Consortium. A consultation document on the Government's Strategy on Restorative Justice 22<sup>nd</sup> July 2003.

regardless of offence category but it was acknowledged that up to this point there had been no experience to report on this category of offender. In fact, it should be noted that prior to the introduction of the Act there was a list of very serious offences for which my consent was required before a juvenile is admitted to the Garda Diversion Programme and the list included the more serious sexual offences. While the Minister is empowered by section 47 of the Act to exclude certain offences from the ambit of the scheme he has not done so. In principle every offence is covered. However, it remains to be seen what attitude will be adopted by the Garda in cases involving very serious offences since admission to the programme must not be inconsistent with the interests of society and the victim.

International research reports that over half of adult sexual offenders admit to having engaged in sexually abusive behaviour in their teenage years<sup>6</sup>. Research in Ireland on this topic found that 21% of perpetrators of confirmed child abuse were juveniles aged 15 or younger<sup>7</sup>. The SAVI Report (2002) estimated that juvenile perpetrators constitute one-third of the sexual abuse of children. For our part the Office is faced with the task of dealing with this category of case and having to make the decision whether or not to prosecute. Ideally juvenile sex offenders are best dealt with by way of suitable treatment or therapy and detention would generally not appear to be the method of choice. It may be added that for a child victim a prosecution is likely to prove traumatic. However, where offenders are not prepared to undergo treatment or fail to do so awkward problems will arise because such offenders clearly pose a risk to other juveniles as well as to themselves. If there is nowhere to send these young people for treatment and no suitable place for them in detention they are likely to re-offend.

A particular problem which can arise is that options based on voluntary willingness to undergo treatment depend on the offender's willingness to admit the offence and cooperate with the treatment programme. This is not always forthcoming, and the result may be that there is no alternative to prosecution. A particular difficulty may arise after the age of criminal responsibility is changed where offenders under the new age of 12

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<sup>6</sup> See Knight, R. and Prentky, R. "Exploring Characteristics for Classifying Juvenile Sex Offenders" in H. E. Barbaree, W. L. Marshall and S. M. Hudson (eds) *The Juvenile Sex Offender*. Guildford Press, 1993 p.46.

<sup>7</sup> O'Reilly, G. and Carr, A. (1999). Child sexual abuse in Ireland: A synthesis of two surveys. *The Irish Journal of Psychology*, 20, 1-14.

are not prepared to admit the wrongdoing and cooperate in treatment programmes. This may require further thought. However, the provisions of section 53 seem to provide an adequate basis to take a child under 12 into care where necessary.

Under the Act the age of criminal responsibility is raised from seven years of age to 12. However this section of the Act has yet to be implemented. This means that for the time being my Office has the power to prosecute a child over seven years of age. In practice prosecution of children under 12 is a rare occurrence and I would only consider doing so where no other reasonable option was open. As a general rule it seems contradictory to have a piece of legislation whose focus is more on rehabilitation and deterrence than on retribution and then continue to allow possible prosecution of a child who is between the ages of seven and twelve. Presumably this section of the Act has not yet been implemented because Health Boards have not yet got the services in place yet to deal with these young children. It is a matter of urgency that this should be done. It is a matter of concern to me that I am still occasionally confronted with the question of whether to prosecute a child who is under 12.

When the Act was at the Bill stage the proposal in the Bill to increase the age of criminal responsibility attracted much comment. The decision to increase the age of responsibility came in the wake of the recommendations contained in the First Report of the Dáil Select Committee who considered that juvenile crime should only be applicable to those criminal acts perpetrated by those between the age of 12 and 18 years of age.<sup>8</sup> That is not to say that children who under 12 cannot do wrong, but rather that the invocation of criminal law is not the appropriate response for such young wrongdoers.

The Act provides under section 111 for parental supervision orders which allow the court to make an order for the supervision of the child's parents where "it is satisfied that a wilful failure of the child's parents to take care of or control the child contributed to the child's criminal behaviour".<sup>9</sup> This part of the Act has not yet been brought into force. It has been the focus of some criticism. Section 113 of the Act allows the Children's Court to impose a fine upon the parents or guardian of the child in cases where it considers

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<sup>8</sup> Dáil Eireann. (1992) First Report of the Select Committee on Crime. Juvenile Justice – Its Causes and Remedies.

<sup>9</sup> Children Act 2001, s.111 (1)

that the failure of the child's parents to take care of or control the child contributed to the child's criminal behaviour<sup>10</sup>. This section is now in force.

This method of making parents responsible for the offending behaviour of their children is really only suitable in cases where children come from homes or family environments where fining the parents or making the parents responsible for them is expected to have some effect on the child's behaviour. Unfortunately in many cases offending children have such extensive experience of the criminal justice system that fining their parents or guardians would not serve as a deterrent to them committing crimes. Some parents are unable to stop their children from coming to the attention of the criminal justice system. Increasingly parents who are unable to control their children come to court seeking State assistance to do so.

In a recent newspaper interview given by Chief Justice Ronan Keane on the current state of the Irish juvenile justice system, he observed from his time on the bench that the dysfunctional family is at the root of an enormous amount of juvenile crime. He also said that the absence of the father's role is an important factor and children are affected badly when there is no settled male figure in their lives.

His view attracted a great deal of publicity, some of it critical. But it is surely beyond argument that the vast majority of children who offend come from families who are unable to cope, have inadequate resources or support, or lack the skills to care for a difficult child. Parenting is a difficult skill even at the best of times. It is hardly surprising that a mother who has to bring up a child on her own faces a more difficult task than a mother who does so with the support of another adult. Of course one good parent is better than two bad ones. But it is not a reflection on the many lone parents who succeed in getting their children through the difficult teenage years to observe that not many children in trouble come from stable family backgrounds where they have the support of two loving parents. Nor is it a reflection on the loving care which almost all single mothers give to their children to observe that a child, and particularly a boy, who is brought up without a suitable male role model, or without the emotional support of a father, suffers a disadvantage. That is not to say, of course that a child who is exposed

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<sup>10</sup> Irish Current Law Statutes Annotated. 01-24.312

to an unsuitable male role model may not be even more disadvantaged still! Of course, in the absence of statistics which would compare the position of children in trouble with that of disadvantaged children generally it is impossible to be absolutely sure about the extent to which this is a factor but my own observations would tend to accord with those of the Chief Justice.

## **RESIDENTIAL AND DETENTION PROVISIONS FOR JUVENILE OFFENDERS**

The Children Act, 2001, whilst an innovative and forward thinking piece of legislation can only go so far to deal with the problem of juvenile offenders in Ireland. Although it is important that we move away from considering detention as the only option for dealing with juvenile offenders, or even as the option of choice, there are cases where when all else has failed it can be the only option. It is a fruitless exercise for those of us who work with juvenile offenders, whether as administrators, carers or lawyers, to ignore the fact that we have some juvenile offenders who are a serious risk to themselves and society and for whom a custodial solution is both appropriate and necessary. There are frequent cases of young offenders up on charges who already have numerous convictions. How can it be acceptable for a young person to be standing before a court with a list of previous convictions that in some cases can run to double figures and close to fifty if not higher?

In those cases it is imperative that there are facilities and centres in operation that can manage and make some effort towards the rehabilitation of the most serious juvenile offender. Part 10 of the Act, which contains provisions for the operation and management of children detention schools and also sets out how those schools should be run, has yet to be implemented. The number of secure places available to detain out of control children remains insufficient. Often there is no facility to place young offenders or they are detained for too short a period to allow for effective intervention. They are then released on bail where they are likely to engage in further criminal behaviour.

There are, therefore, young people involved in very serious offences who are clearly a risk to themselves and others for whom community sanctions are not appropriate.

Detention in children schools may not be a suitable method of dealing with very disruptive young persons as in many cases the young offenders have absconded from the schools or else the schools themselves do not have the room or the facilities to deal with disruptive or anti-social behaviour. For some of these young offenders high security detention is unfortunately required.

All of this has major resource implications. Residential care for out-of-control children does not come cheaply. Non-custodial solutions are not cheap either. They are very labour intensive and take time. Labour and time cost money. But this is one area where we cannot afford to cut corners. If we save a euro now, what will it cost us in ten year's time – ten, twenty, fifty euro? The consequences of money saved now on proper programmes to deal with the cost of out-of-control children will be lives ruined in the future, both the children themselves and of their victims. What price can you put on the life of someone killed by a young joyrider who was allowed to roam free because there was no place for him in a secure unit?

In conclusion, the publication of the report of last year's IASD Conference is a timely and welcome event. The papers represent a snapshot of where the implementation of the Children Act, 2001 now stands. I hope they will act as an impetus to redouble the effort to see this Act in force in its entirety in the near future and that Martin Tansey's vision of a conference in 2008 with the theme – "the Children Act 1908 – 100 years on" does not prove an accurate prophecy.

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