Draft Criminal Justice (NI) Order 2007
Response of the Northern Ireland Human Rights Commission

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,\(^1\) advising on legislative and other measures which ought to be taken to protect human rights,\(^2\) advising on whether a Bill is compatible with human rights\(^3\) and promoting understanding and awareness of the importance of human rights in Northern Ireland.\(^4\) In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding ‘soft law’ standards developed by the human rights bodies.

2. The scope of the draft Order is extremely broad, bringing into Northern Ireland a number of provisions that have existed in England and Wales for some time. The Commission notes, on a general point, with disappointment the lack of information given by the Northern Ireland Office (NIO) as to the impact these provisions have had in England and Wales on human rights protections and indeed as to the effectiveness of the provisions in terms of meeting intended objectives. The provisions engage a number of rights under the European Convention on Human Rights, including Article 3 (the right not to be subjected to torture, inhuman or degrading treatment or punishment), Article 6 (the right to a fair trial) as well as a number of rights enshrined in international human rights treaties to which the UK is a party. These are discussed in

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\(^1\) Northern Ireland Act 1998, s.69(1).
\(^2\) Ibid., s.69(3).
\(^3\) Ibid., s.69(4).
\(^4\) Ibid., s.69(6).
more detail below.

3. The Northern Ireland Office will of course also be aware of the report of the NI Assembly ad hoc Committee on the draft Criminal Justice (NI) Order (the ad hoc Committee) and the Assembly debate. Reference is made to these, where appropriate, below.

Part 2 Sentencing

4. The Commission notes the introduction of new measures for sentencing and assessment of ‘dangerous violent and sexual offenders’ and in particular the proposal to introduce indeterminate custodial sentences for public protection. As a general point on sentencing arrangements, it is important to achieve a balance between deterrence and rehabilitation of offenders. It is vital that the objectives of retribution, deterrence and protection are balanced by the principles, reflected in, for example, Article 10 of the International Covenant on Civil and Political Rights which states that “all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of that person”.

5. The public does of course require protection and it is the state’s duty as fundamental guarantor of human rights to ensure adequate protection to the public from all forms of crime and in this instance from serious and dangerous crime. However, the Commission is concerned about the very concept of indeterminate sentences because they would appear to be punishing people for what they might do as well as what they already have done. The Commission is concerned that the NIO has failed in introducing this legislation, to refer to evidence that indicates how indeterminate custodial sentences are working in England and Wales in terms of protecting the public, reducing the possibility of re-offending whilst of course protecting the fundamental human rights of prisoners as well as victims. The Commission is certainly aware of reports that suggest very strongly the system is not working well in England and Wales.

6. In particular the Commission notes that all the human rights implications of indeterminate sentences become even more acute if they are to be given to children as has been the case in England and Wales. The Commission will not comment on the provisions as they impact on children in great detail but refers the NIO to the concluding observations adopted by the
UN Committee on the Rights of the Child after examination of the UK’s report in 2002. The Committee recommended that the UK should “Ensure the detention of children is used as a measure of last resort and for the shortest appropriate period of time and that children are separated form adults in detention, and encourage the use of alternatives to deprivation of liberty.”

7. The Commission notes what are intended to be extra safeguards in this Order that are not to be found in the Criminal Justice Act 2003, which introduced indeterminate sentencing to England and Wales. For example, the Commission assumes that the minimum two year tariff and the introduction of extended custodial sentences (ECS) are intended to ensure that those prosecuted for fairly minor offences are not subject to an indeterminate custodial sentence.

8. However, even with the minimum two year tariff, the list of specified serious offences for which indeterminate sentence would be given in Schedule 1 of the draft order remains broad. The Commission is concerned about the potential for differential interpretation as to what constitutes a serious offence which may carry a life sentence, an extended custodial sentence or an indeterminate custodial sentence. For example, there is a wide range of offences listed as ‘serious’ in Schedule 1 of the Draft Statutory Instrument. Offences involving ‘riot’, ‘affray’, ‘false imprisonment’ cover a very wide range of offending behaviour with differing degrees of seriousness.

9. Further offences listed in Schedule 1 range from ‘soliciting murder’ and ‘threats to kill’ alongside ‘using chloroform etc. to commit or assist in the committing of any indictable offence’; ‘attempting to choke ... in order to commit or assist in committing an indictable offence’; and ‘endangering the safety of railway passengers’. In Schedule 1 (14) under the Theft Act (Northern Ireland) 1969, an offence consisting of carrying out ‘unlawful damage to a building or anything in it’ is listed as a serious offence.

10. In addition, the assessment of dangerousness as drafted in the Order is vague and has been one of the criticisms of the Criminal Justice Act 2003. The Commission notes the omission in the Order that is found in section 229 (3) of the Criminal Justice Act 2003 under which previous convictions of specified offences mean that the Court must find that the
defendant is dangerous, unless it would be unreasonable to do so. Doing away with the presumption of dangerousness is positive; however the Order’s address of the assessment of dangerousness would appear to leave much to the discretion of the sentencing judge.

11. The explanatory document which accompanies the draft Order states that dangerousness assessments will be based on reports prepared by specialists including probation officers, psychiatrists and psychologists. While the Commission has little doubt that judges will use the legislation as intended (i.e. that only the most serious/dangerous offences are subject to indeterminate sentences) if the legislation is to be enacted, we would like further clarification in it on the assessment of dangerousness. So for example will every pre-sentence report for every defendant consist of information from probation officers, psychiatrists and psychologists – what happens when there is conflicting assessments – what range and level of information and detail will be provided to the court? Will there be a standard format for reports and how will they be compiled? The Commission is concerned that there is an absence of clarity as to whether there will be a consistent assessment process for all cases where an indeterminate sentence is considered.

12. There is strong evidence in England that the introduction of indeterminate sentencing is leading to serious prison overcrowding. This point was made forcibly in the 2005/06 Annual Report of the Her Majesty’s Chief Inspector of Prisons. The Commission is aware that predictions for Northern Ireland’s prison population are very different with some estimates indicating the need for an extra 120 prison places over many years. However, due regard must be given to the obligations under Article 3 of the ECHR which states that “no-one will be subjected to torture or to inhuman or degrading treatment or punishment”. Unsuitable physical and/or mental conditions for prisoners would certainly engage Article 3.

13. The onus placed on prisoners as a result of indeterminate sentencing in England and Wales, to successfully complete certain courses which are designed to redress their behaviour and as a consequence prove they are fit for release has placed substantial burdens on the Prison Service. The Commission is assuming similar requirements will be made of prisoners in

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5 See ad hoc Committee Official Report (Hansard) Evidence by CJI NI, Kit Chivers
Northern Ireland and therefore refers the NIO to two reports of Criminal Justice Inspection: Report of an announced inspection of Magilligan Prison by HM Chief Inspector of Prisons and the Chief Inspector of Criminal Justice in Northern Ireland, 20-24 September 2004 and The Management of Sex Offenders – Follow-up Inspection, November 2007. In the first of these reports and in relation to HMP Maghaberry which accommodates medium to high risk prisoners, insufficient numbers of ‘programme ready’ prisoners delayed the running of sex offender treatment programmes (SOTPs). In relation to Magilligan (which accommodates medium to low risk prisoners), continuing problems were identified in providing an adequate pool of tutors for SOTPs and it was recommended that “the choice of offending behaviour programmes and the number of places available should meet the needs of the prisoner population”.

14. The second report looked at the management of sex offenders⁶ and noted that careful planning is required to deliver extended and indeterminate public protection sentences. Following arrangements in England and Wales whereby the scope of indeterminate sentences was increased, the numbers of prisoners with these sentences almost doubled (i.e. from 5,475 to 9,500). The Report further notes that many of these prisoners have been unable to “access the programmes they need to persuade the Parole Board they no longer represent a danger, leading in turn to human rights challenges in the High Court”.

15. Indeed in a High Court decision⁷ of 31 July 2007, two prisoners won rulings that it was unlawful to hold them when they could not access courses designed to redress their behaviour and so help them to prove they were fit for release. The verdict concluded that there “was a general and systemic failure” in the application of the Indeterminate Sentence for Public Protection. Government is appealing this decision. It is important that steps are taken to ensure that a similar situation should not develop in Northern Ireland. Given that decision and given that the outcome of the appeal lodged by Government is as yet unknown; this Commission has serious concerns regarding the decision to introduce indeterminate sentencing to Northern Ireland at this time. The Commission refers the NIO to the report of the ad hoc Committee which

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⁶ The Management of Sex Offenders – Follow-up Inspection, Criminal Justice Inspection Northern Ireland, November 2007
⁷ Wells-v-Parole Board & Secretary of State for Justice and David Walker-v-Secretary of State for the Home Department
states that the “Prison and Probation Services ensure that all relevant prisoners have access to appropriate basic skills training and behaviour-change programmes; and that the necessary resources should be deployed to facilitate such programmes so that prisoners may prepare themselves to be acceptable for release”.\(^8\) To that recommendation, the Commission would add that if this legislation is to go ahead the necessary resources are needed beforehand to ensure prisoners rights under Articles 3 and 5 (4) (the right to have the lawfulness of detention reviewed) of the ECHR are not compromised.

16. The Commission has consistently noted with concern the numbers of people in need of therapeutic care that end up in state custody. If the legislation is to go ahead despite the reservations it is vital that adequate strategies and resources are in place across all those state agencies that will be involved in seeing out the provisions of the Order. With the benefit of the English experience this pre-planning is even more vital and any responsible Government must learn from that experience before extending the measures to other jurisdictions. Due consideration must be given in advance, of whether the NI Prison Service is, or indeed can ever be equipped to deal with the provisions of the Order in terms of meeting the physical and mental health needs of prisoners who are to be in custody for an indeterminate period AND who have to prove it is safe for them to be released?

**Release on license**

17. The Commission sees no legal or other reason for which certain groups of offenders should be excluded from the possibility of availing of release on license prior to the end of their requisite custodial period (Article 20 of the Draft Order). Release on license lies in the discretion of the Secretary of State and presumably will be subject to risk assessment. The fact that a person belongs to a certain category of prisoners (for example, foreign national prisoners who are liable to removal from the UK) should not be a decisive factor as to whether the person can be released on license.

18. The Commission is particularly concerned that Article 20 of the draft Order singles out foreign nationals liable to removal from the UK as a category of persons who will not have the right to be considered for earlier release. The Commission

sees this provision as potentially discriminatory and therefore engaging Article 14 of the European Convention on Human Rights (the non-discrimination clause).

**Curfews and electronic monitoring**

19. The Commission is concerned about the extent to which curfews and electronic tagging will be used on individuals released on licence and as conditions of bail. These are provided for under Articles 35 – 41 of the draft Order. Such conditions potentially engage a number of rights under the ECHR: Article 5 (the right to liberty), Article 6 (the right to a fair trial), Article 8 (the right to privacy and family life), Article 9 (the right to freedom of thought, conscience and religion), Article 10 (the right to freedom of expression), and Article 11 (the right to freedom of assembly). Where such provisions are made use of it is crucial that this is done proportionately with due regard for the individual’s rights.

**Management of low risk offenders in the community: Supervised Activity Orders**

20. The Commission welcomes the statement made at 1.6 in the Explanatory Document that the proposals are aimed at “ensuring that custody is only used for those offenders who merit it”. As such, it is important that sentencing options involving alternatives to custody are maximised and the creation of Supervised Activity Orders (SAO) as an alternative to custody for fine default is a welcome development.

21. In relation to all prisoners (i.e. male and female), significant numbers are committed to prison for fine default. This point has also been raised in a recent report by the Northern Ireland Affairs Committee into the Northern Ireland Prison Service. Commenting on the high number of fine defaulters receiving a prison sentence as compared to England and Wales, it concluded that “the imprisonment of fine defaulters represents a disproportionate demand on the scarce resources of the Northern Ireland Prison Service”, and SAO’s were viewed as a “good start” to addressing this issue. The Commission has previously highlighted its concerns in this area in relation to women fine defaulters. In its recent report, ‘The Prison Within: the imprisonment of women at Hydebank Wood 2004-06’, it was reported that in ‘Northern Ireland between September 2005 and February 2007, 44 per cent of

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9 First Report of Session 2007-08, Volume 1, at para 37
the women committed to prison were find defaulters’. The report further states that,

*In explaining fine default, it is imperative to consider the poverty and deprivation experienced by many women, alongside addiction to, and/or, dependency on legal or illicit drugs and alcohol. Economic marginalisation impacts heavily on women in conflict with the law, leaving them vulnerable particularly if they have responsibilities as mothers or carers.*

22. The principles of restorative justice should underpin the imposition of a community-based alternative and govern its purpose, effect and obligations. There is a large body of international human rights standards and conventions that support community based restorative justice. These include the UN Standard Minimum Rules for the Administration of Justice (the Beijing Rules); the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules); the EU Framework Decision on Restorative Justice and the Council of Europe Recommendation Concerning Mediation on Restorative Justice; the Council of Europe Recommendation Concerning Mediation in Penal Matters; and the UN Economic and Social Council-endorsed Basic Principles on the use of Restorative Justice Programmes in Criminal Matters (the Basic Principles). As part of the restorative process, activities specified in the Order should reflect, wherever possible, the principles of ‘repairing harm’ and giving something back to communities where harm has been done. Community based activities should ensure the safety of offenders within their communities and should respect the inherent dignity of the offender.

23. Schedule 3.1(a) states that a supervised activity order will only be made if arrangements exist for “persons who reside in the petty sessions district in which the offender resides or will reside to carry out the requirements of a supervised activity order”. This may potentially lead to a situation where an offender does not have the opportunity to participate in a SAO through no fault of their own, but simply because no suitable arrangements exist in their locality. Arrangements must be put in place, and, where necessary, additional resources identified, to ensure that there is access to suitable supervised activities throughout Northern Ireland.
24. The challenge for penal policy in Northern Ireland is to make alternatives to custody a reality and to restrict custody only for those who merit it. As part of a commitment to ensuring that community sentences are given where appropriate, more training initiatives should be in place to increase the awareness of sentencers of the benefits of non-custodial sentences for fine default offences.

25. The UK commitment to establishing the ‘Reducing Re-offending Inter-Ministerial Group’ (IMG) to take forward the recommendations made by Baroness Corston in her ‘Review of women with Particular Vulnerabilities in the Criminal Justice System’ should provide an impetus to ensuring that sentencers are better informed regarding the benefits of community sentences for women. Amongst the many recommendations in the Corston Report is that “Community sentences for non-violent women offenders should be the norm” and that “community sentences must be designed to take account of women’s particular vulnerabilities and domestic and childcare commitments”.

Part 5 Miscellaneous and Supplementary

26. The Commission has concerns regarding three proposals in Part V of the draft Order. They are:

- The Test Purchase Power (Article 66)

- The extension of live links to court for sentencing and appeals and for vulnerable defendants (Articles 78-82); and

- The proposed extension of the existing power to make interim ASBOs so that an interim order may be made on an ex parte or no notice basis (Article 92)

27. Common to all three is, in the Commission’s view, the failure of the NIO to make out any adequate case for their introduction through statistical or other reasoned policy argument. Given the deficiencies of the Order in Council mechanism we would argue that an enhanced policy rationale is imperative in an Order of this complexity.

28. Given the Commission’s concerns regarding the potential adverse human rights impact of these proposals it is unfortunate that insufficient detail is available at this stage as to the operation in practice of these powers.
Test Purchase Power

29. Article 66 provides for a “test purchase power” which inserts a new power (Article 60(a)) into existing licensing law (the Licensing (Northern Ireland) Order 1996). The test purchase power allows police officers to identify bars and off licences selling alcohol to minors and to then “set up” the commission of an offence by arranging for a minor to purchase alcohol.

30. There are two conditions to the use of the power: “the constable is satisfied that all reasonable steps have been or will be taken to avoid any risk to the welfare of that person.” Article 60(A)(2)(a); and “a parent of that person has consented in writing to his being sent into those premises for that purpose.” Article 60(A)(2)(b)

31. The Commission has grave concerns about the test purchase power and its position is firmly grounded in international human rights law. The United Nations Convention on the Rights of the Child, by which the United Kingdom is bound, states

- in all actions concerning children the best interests of the child shall be a primary consideration (Article 3);
- no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation (Article 16);
- States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare (Article 36).

32. The Commission does not consider it to be in the best interests of any child to be used to promote the commission of a criminal offence in an entrapment situation. What possible benefit can there be to the child to be involved in such a way?

33. Moreover, the Commission does not consider that the need for written parental consent (Article 60(A)(2)(b)) can meet the requirement in relation to the best interests of the child. In what circumstance could it be in the child’s best interest for the parent to consent on their behalf?
34. No information has been provided in the NIO Explanatory Document as to how the police will identify the child they are to use to entrap the licensee. The concern is that it will be the vulnerable child who is known to the police who is approached and asked to purchase alcohol under the test purchase power in order to avoid a criminal prosecution or perhaps an Anti-Social Behaviour Order. What other possible inducement might there be for a parent to consent to their child being used in this way if not to avoid some sort of prosecution?

35. The Commission is very concerned about the risks to the safety and welfare of the child who does assist the police in the entrapment of a licensee. It is not difficult to see how the child’s involvement might well lead to threats of, or risk of, physical violence either from those who have been charged as a result of their involvement or from those in the community who may become aware of the child’s assistance to the police. No information is provided in the NIO Explanatory Document as to any possible safeguards which could be put in place nor as to what follow up or evaluation might be undertaken with the child involved. There is also no information as to whether the child will be expected to testify in court and if so what protections will be made available at that stage. The NIO Equality Screening Forms which accompany the draft order state: "To ensure the protection of children taking part in the test purchase operations will follow best practice guidance on test purchasing.” (emphasis added) Unfortunately no information is provided as to what “best practice guidance on test purchasing” might be.

36. It is to be assumed that the police would only seek to use such a power where complaints from the public or on the beat policing had identified problems with the sale of alcohol to minors in particular licensed premises The explanatory document which accompanies the draft Order fails to make clear whether the power is intended for use in such targeted policing operations. If that is the intention, the Commission does not understand why it is necessary for the police to have recourse to this power rather than mounting their own undercover operations in order to witness the commission of an offence. Again the Explanatory Document provides no rationale for the introduction of this power.

37. The NIO have concluded that this power will have no adverse differential impact between the various section 75 groups. The NIO Equality Screening Forms which accompany the draft order state: "The people affected by the proposal will be those
who sell alcohol to children, children who wish to purchase alcohol and children who take part in the test purchase operation. The existing offences and penalties for minors and license holders and their staff or agents will not change so there will be no differential impact.”

38. The Commission does not agree with this statement as there is a very clear potential adverse impact on the child who is asked to take part in the test purchase power. Given the very obvious risks to individual children together with the clear engagement of the UK’s commitments under international human rights law, the Commission cannot endorse the NIO’s conclusion that this power ought not to be submitted to a full Equality Impact Assessment under Section 75 of the Northern Ireland Act 1998.

39. While the ad hoc Committee on balance, supported the proposal, this support was, however, subject to an Equality Impact Assessment being carried out. The Committee endorsed the Commission’s concerns in this regard and recommended: “that the NIO should undertake an Equality Impact Assessment on the test purchase scheme taking account of the views and concerns raised by the NIHRC.”

**Live Links**

40. At present, live links can be used for remand hearings for defendants in custody awaiting trial. The draft order proposes to extend the power to substitute personal attendance by the defendant in the court by live link to prison to two further categories of proceedings: sentencing hearings (article 80) and appeals under the Criminal Appeal Act (article 82).

41. In respect of sentencing hearings the direction of appearance by live link can only be made by the court with the consent of the offender. This is not the case in respect of a direction relating to a criminal appeal in the Court of Appeal. While the live link direction cannot be made without the parties to the appeal having an opportunity to make representations, the consent of the offender is not required. A defendant could consequently be denied the opportunity to be present in court in person for their own appeal contrary to their wishes.

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10 P.30, paragraph 2.1
42. The ad hoc Committee endorsed the concerns of the Commission in its recent report recommending: "that the consent of the offender provision should be extended to any live link direction given in the Court of Appeal."12

43. The Commission has recently attended Belfast Magistrates Court in order to observe the operation of the existing live links for remand hearings for those in custody. In the Commission’s view, the barriers for the average defendant to fully understand and participate in the proceedings relating to them are very starkly and exponentially increased by the use of live links.

44. Present in court are the judge, the prosecution and defence, probation, police, court staff, press and unconnected members of the public in the public gallery: everyone with the exception of the person most directly affected by the proceedings.

45. Extension of the existing live links to further categories of criminal proceedings has the potential to substitute long standing safeguards associated with the right to a fair trial with what could be considered some sort of appalling video game-justice by remote control. One of the functions of sentencing and appeal hearings is to allow a defendant to face the court and take responsibility for their actions. For certain defendants, one could see how the physical separation from the court would be attractive and increase their ability to detach themselves from the proceedings and avoid accepting responsibility for their actions.

46. Again little is provided by way of rationale for this important interference with the long standing safeguards surrounding the right to a fair trial. In relation to the extension of live links to appeals before the Court of Criminal Appeal the NIO cite two reasons: improved security of prisoners and reduction of delays in court hearings relating to transport of prisoners to the Court of Appeal. No statistics are provided regarding either breaches of prisoner security nor as to court delays resulting from the transportation of prisoners.

**Vulnerable Accused**

47. In addition, Article 81 deals with conditions to be met for the giving of evidence by live link by the vulnerable accused. The

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Commission welcomes the fact that the live link direction in proceedings relating to the vulnerable accused can only be made on the application of the accused. The definition of vulnerable accused detailed in Article 21A.

48. The NIO Equality Screening Forms which accompany the draft Order provide the following rationale for the introduction of this power: "This provision brings us into compliance with the obligations under the European Court of Human Rights. The judgment of the ECtHR in the case of SC v UK found that an 11 year old with a cognitive age of only 6-8 years had not had a fair trial because he could not effectively participate in the trial as he had a very low understanding about the proceedings and their consequences. Giving evidence via a live link from a comfortable room in the courthouse, away from the formality of the courtroom itself, may be less distressing and difficult than giving evidence in the courtroom. The provision will ensure that a vulnerable defendant receives a fair trial by allowing them to fully and effectively participate in the proceedings."

49. The Commission finds the NIO conclusion that this proposal brings the state into compliance with its obligations under the European Convention on Human Rights extremely problematic.

50. The case of SC v the UK (European Court of Human Rights, 15 June 2004) involved an 11 year-old child whose Counsel at the pre-trial hearing argued that the trial should be stopped because of the boy's low attention span and his educational age. A consultant clinical psychologist had assessed the boy as having the cognitive abilities of a child between the ages of six years, two months and eight years, two months. The judge refused, saying the trial would be informal and that the child appeared to be "a 'streetwise' child, whose intellectual impairment is largely the result of spending two of his critical years outside the education system".

51. However The European Court of Human Rights (ECtHR) found that the child’s right to a fair trial under Article 6 of the ECHR had been breached. It stated: "The Court considers that, when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child's best interests and those of the community, it is essential that he
be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours, and adapt its procedure accordingly.”

52. The Commission considers that providing a live link in some instances for such a vulnerable young defendant may well have value as one of a package of measures which should be made available to meet the range of needs of such defendants. In itself, however, a live link may only serve to further increase barriers to understanding and participation in the trial. It certainly does not meet the requirements of the ECtHR decision that a specialist tribunal with adapted procedures be available for such defendants.

53. While in certain instances attendance by a live link may be in the interests of the vulnerable accused the Commission considers that in many cases being alone in a room with a live link may only serve to exacerbate the inability of the accused to fully appreciate the nature of the proceedings. Article 81 of the draft Order is concerned merely with the way in which the vulnerable accused give their evidence and does not address wider issues regarding understanding and appreciation of the nature of the proceedings let alone effective participation.

54. The Commission would urge the NIO to reconsider the full range of measures it ought to put in place in order to ensure compliance with the judgment of the European Court of Human Rights in SC v the UK. More consideration needs to be given to a range of measures to support the vulnerable accused.

55. Again, the Commission’s concerns were endorsed by the ad hoc Committee. The Committee recommended: “that the NIO should give further consideration to the operational aspects of the provisions relating to vulnerable accused persons under 18, taking account of the concerns raised by the NIHRC, to ensure the live link procedures do not present any additional barriers to young persons’ needs”.13

Anti-Social Behaviour Orders (ASBO)

56. The NIHRC has a long record of opposition to ASBOs, dating back to their introduction into Northern Ireland in 2004, and has expressed this view to the NIO and to Parliament with

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some considerable force\textsuperscript{14}. Unfortunately, the Commission’s concerns regarding ASBOs have been ignored by Government. It is with dismay that the Commission notes the current proposal in Article 92 of the draft order that applications for interim orders (already in existence), are to be possible without notice being given to the defendant. This proposal merely serves to exacerbate the Commission’s existing concerns regarding the granting of ASBOs.

57. The Commission acknowledges the existence of precedents for ex parte proceedings in a range of areas of law. What makes ASBOs different is that ASBO proceedings blur the division between civil and criminal law.

58. The odds are very heavily stacked against the person against whom the order is sought. Hearsay evidence is admissible. As of October 2006, less than 1\% of applications for ASBOs had been turned down in England and Wales\textsuperscript{15}. While such statistics are not available for Northern Ireland, we have no reason to consider the situation here to be any different. Without an opportunity to present arguments at an interim hearing the likelihood of an inappropriate ASBO being granted are greatly increased. Breach of an interim order carries the same penalties as breach of a full order.

59. ASBOs were introduced in Northern Ireland in 2004 by way of the \textit{Anti Social Behaviour (Northern Ireland) Order}. Provision was made for the granting of interim orders. Unlike in England and Wales, however\textsuperscript{16}, no specific provision was made in Northern Ireland for the granting of such interim orders without notice.

60. In a Judicial Review decision in 2005\textsuperscript{17} the issue of the power of a magistrate to grant an interim ASBO without notice was considered. The application raised the important issue whether a Magistrates’ Court has power to grant an interim ASBO on foot of an ex-parte application without the respondent to the application being given notice of the

\textsuperscript{14} See NIHRC policy responses to previous ASBO consultations, available at \url{www.nihrc.org}


\textsuperscript{16} See Magistrates’ Court (Anti Social Behaviour Orders) Rules 2002, Rule 5.

\textsuperscript{17} In \textit{The High Court Of Justice In Northern Ireland Queen’s Bench Division (Judicial Review) In The Matter of an Application by Northern Ireland Housing Executive for Judicial Review of the Decision of Mrs Kelly, Resident Magistrate, dated 28 April 2005 [2005] NIQB 71}, Delivered 23/11/2005
application. A resident magistrate’s refusal to grant such an order without notice in the absence of a specific legislative power was upheld.

61. The decision of Girvan J reflects the many concerns that the Commission has regarding the use of ASBOs, in particular, the use of an apparently civil procedure which can give rise to a potentially criminal liability. Girvan J considered that the nature of ASBO proceedings increases the imperative against such orders being available on an ex parte basis. Girvan J stated: “The ASBO legislation straddles the division between civil and criminal law. At first sight it is tempting to equate an ASBO with a form of civil law injunction breach of which can lead to an application to commit for contempt and the equation may tempt one to see an interim order as something very akin to an interlocutory injunction. The comparison, however, is not a true one. Breach of an injunction is not a criminal act with potentially severe consequences in terms of giving rise to a conviction and possibly leading to imprisonment as a punishment not merely as a means of ensuring compliance with the order but as a penalty. This heightens the argument against the making of an ex parte order in the defendant’s absence.”

62. The Court shared the concern of the Commission regarding the serious risks of arbitrariness the orders can pose regarding the definition of what might constitute criminal activity for the purposes of an order.

63. Despite the clear concerns expressed by Mr Justice Girvan in the Judicial Review about the inappropriateness of no notice interim orders in the particular context of ASBO proceedings and the long standing advice of the independent statutory Human Rights Commission regarding ASBOs in general, the NIO has proceeded with this proposed extension without any cogent policy rationale or statistical basis.

64. No evidence has been produced that the need to serve interim orders has proved problematic. It is reasonable to expect that interference with fundamental rules of natural justice (audi alteram partem) would have required a demonstration of need. However, the NIO has not sought to demonstrate how the inability to apply for ex parte interim orders fails to protect the public in certain instances.

65. Indeed the NIO would not be able to demonstrate such need as they are unable to say how many of the 60 ASBOs granted
to date in Northern Ireland began as interim orders. This information is not monitored. Nor can they say whether an interim order has ever been overturned in Northern Ireland.\footnote{Information provided to the NIHRC by the NIO Community Safety Unit, 8 January 2008}

66. There has been no proper evaluation of the use of ASBOs since their introduction in 2004. The NIO and the Criminal Justice Inspection have jointly commissioned such an evaluation which we understand will be published in the next few months. Seeking this power is premature in advance of the publication and consideration of that evaluation.

**Custody of children over the age of 17**

67. Article 95 states that a judge can sentence a person who is 17 to custody in the juvenile justice centre if there is no appropriate accommodation available in the young offenders’ institution. The provision has the character of a direction only where there are no resources rather than making such possibility available to the court when it is necessary for the best interests of the child, which as already stated under the UN Convention on the Rights of the Child should be of primary importance in all decisions effecting the child.