

Office of the Children's Commissioner:

**A Child Rights Impact Assessment of the
Anti-Social Behaviour, Crime and Policing Bill (parts
1 - 6; part 9)**

June 2013

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Abbreviations

ASBI	Anti-Social Behaviour Injunction
ASBO	Anti-Social Behaviour Order
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CBO	Criminal Behaviour Order
ECHR	European Convention on Human Rights
OCC	Office of the Children's Commissioner for England
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child

Executive Summary

1. This is the Office of the Children's Commissioner's assessment of the likely impact of the Anti-Social Behaviour, Crime and Policing Bill on the realisation on children's rights as set out in the UN Convention on the Rights of the Child (UNCRC)
2. The assessment focuses on two aspects of the Bill: parts 1 – 6 which deal with Anti-social behaviour, and part 9 which addresses forced marriage. It asks whether these measures are likely to be in the best interests of children.

Anti-Social Behaviour (parts 1 – 6)

3. **Children are entitled to a safe and secure environment** where they can grow, learn, play and take part in community life, free from distress or harm.
4. Anti-social behaviour has a disproportionate impact on those living in deprived communities, including on children. **Effective strategies to reduce anti-social behaviour have the potential to enhance children's rights.**
5. The UK government is required by the UNCRC to ensure that children who are in trouble with the law are provided with support to reintegrate into society. There are **serious and long-standing concerns about current mechanisms** for dealing with anti-social behaviour and their impact on children's rights. These concerns form the starting point for our assessment, and are not substantially addressed by the measures in the Bill.
6. The move towards to Civil Injunctions, where **breach would amount to civil contempt but not a criminal offence**, should remove a barrier to children's reintegration into society, and is in keeping with the UNCRC.
7. However, as a result of lower thresholds for the imposition of the **new civil injunction**, and the use of a civil standard of proof, it is likely that there will be a modest increase in the number of children subject to a formal order. Holding children as young as ten to account for their actions in the courts, with no requirement to consider alternative courses of action or the specific circumstances of the child, is **not age appropriate**, and is **not in children's best interests**.
8. The inclusion of **positive requirements** in civil injunctions and criminal behaviour orders may support some children to address their problem behaviour. However, on balance, **positive requirements are likely to make compliance more difficult** for children, leading to more breaches, and increasing the risk that children will receive custodial sentences. It is unclear that funding and support will be available to support positive requirements in practice. **Alternative approaches to securing the support that children and their families need** to turn their behaviour around would be more likely to serve children's best interests.
9. We recognise that, overall, 3 month limits on the length of detention orders for injunctions and their restriction to 14 – 17 year olds is likely to result in shorter average sentences compared to the current regime, with fewer of the youngest children likely to be detained for breaches.

10. Nevertheless, custody should be reserved for only the most dangerous and serious young offenders. **The use of custody as a sanction for breach of orders which do not meet the threshold for criminal prosecution is not in accordance with the UNCRC requirement that children should be imprisoned only for the most serious offences and as a matter of last resort.**
11. The presumption against reporting restrictions in civil injunction and criminal behaviour order proceedings is **in breach of the UNCRC requirement that children in trouble with the law must have their privacy fully respected** at all stages of the proceedings.
12. The impact of the proposed new **dispersal power** is likely to be mixed, with **potential benefits** for some children affected by anti-social behaviour. However, for some children the change may result in **increased vulnerability to violence and/or disproportionate restrictions on their freedom of assembly**, with reduced oversight and monitoring leading to variation between different localities.
13. Provisions on **repossession** of dwelling houses mean that children may be made homeless as the result of the actions of others, or potentially as the ultimate result of behaviour deemed a nuisance and annoying. Homelessness is **detrimental to children's right to an adequate standard of living, to education and health, and their safety**. Children are entitled to enjoy their rights without discrimination, and it is a concern that this provision will largely **apply only to children whose families live in rental accommodation**.

Forced Marriage (part 9)

14. **Forced marriage is a grave violation of children's rights**. It has serious consequences for children's survival and development and for realisation of a wide range of children's convention rights.
15. **Criminalising breaches of Forced Marriage Protection Orders is likely to support children's best interests** since it will make enforcement easier and increase the protection available to children.
16. There is **limited evidence on which to assess the likely impact on children of a creation of an offence of Forced Marriage**. Where children are involved, forced marriage must be understood and addressed as an integral part of child protection policy and practice, and a range of public law measures already exist which make this possible. We recognise the symbolic value of an offence of forced marriage, however, it is not clear how this provision will translate into practical action which is in children's best interests. There are significant concerns about the potential impact of criminalisation on the willingness of children to seek help. Careful monitoring of the impact of the measures in the Bill on children's rights to protection will be required.

1. Introduction

1.1 The Office of the Children's Commissioner

The Office of the Children's Commissioner is a national organisation led by the Children's Commissioner for England, Dr Maggie Atkinson. The post of Children's Commissioner for England was established by the Children Act 2004. The United Nations Convention on the Rights of the Child (UNCRC) underpins and frames all of our work.

The Children's Commissioner has a duty to promote the views and interests of all children in England, in particular those whose voices are least likely to be heard, to the people who make decisions about their lives. She also has a duty to speak on behalf of all children in the UK on non-devolved issues which include immigration, for the whole of the UK, and youth justice, for England and Wales. One of the Children's Commissioner's key functions is encouraging organisations that provide services for children always to operate from the child's perspective.

Under the Children Act 2004 the Children's Commissioner is required both to publish what she finds from talking and listening to children and young people, and to draw national policymakers' and agencies' attention to the particular circumstances of a child or small group of children which should inform both policy and practice.

The Office of the Children's Commissioner (OCC) has a statutory duty to highlight where we believe vulnerable children are not being treated appropriately in accordance with duties established under international and domestic legislation.

Our vision

A society where children and young people's rights are realised, where their views shape decisions made about their lives and they respect the rights of others.

Our mission

We will promote and protect the rights of children in England. We will do this by involving children and young people in our work and ensuring their voices are heard. We will use our statutory powers to undertake inquiries, and our position to engage, advise and influence those making decisions that affect children and young people.

1.2 Introduction to this assessment

This paper presents the Office of the Children’s Commissioner’s child rights impact assessment of Anti Social Behaviour, Crime and Policing Bill (‘the Bill’) which was introduced into Parliament on May 9th 2013.

The purpose of such an assessment is to identify the likely impact of the Bill’s provisions on the promotion and realisation of children’s rights. We assess the Bill against the rights set out in the United Nations Convention on the Rights of the Child (UNCRC); the Human Rights Act 1998, which incorporates provisions of the European Convention on Human Rights (ECHR) into domestic law; and other international human rights obligations.

The UNCRC was ratified by the UK on 16 December 1991. Although it has not been incorporated into domestic law, it has important consequences for the rights of children, since “all domestic legislation has to be construed as far as possible to comply with international obligations”¹. The UK is a state party to the UNCRC and in December 2010 the then Children’s Minister Sarah Teather committed that the Government would give ‘due regard’ to the UNCRC when making new policy and legislation and, in so doing, will always consider the recommendations of the UN Committee on the Rights of the Child.

We also have regard to the interpretative comments of the UN Committee on the Rights of the Child (CRC), and case-law and comments of domestic and international courts and treaty bodies. These include the European guidelines on child-friendly justice, the United Nations Guidelines for the Prevention of Juvenile Delinquency (the ‘Riyadh Guidelines’), and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the ‘Beijing Rules’), all of which are designed to provide states with detailed guidance on meeting their human rights obligations in relation to children involved in the criminal justice system. The section on Forced Marriage also draws on relevant international instruments and guidance which address violence against women and girls.

Childhood is a time of great potential, and of unique vulnerabilities. The UN Convention on the Rights of the Child is the most widely ratified international treaty in history. It sets an ambitious vision for the rights and well-being of all children, and challenges governments and societies to do everything in their power to meet their obligations to children. The OCC’s Child Rights Impact Assessments (CRIAs) reflect the UNCRC’s ambition: we point out potential breaches of the UNCRC, but we also highlight where more could be done to achieve full realisation of children’s rights.

Our Child Rights Assessments aim to draw on the views and experiences of children who are likely to be affected by the measures under consideration. In this assessment, we draw largely on previous consultations and research by our own office and others.

¹ Smith v Secretary of State for Work and Pensions [2006] UKHL 37; [2006] 1 WLR 2024 at [78] per Lady Hale referring to the UNCRC

1.3 Scope of this assessment

The Anti-social Behaviour, Crime and Policing Bill is a complex piece of legislation with important and far-reaching consequences for many different groups of children. This assessment looks at two elements of the Bill with particular relevance for children's rights: parts 1 to 6 which focus on measures to tackle Anti-Social Behaviour, and part 9 which deals with Forced Marriage.

In line with our proposed model for Child Rights Impact Assessments², and with the draft provisions for reforming the OCC, our focus is on considering *'the effect on the rights of children of ... government proposals for legislation'*.³ The assessment considers measures as tabled and does not recommend amendments to the Bill.

The provisions of the Bill will apply to England and Wales. The OCC's remit covers children in England, although we also formally cover non-devolved matters affecting children in other parts of the UK. In this assessment, we draw on data covering England and Wales, although we do not draw out impacts or evidence specific to the Welsh context.

The UNCRC applies only to children and this assessment therefore focuses on under 18's. OCC's remit extends to 18 – 21 year olds who either have a learning disability and/or are care leavers. Our analysis suggests that young adults with these characteristics are likely to be over-represented amongst those subject to anti-social behaviour interventions. The UN Committee on the Rights of the Child *"notes with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception"*,⁴ and encourage the Government to consider appropriate safeguards and support for 18-21 year olds affected by the provisions of this Bill.

² Office of the Children's Commissioner, Proposed Model for Child Rights Impact Assessments, May 2012

³ Reform of the Office of Children's Commissioner: draft legislation, July 2012

⁴ UN Committee on the Rights of the Child, General Comment No. 10 (2007), 'Children's rights in juvenile justice'

Child Rights Impact Assessment: Provisions relating to Anti-Social Behaviour

1. Introduction

This section considers Parts 1 to 6 of the Bill, which include a range of provisions relating to anti-social behaviour. The most important of children's UNCRC rights engaged by these proposals are:

- Article 2: Children's rights apply to all children, whatever their background, and whatever type of family they come from
- Article 3: The best interests of the child must be a primary consideration
- Article 6: The right to life, survival and development
- Article 12: The right of children to express their view and have their views appropriately considered
- Article 15: Every child has the right to meet with other children and to join groups and organisations, as long as this does not stop other people from enjoying their rights
- Article 16: Every child has the right to privacy
- Article 27: Every child has a right to a standard of living that is good enough to meet their needs. The state must provide support where needed, particularly for children's nutrition, clothing and housing.
- Article 37: A child should be arrested only as a last resort and for the shortest possible time
- Article 40: A child accused or guilty of breaking the law must be treated with dignity and respect. They have the right to help from a lawyer and fair trial that takes account of their age or situation. The child's privacy must be respected at all times.

A proportion of children likely to be affected are disabled or at risk of harm; Article 23 (disabled children) and Article 19 (protection from harm) are therefore relevant.

Children's rights are also protected under the European Convention on Human Rights. These provisions engage Article 5 (Right to Liberty), Article 6 (Right to a Fair Trial) Article 8 (Right to a Private and Family Life), and Article 11 (Right to Freedom of Peaceful Assembly and Freedom of Association).

Our assessment also draws on the extensive and authoritative UN guidance designed to help governments meet their obligations as states parties to the UNCRC in the undoubtedly challenging context of juvenile justice.⁵

⁵ Particularly the UN Guidelines for the Prevention of Juvenile Delinquency (the 'Riyadh guidelines'); the UN Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules'); UN

2. Children and Anti-Social Behaviour

2.1 Introduction

Children are entitled to a safe and secure environment where they can learn, play and take part in community life, free from distress or harm. Many children bear the brunt of anti-social behaviour, either because they experience it directly, or because they live in unsafe neighbourhoods and are prevented from going out. Effective strategies to reduce anti-social behaviour have the potential to be rights-enhancing.

Under current arrangements, children account for a high proportion of those subject to anti-social behaviour interventions. In this context, *“protecting the child’s interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.”*⁶ Rights-respecting strategies to address anti-social behaviour must therefore protect victims, whilst ensuring that children who act anti-socially are supported to understand the impact of their behaviour and change for the better.

Existing legislation on anti-social behaviour has been the subject of repeated scrutiny by international treaty bodies, including the UN Committee on the Rights of the Child, the Human Rights Committee (which monitors implementation of ICCPR), and the two recent European Commissioners on Human Rights. All have expressed grave reservations about the law and its implementation, most notably the practice of ‘naming and shaming’ children, and the unnecessary criminalisation of children as young as ten for behaviour which does not meet the threshold for criminal prosecution.

In 2008, the UN Committee on the Rights of the Child argued that Anti-social Behaviour Orders (ASBOs) in the UK do not act in the best interests of children and *‘may in practice contribute to their entry into contact with the criminal justice system’* and recommended that the State Party conduct an independent review on ASBOs with a view to abolishing their application to children.⁷

These concerns remain unaddressed. They form the backdrop for our assessment. The thrust of the Bill is to simplify a complex set of powers into fewer, more flexible instruments. The measures do not, in our opinion, amount to a fundamental reshaping of the way that anti-social behaviour involving children is tackled. There are of course some significant changes and these are highlighted in our assessment. However, the key issues remain the age appropriateness of orders, privacy, and the use of custody as a sanction for breach.

Committee on the Rights of the Child General Comment Number 10 on Children’s rights in Juvenile Justice; and the European Guidelines on Child-Friendly Justice.

⁶ UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of a child to have his or her best interests taken as a primary consideration (art.3, para. 1), 2013

⁷ Committee on the Rights of the Child ‘Concluding Observations: United Kingdom of Great Britain and Northern Ireland’, 2008

2.2 Children as victims

It is difficult to provide reliable figures for children's experience of anti-social behaviour, but children are certainly affected. Children are often reliant on public transport and depend on public spaces such as parks, playgrounds and sports grounds for leisure.

The impact of anti-social behaviour on children varies. Where children live, their age, gender and their background, all have a bearing on their experience. For example: children who live in social-housing, the most deprived areas and in high-crime areas are more likely than their counterparts to perceive teenagers hanging around as a problem.⁸ Girls are much more likely than boys to say they avoided using buses at certain times of day; and children from Black and Minority Ethnic backgrounds are also more likely than White children also say they avoid travelling on buses at certain times of the day because they were worried about their safety or other people causing trouble.⁹ Children may be targeted because of their or their families' identity.

2.3 Children as perpetrators

It is not necessarily easy or accurate to make clear distinctions between children who are victims of anti-social behaviour and those who are perpetrators. They often come from similar backgrounds and localities, and some children are both victims and perpetrators.¹⁰

Children currently make up a high percentage of those subject to anti-social behaviour orders (ASBOs). Between April 1999 and December 2011, 8,160 ASBOs were issued to 10-17 year olds in England and Wales, accounting for 37.5% of all ASBOs.¹¹ However, there has been a steady decline in the number of ASBOs issued to children since 2005.¹²

A high proportion of children breach their ASBOs¹³, and many receive custodial sentences as a result. In 2011, custody was used as a sanction for breach for 10-17 year olds in 38% of breach cases, with an average sentence length of 4.1 months.¹⁴

⁸ Hoare, J. et al 'Children's experience and attitudes towards the police, personal safety and public spaces: Findings from the 2009/10 British Crime Survey interviews with children aged 10 to 15' Home Office Statistical Bulletin, Supplementary Volume 3 to Crime in England and Wales 2009/10. Note that we do not equate 'teenagers hanging around' with anti-social behaviour.

⁹ Ibid.

¹⁰ Crawford, A. et al, 'Research Findings: Anti-Social Behaviour interventions with Young People, University of Leeds, 2012

¹¹ Anti-Social Behaviour Order Statistics - England and Wales 2011

¹² In 2011, there were 375 ASBOs given to 10 – 17 year olds, down from a peak of over 1500 in 2005. Youth Justice Statistics – 2011/12 England and Wales, Youth Justice Board/Ministry of Justice Statistics

¹³ During the period June 2000 to December 2011, children aged 10 to 17 years old accounted for 42% of all ASBO breaches. Younger children were most likely to breach ASBOs: more than 72% of children aged between 10 and 14 years at the time their ASBO was issued were found to have

Children subject to ASBOs tend to be from a highly disadvantaged group, with similar circumstances to other children involved in the youth justice system children. 91% are boys.¹⁵ Many have faced educational difficulty and under-achievement, previous abuse, bereavement and loss, family breakdown and inconsistent supervision or boundary-setting, residence in high-crime neighbourhoods, with few facilities for children their age.¹⁶

There is evidence that a high proportion of young people receiving ASBOs either have mental health problems or an accepted learning difficulty.¹⁷ The Office of the Children's Commissioner's research on neurodisability and young people indicates that generalised learning disability is more prevalent amongst children in the youth justice system with research studies suggesting a prevalence of 23-32%, compared to 2-4% of the general population. Studies of speech and language skills in young offenders in the UK have demonstrated that many have impairment in both receptive and expressive language skills, with incidence rates reported to be as high as 60-90%.¹⁸

Research has found considerable variation between different locations in the proportion of young people receiving ASBOs, and in the speed at which children progress between less and more serious ASB interventions.¹⁹

3. What children say

This section draws on research, evaluations and surveys which have included discussions with children who have been subject to anti-social behaviour interventions. It highlights the importance to children of being listened to and treated fairly, of being clear about the details of an order and the consequences of breaching it, and of getting support to avoid difficult situations and to deal with problems.

Research with children who had received ASBO's found that many lacked a good understanding of the detail of their order. Children would often ignore prohibitions – such as those relating to associating with friends, or going to certain places – if these

breached an ASBO, compared to 66% of 15 to 17 year olds, and just over 50% of adults. All figures from Anti-Social Behaviour Order Statistics - England and Wales 2011.

¹⁴ Between 2000 and December 2011, 4,509 children received custodial sentences for breaches of ASBOs. At 5.9 months, the average sentence received by children for ASBO breaches over this period was significantly longer than the average sentence for adults. All figures from Anti-Social Behaviour Order Statistics - England and Wales 2011.

¹⁵ Anti-Social Behaviour Order Statistics – England and Wales 2011

¹⁶ Solanki et al 'A summary of research into Anti-Social Behaviour Orders given to young people between January 2004 and January 2005', Youth Justice Board, 2006. These findings are echoed by a number of other studies cited in Manders, G. 'The Use of Anti-Social Behaviour Powers with Vulnerable Groups: Some Recent Research', Social Policy and Society, 2010, 9, pp.145-153

¹⁷ British Institute for Brain Injured Children (2007) and Nixon et al (2007) quoted in Manders, G., op.cit.

¹⁸ Hughes, N. et al 'Nobody made the connection: The prevalence of neurodisability in young people who offend', Report for the Office of the Children's Commissioner, 2012

¹⁹ Crawford, A. et al, 2012, op.cit.

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were seen as particularly restrictive. They often did not consider that custody was a 'real' threat or a deterrent.²⁰

Area-specific studies highlight children's responses to what they saw as continuous surveillance and contact with police. Young people in these studies felt resentful and said their views were not taken seriously. Many studies highlight tensions between children's and adults' use of public space.²¹

Other research has examined young people's views about what makes interventions such as Acceptable Behaviour Contracts effective. Priorities for young people included being treated in a fair and respectful way and being listened to; a clear explanation of the details of the contract and the consequences of breaking it; help for the young person to help them change and to avoid difficult situations. Unhelpful interventions included those where requirements were seen as uncertain or unreasonable, or overly punitive (including the threat of eviction) without support to help the young person improve their behaviour.²²

More broadly, a consultation with young people with experience of the criminal justice system highlighted the lack of support for many to help them cope with problems like parental violence and neglect when they were growing up, and widespread distrust of social workers and the police.²³

4. Injunctions to prevent noise and nuisance, and criminal behaviour orders

4.1 What is proposed?

Although there are differences between these two measures, they raise many of the same children's rights issues. They are therefore considered together.

A **civil injunction** can be taken out to prevent anti-social behaviour ('causing nuisance or annoyance') when it is 'just and convenient' (**Part 1**)

- Injunctions can be taken out against children 10-17 years through the youth court.
- They may include positive requirements as well as prohibitions.
- An injunction can be based on a balance of probabilities: the civil standard of proof.
- Injunctions against children cannot be longer than 12 months.
- Breach of the order will be a contempt of court – a civil offence which would not lead to the child having a criminal record.

²⁰ Solanki et al, op cit.

²¹ Goldsmith (2008) and Sadler (2008) cited in Manders, G. 'The Use of Anti-Social Behaviour Powers with Vulnerable Groups: Some Recent Research', *Social Policy and Society*, 2010, 9, pp.145-153

²² Crawford, A. et al, op.cit.

²³ 'What's your story: Young offenders' insights into tackling youth crime and its causes', *User Voice*, 2010

- Children cannot, however, be detained for contempt and fines are difficult to enforce: schedule 2 provides for two orders for children found in breach of injunctions. Children who are found to have breached injunctions can be made subject to a supervision order. Alternatively, children can be given a detention order, but only if they are 14 years or over, for a maximum of three months, and it must be made clear in open court why no other power is appropriate.
- There will be no automatic restrictions on reporting legal proceedings for an injunction where children are involved. The court will be able to restrict publication of information in order to protect a child's identity.

New **Criminal Behaviour Orders** to prevent those convicted of an offence causing harassment, alarm or distress to others (**Part 2**)

- The standard of proof will be 'beyond reasonable doubt'.
- An order can impose positive requirements as well as prohibitions.
- Breach will be a criminal offence.
- Orders made for offenders who are children must be between 1 and 3 years, be reviewed at least every 12 months, with consideration given to the support provided to the child to help them comply with the order.
- There will be no automatic restrictions on reporting legal proceedings for an order or concerning a breach of an order where children are involved. The court will be able to restrict publication of information in order to protect a child's identity. Where a court decides to restrict information about a child where that child has breached an order, it will need to give reasons for doing so.
- The maximum sentence for under-18's convicted of breaching a criminal behaviour order is a custodial sentence of up to 2 years²⁴.

4.2 Likely impacts of the provisions on children

The reforms are intended to ensure that *'professionals have effective powers that are quick, practical and easy to use, provide better protection for victims and communities and act as real deterrents to perpetrators.'*²⁵ It is hard to predict the likely impact of the provisions in practice on levels of anti-social behaviour by children. It is widely accepted that

*"the risk factors for offending are common to a wide range of adverse outcomes, such as mental ill-health and child maltreatment which require comprehensive intervention from a range of services. The solutions to preventing offending lie outside of the youth justice system."*²⁶

²⁴ Two years imprisonment is the maximum penalty available in the youth court

²⁵ Anti-Social Behaviour Crime and Policing Bill, Explanatory Notes, para 13

²⁶ 'Rules of Engagement: Changing the heart of youth justice', The Centre for Social Justice, 2012

Aspects of the Bill are likely (other things being equal) to lead to modest increases in the number of children being subject to civil injunctions,²⁷ more breaches of orders and injunctions, and more children being sent to custody. They include:

- (i) the grounds of the new civil injunction - 'preventing nuisance and annoyance' and that it is 'just and convenient' – constitute a lower threshold than that for current anti-social behaviour orders.²⁸
- (ii) A civil injunction can be made on the basis of the balance of probabilities. This is a weaker test than currently in place for ASBOs²⁹ which are subject to a 'heightened civil standard' of proof. Like ASBO's, the new provisions allow the use of hearsay evidence.
- (iii) The inclusion of **positive requirements** in civil injunctions and criminal behaviour orders may support some children to address their problem behaviour. However, they are also likely to make compliance harder for children, resulting in more breaches. Children with learning disabilities, communication difficulties, mental health problems and low literacy have difficulty understanding what is expected of them, and what will happen if they fail to comply.³⁰ Children may lack parental support to ensure they stick to positive requirements. Take-up of Individual Support Orders at present is limited, and many have questioned whether take-up of the new requirements will be significant.³¹ Access to suitable support locally is already highly variable,³² and is likely to be limited by current budgetary pressures, which are reducing levels of youth service provision and positive activities,³³ with the greatest reductions focused on disadvantaged localities with high levels of anti-social behaviour.^{34 35}

²⁷ The Home Office impact assessment argues plausibly that numbers of Criminal Behaviour Orders are likely to follow current downward trends for ASBOs on conviction, and we agree with this assessment, particularly because the court will in future only be able to impose CBOs with an application by the prosecution. Home Office: Criminal Behaviour Order, Injunction and Dispersal Powers Impact Assessment, May 2013

²⁸ The criteria for ASBOs are used where someone has acted "in a manner that cause of was likely to cause harassment, alarm or distress.". The criteria for the new civil injunction mirrors that of the current Anti Social Behaviour Injunction, previously available only for adults.

²⁹ Strickland P. 'Anti Social Behaviour – The Government's Proposals' House of Commons Library, August 2012

³⁰ Talbot J., 'Seen and Heard : Supporting Vulnerable Children in the Youth Justice System ', Prison Reform Trust, 2010

³¹ Ireland, S. 'Not moving beyond the ASBO', Justice Journal, 2011

³² Crawford et al, 2012, op.cit.

³³ A number of studies have found that youth services have been significantly impacted by local authority cuts, including Family and Parenting Institute 'Families on the Front Line? Local spending on children's services in austerity', 2012; Action for Children's 2012 Red Book; and Hastings, A. Bramley, G., Bailey, N. and Watkins, D. 'Serving Deprived Communities in a recession', January 2012

³⁴ Hastings, A. Bramley, G., Bailey, N. and Watkins, D. 'Serving Deprived Communities in a recession', January 2012 conclude that the overall impact of cuts to local authority budgets appears to be very adverse indeed for more urban and deprived authorities and relatively modest for relatively affluent suburban areas.

³⁵ The risk that resources might not be available to support positive requirements was also noted by the Justice Select Committee in its inquiry report 'Youth Justice', March 2013, para. 68

4.3 Likely impacts on children's rights

This section highlights four ways that Parts 1 and 2 of the Bill are likely to impact on the realisation of children's rights: on the child's right to have their best interests considered in light of their maturity; on children's rights for custody to be a measure of last resort; on children's right to privacy; and on children's right to express their views and for these to be listened to.

4.3.1 *Best interests of the child and age-appropriateness*

The use of formal orders for children as young as ten years, with no requirement to consider children's best interests, specific needs or learning difficulties, or to demonstrate that all possible alternative routes for addressing problem behaviour have been considered, is **not age appropriate and is in breach of the UNCRC requirement that children's best interests must be a primary consideration in decisions affecting them.**

The UN Committee on the Rights of the Child explains that *"children differ from adults in their physical and psychological development, and their emotional and educational needs"* and that this is the basis *"for the lesser culpability of children in conflict with the law"* and explains why *"the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice."*³⁶

States should undertake a range of steps to prevent juvenile delinquency (set out in detailed in the 'Riyadh guidelines'). In the case of individual children, Council of Europe guidelines recommend that

*"Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child's best interests."*³⁷

Council of Europe guidelines on child-friendly justice require that

*"Measures and sanctions for children in conflict with the law should always be constructive and individualised responses to the committed acts, bearing in mind the principle of proportionality, the child's age, physical and mental well-being and development and the circumstances of the case."*³⁸

New insights from neuroscience show that the parts of the brain responsible for regulating behaviour continue developing until the age of at least 20 years, with large differences between individuals. Risk-taking behaviour associated with adolescence is thought to be linked to the imbalance between the development of parts of the

³⁶ UN Committee on the Rights of the Child, General Comment No. 10 (2007), 'Children's rights in juvenile justice'

³⁷ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice B(24)

³⁸ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, E(82)

brain linked to reward and emotional processing which develop in early adolescent, and parts of the brain which guide behaviour and develop much later.³⁹

The minimum age of criminal responsibility in England is one of the lowest in Europe. In May 2013, the UN Committee against Torture commented

“The Committee remains concerned ... that criminal responsibility starts at the age of 10 years in England, Wales and Northern Ireland and regrets the State party’s reluctance to raise it despite the call of more than 50 organizations, charities and experts in December 2012 and the repeated recommendations made by the Committee on the Rights of the Child.”⁴⁰

Aspects of the Bill **do reflect an appreciation of the distinct needs of children:**

- (i) all cases involving children will be dealt with by the youth court
- (ii) there will be a requirement to consult with the relevant Youth Offending Team where a civil injunction or criminal behaviour is to be granted against a child
- (iii) injunctions and orders for children will have specific, and shorter durations when applied to children
- (iv) criminal behaviour orders for children will be reviewed every 12 months
- (v) the inclusion of positive requirements provides a potential avenue for addressing problem behaviour and reintegrating the child into society – although in its current form, this measure may also result in more children breaching orders

Additionally, neither a civil injunctions itself or a breach will lead to a criminal record for a child or adult. This is a welcome shift which is in children’s interests.

Nevertheless, **the measures overall are not age appropriate**, particularly for younger children, and are therefore **not in children’s best interests**.

- (i) Injunctions and orders will be available for all children over 10 years: using formal orders to hold children to account for their behaviour in the same way as adults.
- (ii) The Bill effectively extends the provisions of the old ASBI (which was only used against adults) to children (the new civil injunction can be used against anyone over 10 years).⁴¹ The prospect of children as young as ten becoming engaged in the justice system through the civil injunction process as a result of broadly defined ‘nuisance or annoyance’ is not one that is in children’s best interests.

³⁹ The Royal Society ‘Neuroscience and the law’, December 2011

⁴⁰ Committee against Torture, Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013)

⁴¹ The UN Committee is clear that “a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable”.

- (iii) The provisions contain no requirement for the courts to consider the best interests or the individual circumstances (for example, learning difficulties) of the child.
- (iv) There is no requirement to review whether the objectives of preventing harm could have been achieved by other interventions, and therefore few apparent incentives to pursue informal avenues in order to tackle problem behaviour.
- (v) The stipulation of a minimum length of 1 year for Criminal Behaviour Orders does not comply with the requirement that measures should be tailored to the individual child, and proportionate to the severity of the offence.

4.3.2 Breach, sanctions and the use of custody

Recent years have seen positive progress in reducing the number of children in custody in England and Wales. Custodial sentences should be reserved for only the most dangerous and serious young offenders. **The use of custody as a sanction for breach of orders is not in accordance with the UNCRC requirement that children should be imprisoned only for the most serious offences and as a matter of last resort.**

The UNCRC obliges the UK as a state party to ensure that

“The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”. (UNCRC Article 37) and that

“Children should only be imprisoned for the most serious offences “
(UNCRC Article 40)

Detention of children – even for a short time - disrupts children’s education and development and has long-term and lasting consequences. Detailed longitudinal research involving 4,100 children and young people concluded that the further enmeshed into the formal criminal justice system that children become, the more harm is done and the less likely they are to desist from offending.⁴² Children released from custody have very high re-offending rates: one-year reoffending rates in 2010/11 were 72.6% for children leaving the youth secure estate.⁴³

The Bill does establish **some limits on the use of custody;**

- (i) Courts may not make detention orders in respect of children under 14 years who are found to have breached civil injunctions (currently children as young as 12 years can and do receive custodial sentences for breach of standalone ASBOs)

⁴² Maara L and McVie S, Youth Justice? The impact of system contact on patterns of desistance from offending. *European Journal of Criminology*, 4 (3) 315—45.2007

⁴³ Youth Justice Statistics – 2011/12 England and Wales, Youth Justice Board/Ministry of Justice Statistics

- (ii) the court can only make a detention order for breach of civil injunctions when is satisfied that no other power is appropriate, and must explain this decision in open court
- (iii) the maximum sentence for breach of a civil injunction by a child is 3 months (the maximum sentence for breach of a standalone ASBO is currently 5 years)

However, it will be possible for 14 – 17 year olds to be given a custodial sentence of up to 3 months for breaching a Civil Injunction relating to behaviour causing ‘nuisance and annoyance’, and for 10 – 17 year olds to receive custodial sentences of up to 2 years for breach of a Criminal Behaviour Order. As we have seen, there are features of the Bill which have the effect of lowering the threshold for an injunction, and of making breaches more likely. There is a very real danger that the number of children given custodial sentences will increase as a result, although fewer of these are likely to be under 14 years, and sentences are likely to be shorter.

In addition to custody, the Bill provides for supervision orders for children who breach civil injunctions. These can include a number of demanding requirements including curfews, specified activities, electronic monitoring and supervision. None of these sanctions can be imposed on adults who breach civil injunctions.

4.3.3 The right to privacy

The Bill does not address serious and widespread concerns about the rights of children subject to anti-social behaviour interventions to privacy and therefore it does not accord with the requirements of the UNCRC.

The UNCRC requires that a child accused of, or recognised as having infringed the penal law must

“ ... have his or her privacy fully respected at all stages of the proceedings.”
(UNCRC Article 40)

Both the UN Committee on the Rights of the Child and the Human Rights Committee have expressed grave concerns in the past about the privacy of children subject to Anti-Social Behaviour Orders

*“the State party has not taken sufficient measures to protect children, notably those subject to ASBOs, from negative media representation and public ‘naming and shaming.’”*⁴⁴

*“the State party should ensure that ... the privacy rights of children and adults subject to ASBOs are respected.”*⁴⁵

⁴⁴ Committee on the Rights of the Child ‘Concluding Observations: United Kingdom of Great Britain and Northern Ireland’, 2008

⁴⁵ Human Rights Committee, ‘Concluding Observations: United Kingdom of Great Britain and Northern Ireland’, 2008

The UK's most recent report on implementation of ICCPR⁴⁶ highlights the current reform of Anti-Social Behaviour measures as its response to this recommendation: but the Bill does not fully address the issues raised by the Human Rights Committee, or by successive Commissioners for Human Rights.⁴⁷

Waiving the automatic restriction on reporting legal proceedings in relation to someone aged under 18 (section 49 of the Children and Young Persons Act 1933) - for both injunction proceedings and criminal behaviour order proceedings – is inconsistent with the requirement of both Article 16 of the UNCRC, and Article 40 (which deals with the privacy of children in the juvenile justice system).

For breaches of a Criminal Behaviour Order presumption of anonymity does not exist, although the court has the power to restrict the reporting of proceedings.⁴⁸ This is likely to mean that a child effectively loses their anonymity in relation to the criminal offence to which the Criminal Behaviour Order is linked.⁴⁹

4.3.4 The right to be heard

There is limited reference in the Bill to the need to listen to the views of children during or prior to proceedings. **The lack of focus on children's right to be heard in judicial proceedings falls short of the standards set out in the UNCRC.**

The UNCRC requires that a child is provided with the opportunity to be heard in any judicial or administrative proceedings affecting them, either directly or through a representative (Article 12), and that children who are accused of infringing the law are able to effectively participate in the trial, including through appropriate assistance which is free of charge (Article 40).

The explanatory notes to the Bill suggest that guidance will recommend that children who are subject to criminal behaviour order proceedings are given a chance to express their views.⁵⁰ However there is no reference to children's right to be heard in civil injunction proceedings.

A significant percentage of children involved in these proceedings are likely to have learning disabilities and/or speech and communication difficulties. Ensuring they are able to have an effective voice in proceedings might require special assistance. Concerns have been voiced in the past about the effectiveness of youth courts in recognising and addressing learning disabilities.⁵¹ However there is no specific provision in the Bill to address this.

⁴⁶ International Covenant on Civil and Political Rights Seventh Periodic Report from the United Kingdom, the British Overseas Territories, the Crown Dependencies, December 2012

⁴⁷ For example, memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Rights of the child with focus on juvenile justice, Strasbourg, 17 October 2008

⁴⁸ Under section 45 Youth Justice and Criminal Evidence Act 1999

⁴⁹ under s49 C&YPA 1933 they must remain anonymous for the original criminal offence

⁵⁰ Anti-Social Behaviour, Crime and Policing Bill: Explanatory Notes, 2013, para.112

⁵¹ HMICA 2007 Thematic inspection of Youth Court, quoted in Yates and Fyson op.cit.

5. Dispersal powers

5.1 What is proposed?

Part 3 of the Bill introduces a new general dispersal power which would replace several existing powers.⁵² In summary -

- Under these provisions, constables and Police Community Support Officers can issue a dispersal direction to anybody over 10 years to leave a specific area and not return for up to 48 hours. The order must be authorised by a police officer of at least the rank of inspector.
- A person who does not comply with the dispersal order can be imprisoned for up to 3 months, and/or fined.
- The provisions also retain existing powers which allow the police to return anyone they think is under 16 years to their home or a place of safety
- There are powers to confiscate items which are believed to be linked to anti-social behaviour (these are largely new powers, currently only available in relation to alcohol in controlled drinking zones)

Taken together, these changes will result in a more flexible power, with wider application to any area, lower thresholds for use, and without the same oversight structures as the current powers.

5.2 Likely impacts on children's rights

The impact of the introduction of the new dispersal power is likely to be mixed, with **potential benefits for some children affected by anti-social behaviour in public places**. However, for some children it may result in **a risk of increased vulnerability to violence and/or disproportionate restrictions on their freedom of assembly**.

Under the UNCRC, governments are required recognise children's right to freedom of assembly

- “1. States Parties recognise the rights of the child to freedom of association and to freedom of peaceful assembly.*
- 2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others”.* (UNCRC Article 15)

⁵²The current power includes that in the Anti Social Behaviour Act 2003, (pt. 4) which allows a senior police officer to issue an authorisation for children under 16 to be dispersed in a locality if they believe that the children's behaviour or presence has resulted in or is likely to result in intimidation, harassment, alarm or distress.

In its examination of the UK in 2008, the UN Committee on the Rights of the Child raised concerns about the use of ‘dispersal zones’ (as well as other measures) *“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 be subject to very limited restrictions as enshrined in article 15 of the Convention.”*⁵³

The UN Committee on the Rights of the Child is also clear on the need to focus on the welfare and protection of the child

*“... behaviour such as vagrancy, roaming the streets or runaways should be dealt with through the implementation of child protective measures, including effective support for parents and/or other caregivers and measures which address the root causes of this behaviour”*⁵⁴

Children use public space to travel, to socialise and for leisure, and there is a strong possibility that they will be affected by greater use of dispersal powers.

As we have seen, fairness and proportionality are viewed as very important by children and young people. Current arrangements for the authorisation of dispersal orders require joint working by local agencies and consideration of evidence for an order, alternative options and long-term approaches to diversion.⁵⁵ The Government’s impact assessment notes that a *“key benefit of removing the requirement to designate an area (a “Dispersal Zone”) in advance is that there is no longer the need to go through a process of gathering evidence of “serious and persistent” anti-social behaviour and getting the agreement of the local authority.*⁵⁶

The very wide discretion given to police in relation to the new power, the possibility that ‘locality’ may be defined very broadly causing real inconvenience to children who rely on walking and public transport, combined with the power to confiscate property, may contribute to greater perceptions of unfairness, with localised accountability and monitoring arrangements providing children with few opportunities for redress.

Dispersal orders have in the past sometimes resulted in children moving to locations where they are less safe, or to the displacement of anti-social behaviour to other areas.⁵⁷ There is a risk that reduced oversight may result in children and communities becoming more vulnerable as they move to other areas with little involvement of other services. Additionally, the OCC’s work on sexual exploitation⁵⁸

⁵³ UN Committee on the Rights of the Child ‘Concluding Observations: United Kingdom of Great Britain and Northern Ireland’, 2008

⁵⁴ UN Committee on the Rights of the Child, General Comment number 10 (2007), Children’s Rights in Juvenile Justice

⁵⁵ Lister and Crawford, quoted in Manders, op.cit.

⁵⁶ Home Office, Community Protection Notice, Community Protection Order and Community Trigger Impact Assessment, May 2013

⁵⁷ Lister and Crawford, op.cit.

⁵⁸ Office of the Children’s Commissioner, ‘Inquiry into Child Sexual Exploitation in Gangs and Groups, Interim Report’, 2012

has highlighted that children who are being sexually exploited, or those within street gangs, may be required to be in certain public spaces by those who are abusing/controlling them. Unless police are aware of these risks and able to respond effectively to protect children, there is a possibility that dispersal powers could result in escalating risk to children.

The power to return children under 16 years home or to a place of safety has potential to support children's best interests by removing them from situations where they may be at risk of harm. Inappropriately used, however, there is potential for the power to result in vulnerable children who are on the streets to avoid abusive situations at home being exposed to greater violence, violating UNCRC Article 19 (Governments' duty to ensure that children are protected from all forms of violence, abuse, or neglect). Home Office documentation notes that *"police forces already have safeguarding arrangements in place to ensure that children are not returned to unsafe homes or placed in potentially harmful situations."*⁵⁹

6. Recovery of Possession of Dwelling Houses

Part 5 of the Bill introduces a new absolute ground for possession of secure tenancies (the majority of secure tenants would be in local authority social housing) and assured tenancies (most tenants in the private sector and most tenants of Private Registered Providers and Registered Social Landlords have assured tenancies). This applies where:

- a tenant, a member of their household or a person visiting the property has been convicted of a serious offence;
- a tenant, a member of their household or a person visiting the property has been found to have breached an injunction to prevent nuisance and annoyance, or a criminal behaviour order, or a noise abatement notice or order in relation to the property; or
- the tenant's property has been subject to a closure order for anti-social behaviour for more than 48 hours.

If any one of the conditions is met the courts must grant a possession order.

The Bill clarifies that tenants of public authorities can raise a defence based on their rights under the Human Rights Act 1998, including the defence of proportionality, in possession proceedings⁶⁰.

This Part also introduces a new discretionary ground for possession of secure and assured tenancies so that landlords will also have the power to seek to evict a tenant where they or a member of their household has been convicted for riot related offences anywhere in the UK. The provisions also amend the existing discretionary grounds for possession so that landlords can seek to evict tenants for anti-social

⁵⁹ Home Office, Dispersal Powers Factsheet, May 2013

⁶⁰ Manchester City Council (Respondent) v Pinnock (Appellant), Supreme Court [2010] UKSC 45, On appeal from: [2009] EWCA Civ 852

behaviour directed against them or their staff / contractors outside of the locality of the tenant's property.

6.2 Likely impact on children's rights

Children have a right to grow up in a safe and secure environment, including their immediate neighbourhood. We recognise that children are affected by anti-social behaviour in housing

Nevertheless, there are significant concerns about this proposed measure:

- (i) where **children are in breach** of a civil injunction or criminal behaviour orders: there is a very real possibility of children as young as 10 years old and their family being made homeless as a consequence of original behaviour which was deemed to cause 'nuisance and annoyance'.
- (ii) where **adults or other family members** are convicted of a crime or are in breach of an order or injunction: children may be made homeless as a result of the actions of others
- (iii) this sanction will **only affect children who live in rented accommodation**. The UN Committee on the Rights of the Child is clear that Article 2 (non-discrimination) requires that

"States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of consistent policy and vulnerable groups of children."⁶¹

7. Local involvement and accountability

7.1 What is proposed?

Part 6 of the Bill provides for a local 'community remedy document': a list of possible actions that could be carried out by perpetrators of anti-social behaviour or low level crime, where this is dealt with through an out of court disposal. Victims of low-level crime and anti-social behaviour would have the option of expressing a view about which actions from the list a perpetrator should carry out.

Part 6 also includes provision for a 'community trigger' – a mechanism for victims of persistent anti-social behaviour to request that the relevant bodies undertake a review.

7.2 Likely impacts on children's rights

The UNCRC envisages effective systems of diversion and restorative justice to support the reintegration of children who offend into society whilst protecting public

⁶¹ UN Committee on the Rights of the Child, General Comment No. 10 (2007), 'Children's rights in juvenile justice'

safety. **However, the community remedy provisions do not, as they stand, provide adequate safeguards to protect children’s best interests.**

A community trigger which enables a swift and effective response to the needs of children who are victims of persistent anti-social behaviour would support children’s **rights to protection from all forms of violence** (UNCRC Article 19). As drafted, there is **little in the Bill to ensure the community trigger is a child-friendly mechanism.**

The UNCRC requires governments to put in place measures – ‘diversion’ - to deal with children who break the law without judicial proceedings.

“States shall seek to promote ... Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”

“A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.” (UNCRC Article 40(3) and 40(4))

In principle, therefore, measures which encourage out of court disposals are welcome. However, states are also required to ensure that ‘children’s human rights and legal safeguards are fully respected and protected’. Inter alia, this entails⁶²

- only using diversion where the child freely and voluntarily admits responsibility
- the child must give informed consent in writing to the diversion
- the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed in particular to protect the child from discrimination
- When a child completes the diversion, it should result in a definite and final closure of the case.

Like all decisions taken in the context of juvenile justice, the best interests of the child should be a primary consideration, and *‘the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders’*.⁶³

The community remedy measures as set out in the Bill do not include sufficient safeguards to ensure that the menu of actions includes those which will be appropriate for children of different ages, that police have the appropriate guidance

⁶² UN Committee on the Rights of the Child, General Comment No. 10 (2007), ‘Children’s rights in juvenile justice’

⁶³ Ibid.

and training to identify which actions are likely to support an individual child's rehabilitation, and that children understand and freely consent to this approach.

The localised approach to the development of the community remedy and the absence of national monitoring and oversight of its implementation make it likely that children in different local areas will be treated very differently, and open up the possibility that community remedies will be implemented in a way which is discriminatory or which undermines children's rehabilitation. Since the cost of interventions (for example required attendance on training courses) is to be met by the local PCC, the lack of national standards means there is a high risk that budgetary pressures will restrict the menu of appropriate actions for children.

Where a child is a victim of anti-social behaviour, there are insufficient safeguards to ensure that the child is protected from repeat victimisation as a result of involvement in the process.

A community trigger which enables a swift and effective response to the needs of children who are victims of persistent anti-social behaviour would support children's rights to protection from all forms of violence (UNCRC Article 19). As drafted, however, there is little in the Bill to ensure the trigger is a child-friendly mechanism, and it is difficult to imagine that children who are affected by anti-social behaviour would have the confidence and tenacity to use it.

Child Rights Impact Assessment: Provisions relating to Forced Marriage

1. Introduction

This part of the assessment relates to part 9 of the Bill. Forced marriage – whether of adults or children - is a grave human rights violation. Where forced marriage involves children, the following articles of the UNCRC are engaged -

- Article 2: Children’s rights apply to all children, whatever their background, and whatever type of family they come from.
- Article 3: The best interests of the child must be a primary consideration
- Article 11: Governments must take steps to prevent children being taken out of their own country illegally or being prevented from returning
- Article 12: The right of children to express their view and have their views appropriately considered
- Article 19: Children should be protected from all forms of violence, abuse and neglect by parents or anyone else who looks after them
- Article 24.3: States Parties shall take all effective and appropriate measures with a view to abolishing harmful practices prejudicial to the health of children.
- Article 39: Children who have been neglected, abused or exploited should receive special help. Particular attention should be paid to restoring the health, self-respect and dignity of the child.

Children under the age of 16 years cannot consent to marriage and any marriage of such a child is therefore forced marriage and child abuse.

Children in England and Wales over the age of 16 years can legally marry with the consent of their parents, but remain children and holders of all the rights in the Convention.⁶⁴ Where children have the legal right to marry, Article 12 of the European Convention on Human Rights⁶⁵ provides that ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of that right.’ This entails a right not to marry and for there to be free and full consent to marriage.⁶⁶

Article 3 of the European Convention on Human Rights (prevention of torture) is likely to be engaged where forced marriage involves physical abuse, and in many cases involving emotional abuse or intimidation. The European Court of Human

⁶⁴ CEDAW recommends a minimum age for marriage of 18 years for women and men – General Recommendation No, 21, 1994

⁶⁵ The right to marry is also included in including the Universal Declaration of Human Rights (Article 16 (2)), the International Covenant on Civil and Political Rights (Article 23); the Convention on the Elimination of all forms of Discrimination against Women (Article 16).

⁶⁶ Liberty’s Briefing: Forced Marriage (Civil Protection) 2007

Rights has underlined the principle that states should provide effective protection for children and vulnerable adults, particularly where they should have had knowledge of the abuse, and that victims of domestic abuse could fall within the group of 'vulnerable individuals' entitled to state protection under Article 3. Any legislation must be effective; passing legislation is not in itself sufficient to meet the state's Article 3 obligations.⁶⁷

Article 8 of the European Convention on Human Rights (right to a private and family life) is also likely to be contravened by forced marriage, since it entails a right to bodily integrity and also to psychological integrity.⁶⁸

2011's Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence⁶⁹ enshrines a principle of due diligence: States must take the legislative and other measures necessary to prevent, investigate, punish and provide reparation for acts of violence, as well as to provide protection to the victims. In the area of Forced Marriage (Article 37) the Convention requires the following

"1. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.

*2. Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage is criminalised."*⁷⁰

2. What is proposed?

The definition of forced marriage used by government is

*"A forced marriage is a marriage in which one or both spouses do not (or, in the case of some vulnerable adults, cannot) consent to the marriage but are coerced into it. The coercion can include physical, psychological, financial, sexual and emotional pressure"*⁷¹

Clause 103 of the Bill would create a criminal offence of breaching a Forced Marriage Protection Order, meaning the police would always be able to arrest for a breach of the order, with a maximum penalty of 5 years' imprisonment.

⁶⁷ Choudhry, S. 'Forced marriage: the European Convention on Human Rights and the Human Rights Act 1998' in Gill, A. and Anitha, S. 'Forced Marriage: Introducing a social justice and human rights perspective', 2011

⁶⁸ Choudhry, S. op. cit.

⁶⁹ The drafters of the Convention are also clear that the provisions can be implemented with a view to supporting and protecting boys who experience any of the forms of violence covered by the Convention.

⁷⁰ Note that UK has signed but not yet ratified this convention.

⁷¹ Home Office Forced Marriage Consultation, 2011

Clause 104 would create a new offence of forced marriage, with a maximum penalty of 7 years' imprisonment.

Under current law, forced marriage itself is not a crime, although many of the behaviours which may be used to coerce somebody into a marriage are offences. Forced Marriage Prevention Orders may contain any number of provisions as the court deems necessary to protect an individual who is at risk of forced marriage or who has already been forced into a marriage. A breach of an FMPO order is currently dealt with as a civil contempt of court. Children at risk of being forced into a marriage are also entitled to the statutory protection afforded by the public law aspects of the Children Act 1989.

3. Children affected

There are no reliable figures for the prevalence of forced marriages in England and Wales.⁷² In 2012, the Forced Marriage Unit gave advice or support in relation to a possible forced marriage in 1485 cases: 13% of cases involved victims aged 15 years and under, and 22% involved victims aged 16-17 years.⁷³ 82% of victims were women or girls. A number of victims supported by the unit identified as lesbian, gay, bisexual or transgender, and a significant percentage were disabled.

The majority of victims were reported to be from South Asian backgrounds. However, a significant number of those affected come from a variety of other backgrounds. Because much research, intervention and community action has focused on South Asian communities, many victims from other backgrounds may not recognise their experience as forced marriage and so may not seek assistance.⁷⁴

The number of children protected through Forced Marriage Protection Orders is relatively low. During 2011 (the most recent year for which data was available),⁷⁵ there were 65 applications for Forced Marriage Protection Orders where victims were 17 and under. Once awarded, the number of FMPOs found to be breached is tiny.

⁷² Kazimirski, A. et al 'Forced Marriage – Prevalence and Service Response', NatCen research for Department for Children, Schools and Families, 2009 put the number of reported cases of Forced Marriage in England and Wales at between 5000 and 8000 comprised of around one-third where forced marriages were reported to have taken place, and two-thirds where forced marriage had been threatened. However, it is difficult to verify these figures.

⁷³ Forced Marriage Unit, 2012 Statistics

⁷⁴ Roy, S. et al 'The Missing Link: a joined up approach to addressing harmful practices in London', Report submitted to the Greater London Authority, September 2011; Gill, A. and Anitha, S.

"Introduction" in "Forced Marriage: Introducing a Social Justice and Human Rights Perspective", 2011

⁷⁵ Judicial and Court Statistics 2011, Ministry of Justice

4. Likely impact on children's rights

Forced marriage is itself a grave violation of children's rights and a form of gender-based violence. It is additionally "linked to rape, forced pregnancy, forced child-bearing and other forms of violence. It can also include the withdrawal of a young woman from education which may then impact upon her life opportunities and economic situation".⁷⁶

There is no question that effective action to protect children from forced marriage would address a very serious violation of children's UNCRC rights, in particular by addressing a violation which prevents girls in particular from enjoying their UNCRC rights (Article 2), contributing to children's survival and development (Article 6), ensuring that children's views are heard (Article 12), by protecting them from abuse and violence (Article 19), stopping children being prevented from returning to their country (Article 11), contributing to the abolition of harmful practices prejudicial to the health of children (Article 24.3), and supporting children who are victims of abuse and exploitation (Article 39).

The UN Committee on the Rights of the Child has set out states' obligations to put in place a "holistic child protection system" with "provision of comprehensive and integrated measures" to protect children from violence (including forced marriage): this must include prevention, identification, reporting, referral, investigation, treatment and follow up, as well as judicial involvement.⁷⁷

Significant work has been undertaken to tackle forced marriage in the UK, and there are many excellent examples of good practice. However, this has not so far amounted to a comprehensive approach to prevent forced marriage and to protect and support every child affected.

This assessment focuses on the possible impact of the provisions in the Bill on children, and considers whether – in principle – the specific changes proposed are likely to lead to outcomes which are in children's best interests. The Office of the Children's Commissioner has not undertaken direct work on forced marriage to date, and therefore our evidence base is relatively limited.

However, we consider it likely that the real-life impact of the Bill for children will hinge on how effectively organisations concerned with child protection are able to identify children at risk and provide them with the protection and the practical and emotional support they need. Research has shown that specialist services – including vital support from specialist voluntary sector organisations - for women and girls at risk of forced marriage are patchy.⁷⁸ It has been widely argued that limited service provision, as well as inadequately robust responses from public bodies - notably

⁷⁶ Roy, S. et al 'The Missing Link: a joined up approach to addressing harmful practices in London', Report submitted to the Greater London Authority, September 2011

⁷⁷ Committee on the Rights of the Child, General comment No. 13 (2011), The right of the child to freedom from all forms of violence

⁷⁸ Roy, S. et al, op.cit.

schools and children's social care departments⁷⁹ - in meeting their child protection obligations, is the major block to effective protection for children. Wider measures announced by the government to prevent forced marriage, protect potential victims, and provide support to victims⁸⁰ are therefore integral to the success of any strategy to eliminate this violation of children's rights.

Criminalisation of FMPO breaches

Clause 103 of the Bill provides for a breach of an FMPO to be a criminal offence with an automatic power of arrest. This offers a positive way to strengthen enforcement of the orders, without requiring applicants (in this case, children) to apply back to the court for an arrest warrant, usually against a member of their own family, with whom they are likely to be living. The benefit of an order is that it focuses on protecting a victim or potential victim.

In principle, the change is likely to support the best interests of the child, since it makes enforcement easier and increases the protection available to children.

Criminalisation of Forced Marriage

Clause 104 would create a new offence of forced marriage, with a maximum penalty of 7 years' imprisonment.

International human rights law is clear that states parties must take effective action to tackle violence against children and gender-based violence. The UNCRC requires that states parties

“Review and amend domestic legislation in line with article 19 and its implementation within the holistic framework of the Convention, establishing a comprehensive policy on child rights and ensuring absolute prohibition of all forms of violence against children in all settings and effective and appropriate sanctions against perpetrators”⁸¹

In our view, it is hard to predict with confidence what impact criminalisation would have on the behaviour of victims or perpetrators, or whether the impact would be in children's best interests.

To date, there has not been a comprehensive evaluation of the operation of Forced Marriage Protection Orders, and so it is not clear what the shortcomings are in the FMPO system and how the creation of a new separate criminal offence of forced marriage would address these. There is also little international evidence on which to

⁷⁹ Home Office/Foreign and Commonwealth Office, 'Report on the Implementation of the Multi-agency statutory guidance for dealing with forced Marriage (2008)', 2010; Home Affairs Committee - Eighth Session Report, Forced marriage, 2011

⁸⁰ Home Office, Forced Marriage – A consultation summary of responses, June 2012

⁸¹ UN Committee on the Rights of the Child, General comment No. 13 (2011), The right of the child to freedom from all forms of violence

make an assessment of the relative effectiveness of criminalisation of forced marriage, civil orders, or strategies which rely on existing offences. Recent research across different European countries found a mixture of laws and sanctions, arguing that “the intersection of women’s rights and children’s rights contributes to letting these forms of violence fall between the cracks in state due diligence obligations.”⁸²

For those who support creation of a specific criminal offence of forced marriage with more severe penalties, the provision would ‘speak to the seriousness of the problem’, send a public message to professionals, children and adults that forced marriage is a human rights violation and an offence, encouraging them to identify their experience as a crime, and provide effective avenues for redress for victims.⁸³

However, a number of arguments have been made to suggest that criminalisation of forced marriage would not necessarily have a positive impact on children’s best interests:

- (i) forced marriage involving children is best understood and addressed robustly as a safeguarding and child protection issue, and concerns about forced marriage would reach the threshold of ‘significant harm’ under the provisions of the Children Act 1989.⁸⁴ In practice, there are many challenges to implementation of the law, including the complexities involved where a victim is expected to make claims against family members, and the fact that some forced marriage cases involving children ‘take place on the cusp of private and public law proceedings’.⁸⁵ Nevertheless, a wide range of mechanisms are already available in domestic law to protect children⁸⁶. A comparison of these mechanisms against guidance on legislation against forced marriage and child protection on the UN’s ‘End Violence against Women’ site⁸⁷ suggests that the law in England and Wales addresses nearly all the recommendations relating to child protection.

⁸² Kelly, R. et al ‘Realising Rights: Case studies on state responses to violence against women and children in Europe’, Child and Women Abuse Studies Unit, London Metropolitan University, 2011

⁸³ in Gill, A. and Anitha, S. ‘Introduction’ in ‘Forced Marriage: Introducing a social justice and human rights perspective’, 2011

⁸⁴ Gupta, T. and Sapnara, K. ‘The law, the courts and their effectiveness’, in Gill, A. and Anitha, S. ‘Forced Marriage: Introducing a social justice and human rights perspective’, 2011

⁸⁵ Gupta, T. op.cit.

⁸⁶ These include care and supervision orders for children under 17 years, on application by a local authority (Section 31 of the Children Act 1989); Emergency Protection Orders can be used by police at airports to prevent a child being removed from the UK for a forced marriage (Section 44 of the Children Act); Police have power of entry, and can remove a child to suitable accommodation where they believe a child would otherwise be likely to suffer significant harm (Section 46 of the Children Act); it is an offence for somebody ‘connected with’ a child under 16 to take or send the child out of the UK without appropriate consent (Section 1 of the Child Abduction Act 1984); Child Cruelty by a parent or carer is an offence (Section 1 of the Children and Young Persons Act 1933); various sexual offences can be prosecuted – both for under and over 16 year olds – depending on the circumstances of the case (Sexual Offences Act 2003); 16 – 18 year olds are entitled to protection from relevant criminal offences murder, rape, threatening behaviour, kidnap, abduction, and the Domestic Violence Act 2004; Forced Marriage Protection Orders are civil orders containing provisions as the court deems necessary to protect an individual who is at risk of forced marriage or who has already been forced into a marriage. (Forced Marriage (Civil Protection) Act 2007)

⁸⁷ www.endvawnow.org > Legislation > Forced Marriage > Child Protection

- (ii) Criminalising forced marriage may deter victims – particularly children – from seeking support. Many victims live at home and the perpetrators are, on the whole, members or their immediate and extended family, on whom they are reliant.
- (iii) The evidentiary threshold in criminal cases is higher than in civil cases, and securing convictions will be challenging in many cases, particularly those where coercion is a process which happens over a long period of time.
- (iv) In child protection cases more broadly, criminal prosecutions often run in parallel to care proceedings. It is widely recognised that these are often problematic for children: cases take a long time, may not result in a clear-cut outcome which benefits the victim, and involve giving evidence and cross-examination in court. Where criminal proceedings are taken forward in cases of forced marriage, it will be important to ensure children are listened to and their interests are considered so that they are not traumatised further.
- (v) There are some concerns that criminalisation of forced marriage would further drive the practice underground, potentially resulting in more girls and boys being removed to other countries without warning.

In conclusion, there is limited evidence on which to assess the likely impact on children of a creation of an offence of Forced Marriage. Where children are involved, forced marriage must be understood and addressed as an integral part of child protection policy and practice, and a range of laws already exist which make this possible. We recognise the symbolic value of an offence of forced marriage, however, it is not clear how this provision will translate into practical action which is in children's best interests. There are significant concerns about the impact of criminalisation on the willingness of children to seek help. Careful monitoring of the impact of this change on children will be required.

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Office of the Children's Commissioner: A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill (parts 1 - 6; part 9)