

Anti-Social Behaviour Legislation in Northern Ireland

Review of the Current Legislative Framework

Introduction

The Northern Ireland Commissioner for Children and Young People (NICCY) was created in accordance with 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland. Under Articles 7(2) and (3) of this legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. Under Article 7(4), NICCY has a statutory duty to advise any relevant authority on matters concerning the rights or best interests of children and young persons. The Commissioner's remit includes children and young people from birth up to 18 years, or 21 years, if the young person is disabled or in the care of social services. In carrying out her functions, the Commissioner's paramount consideration is the rights of the child or young person, having particular regard to their wishes and feelings. In exercising her functions, the Commissioner has regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

The Commissioner was pleased to have constructively engaged with officials from the DoJ with regards to this review. NICCY was taken aback by this consultation and was not made aware that the DoJ was considering reviewing the current legislative framework. Also there little account seems to have been taken of the discussions and context leading to passing the Anti-Social Behaviour Order (NI), 2004 order. The issues outlined in opposition to this legislation at that time apply equally today.

The operation of the current legislation for addressing anti-social behaviour in Northern Ireland since its introduction has shown that ASBO's are ineffective in terms of addressing anti-social behaviour and we believe that the development of a similar, punitive legislative approach is a fundamentally flawed.

The UN Committee on the Rights of the Child in its 2008 Concluding Observations following its examination of the UK Government's compliance with the UNCRC stated,

"The Committee is concerned at the restriction imposed on the freedom of movement and peaceful assembly of children by the anti-social behaviour orders

(ASBOs)... as well as by the use of the so called “mosquito devices” and the introduction of the concept of “dispersed zones”

35. The Committee recommends that the State party reconsider the ASBOs as well as other measures such as the mosquito devices insofar as they may violate the rights of children to freedom of movement and peaceful assembly, the enjoyment of which is essential for the children’s development and may only subject to very limited restrictions as enshrined in article 15 of the Convention...

79. The Committee is concerned at the application to children of the Anti-Social Behaviour Orders (ASBOs), which are civil orders posing restrictions on children’s gathering, which may convert into criminal offences in case of their breach. The Committee is further concerned:

a) at the ease of issuing such orders, the broad range of prohibited behaviour and the fact that the breach of an order is a criminal offence with potentially serious consequences;

b) that ASBOs, instead of being a measure in the best interests of children, may in practice contribute to their entry into contact with the criminal justice system;

c) that most children subject to them are from disadvantaged backgrounds.

80. The Committee recommends that the State party conduct an independent review on the ASBOs with a view to abolishing their application to children.”¹

Comments

In paragraph 3.1 of the consultation it is recognised that the definition of anti-social behaviour can be “broad. However there is no acceptance of the fact that such behaviour is described in legislation as

3.1(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself;²

It would have been helpful if there was some discussion with regards to the inherent challenges of such a highly subjective definition. This subjectivity combined with the fact that what is being proposed are civil orders with a lower burden of proof and the admissibility of hearsay and professional evidence, would render these orders and associated proceedings against children as not compliant with Article 6 of the European

¹ Paras 34, 35, 79 and 80 CRC/C/GBR/CO/4

² The Anti-social Behaviour (Northern Ireland) Order 2004

Convention on Human Rights, especially in the context of the distinct blurring of the civil and criminal law. We assume that breaching the conditions of these orders will be a criminal offence and consequently a child will be criminalised in respect of a breach of a civil order which he/she received for behaviour which may not be characterised as criminal (especially in the context of public space protection orders). The incompatibility regarding the use of civil orders that may result with criminal sanctions was very well rehearsed in 2004 and I attach references for your information³

The review document conflates crime and anti-social behaviour where in paragraphs **3.3 – 3.6** it makes contradictory statements with regards to trends and reporting of crime and ASB in NI .

NICCY does not view the decline in the use of legal remedies as a negative and instead welcomes this trend. Paragraph **3.10** raises very significant concerns and NICCY would be grateful if the department can provide further clarification for the assertion that *“commentary from stakeholders indicates that there are limited instant solutions when all other current advice, guidance and diversion strategies have been exhausted”*. We would particularly welcome further information on the identity of the stakeholders and nature of their commentary. The Commissioner also believes that “instant solutions” for children and young people should be used sparingly as interventions must be based on the a clear assessment of the needs of the child and their family.

There is insufficient evidence in the document with regards to the need for additional legislation, the challenges of implementing the part 5 of the Criminal Justice (NI) order, 2008 or the effectiveness of the GB legislation and the need to apply it in Northern Ireland. This lack of information and data makes it difficult for consultees to answer the questions posed.

It is not our intention to address all three proposed orders but do wish to raise concerns with regards to Criminal Behaviour Orders. In the discussion of CBOs there is no recognition that the Youth Justice System in NI has a range of criminal orders which provide for the programmes outlined in the document, particularly to youth conference orders (both diversionary and on conviction) as well as to the period of supervision that a young person on a JJC order is subject to when released. Therefore the Commissioner is unclear as to the merits of another order for young people who have been convicted.

³ <http://www.includeyouth.org/mgmt/resources/include-youth-asbo-submission-march-04.pdf>

Response by the Children’s Law Centre to “Measures to Tackle Anti-Social Behaviour in NI” 30th March 2004. Available from CLC

There also seems to be no understanding of the welcome amendment in 2015 of the Justice (NI) Act, 2002 to incorporate article 3 of the UNCRC (best interests principle) as a core aim of the youth justice system.

“(3) But all such persons and bodies must also—

(a) have the best interests of children as a primary consideration; and

(b) have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development.”⁴

If due consideration had been given to this duty by the department it is likely that the provision outlined in paragraph 5.8 to consider publicising a CBO would be dismissed as not appropriate in Northern Ireland. The UNCRC is very clear on the issue of a child’s right to privacy and states that:

- *a child shall not be subject to arbitrary or unlawful interference with his or her privacy, family, home (Article 16) and that*
- *the state guarantees “to have his or her privacy fully respected at all stages of the proceedings” (Article 40 (2)(b)(vii)*

One of the greatest children’s rights concerns with regard to the use of ASBOs in Northern Ireland is the fact that there are no mandatory reporting restrictions in such proceedings against a child. NICCY engages with children and young people across NI on a regular basis and, in particular communities, young people have reported not feeling safe, including from sectarian violence and the continued influence of “paramilitaries”. Paramilitary-style shootings and attacks on children under guise of community safety still occur in Northern Ireland hence the development of Northern Ireland Executive’s Tackling Paramilitarism Programme⁵. To consider making a child or young person’s personal information public as the subject of an CBO in the current Northern Ireland context is to identify children to armed gangs with an interest in ‘anti-social behaviour’ which will have potentially grave implications for the child’s safety including a threat to their right to life.

Equality Duties

NICCY has been in correspondence with DoJ with regards to the need to have published and Equality Impact Assessment (EQIA) alongside this Review as the discussion clearly identifies one group of people (namely young people) who are those most likely to be affected by these proposals. The DoJ should have screened this policy and identified the

⁴ <https://www.legislation.gov.uk/nia/2015/9/section/98>

⁵ <https://www.northernireland.gov.uk/articles/executive-programme-tackling-paramilitary-activity-and-organised-crime-0>

clear potential for adverse impact on young, disabled males, given their over representation in the criminal justice system which would have given rise to an EQIA being carried out, including direct consultation with children and young people and a 12 week consultation period. The findings of the EQIA should be used to inform the consultation, not after the consultation where there is no opportunity to influence the proposals. Section 75 is intended to be used as a policy formulation tool. The Equality Commission's, "*Guidance for Implementing Section 75 of the Northern Ireland Act 1998*"⁶ is clear about the stage at which public authorities need to screen policy proposals and carry out EQIA's when required. The Guidance states that,

*"Section 75 is important to policy formulation (new or proposed policies) and policy review (existing policies). It is important that public authorities use the assessment of policies for impact on equality of opportunity, including screening and equality impact assessment, as part of their policy development process, rather than as an afterthought when the policy has been established."*⁷

DoJ approved Equality Scheme also states that,

*"Once a policy is screened and screening has identified that an equality impact assessment is necessary, the Department will carry out the EQIA in accordance with Equality Commission guidance. The equality impact assessment will be carried out as part of the policy development process, before the policy is implemented."*⁸

Section 75 is therefore not intended to be used when policy decisions have been taken, with no regard having been shown to the obligation to have due regard to the need to promote equality of opportunity.

NICCY believes that where policies are developed using section 75 as a policy formulation tool, policies which promote equality of opportunity and mitigate against adverse impact are those which will achieve better outcomes.

We do accept that following prompting by an NGO a young person's version was published and the consultation period extended to 12 weeks.

⁶ April 2010.

⁷, Pg. 13.

⁸ Para 4.19, July 2015.

Conclusion

No evidence has been provided in the consultation document that the current proposals are necessary, particularly given that there is a range of criminal justice legislation already in existence to deal with the issues identified. Where behaviour is not criminal, a criminal justice approach is not necessary. Where behaviour is criminal in nature, the due process and protection of the criminal justice system should be implemented and this will include diversion, restorative approaches for example. NICCY believes that the use of a criminal justice legislative response to the behaviour of children and young people, without taking full and adequate cognisance of the criminal justice system, not least with regard to the due process of the law and the checks and balances contained within it is a breach of Article 40 of the UNCRC and other international children's rights standards and Article 6 of the European Convention on Human Rights (ECHR).

It is also clear from the experience of their operation in Northern Ireland and Britain that ASBOs do not work. They have failed to address the issue of anti-social behaviour in communities and do not address the causes of anti-social behaviour, nor do they provide solutions to issues such as poverty, social exclusion and a lack of facilities in communities. The introduction of further civil orders to address anti-social behaviour will not address the causes of this behaviour in communities, which will require a whole community approach which addresses systemic issues. The current proposals will result in the criminalisation of young people, compounding ASB and criminal behaviour, gravely impacting on the community and the young people themselves.

The Commissioner believes that the Government should have learned from the failure of ASBOs to address anti-social behaviour within a Northern Ireland context and develop a policy which recognises the role of young people in society and aims to address the issues behind anti-social behaviour, rather than taking a punitive civil order based approach which, will move the problem of anti-social behaviour on to another area and another estate rather than addressing and fixing the problem.

The Commissioner suggests that evidence is gathered with regards to the relevant issues concerning anti-social behaviour and that a thorough review is undertaken of the efficacy of existing measures and legislation. This information should be then discussed with stakeholders which must include NGOs, communities and children and young people who will be able to advise DoJ as to how to achieve the best a safe community where all respect the law and each other.

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