HOUSE . . . . . No. 6808

The Commonwealth of Massachusetts

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STATE HOUSE, BOSTON 02133

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To the Honorable Senate and House of Representatives:

In accordance with the provisions of Article LVI of the Amendments to the Constitution, I am returning, herewith, House Bill No. 6673, entitled, "An Act Relative to the Trial of Certain Juveniles as Adults in Certain Court Proceedings."

House 6673 revises section 61 of chapter 119 of the General Laws, the so-called "bindover" provision of the juvenile delinquency statutes under which a child who is alleged to have committed a serious offense may be transferred to an adult criminal session for trial rather than being treated as a juvenile in a civil proceeding under chapter 119. H 6673 makes it clear that any decision to bind over a child must be preceded by a transfer hearing which is clearly differentiated from an adjudicatory hearing on the charge itself.

H 6673 had originally been filed in response to the United States Supreme Court's decision in *Breed v. Jones,* which called into question the constitutionality of the Commonwealth's current bindover provisions. While the subsequent decision of the Supreme Judicial Court in *Stokes v. Commonwealth,* upholding the constitutionality of section 61 as currently written may have rendered this legislation unnecessary in a strict sense, its enactment would still serve the useful function of conforming the law on the statute books to both the requirements of the United States Constitution and the current court rules and practices.

However, I have been advised by a number of persons and agencies — including the Chief Justice of the District Courts, the Department of Corrections, the Committee on Criminal Justice, the Office for Children, the Massachusetts Defenders Committee, the Executive Office of Public Safety, and my own legal staff — that several modifications of section 1 of H 6673 are necessary in order to eliminate further ambiguities and weaknesses in the bindover provisions of the juvenile laws.

The two most substantial amendments that are necessary relate to the scope of the offenses for which a child may be criminally prosecuted, and the standards for deciding, on an individual basis, which children should be transferred to a criminal session. Both amendments that I propose reflect the current practice in the great majority of juvenile courts and juvenile sessions in district courts.

Currently, a child may be bound over to face prosecution as an adult when he is accused of virtually any criminal offense, no matter how trivial — even for violations of town by-laws that carry only small fines as punishment. The spirit of our juvenile laws, as expressed in section 53 of chapter 119, is that adult prosecution must be a last resort, to be used in serious cases where previous efforts at rehabilitation have failed. Most judges, especially those who handle large numbers of delinquency proceedings, act consistently with this policy, but the General Laws must set a state-wide standard that will apply equally to all children, no matter what court they may appear in. Accordingly, I suggest that the offenses for which a child may be transferred to a criminal session be limited to those punishable by a sentence to a state prison, and in the case of first offenders to those involving the infliction or threat of serious bodily harm. This limitation in fact encompasses virtually all the serious crimes for which children are now customarily bound over, but its placement in the statutes will substantially clarify the boundary lines between juvenile and adult proceedings.

Similary, the current standard for deciding which children charged with the listed offenses should be bound over — "the interests of the public" — is certainly indefinite, and possibly unconstitutionally so. The more definite standards that I propose — danger to the public and potential for rehabilitation — are flexible enough to allow the court to exercise its discretion but at the same time provide enough guidance to withstand, I believe, a later finding of unconstitutionality that would be grounds to reverse an entire proceeding. My conclusion is bolstered by the fact that these standards correspond to those adopted in other jurisdictions as well as the national Juvenile Justice Standards Project.

Finally, I suggest language that will clarify the question, raised by Chief Justice Flaschner, of the inconsistency between two related provisions, sections 61 and 75 of chapter 119, that may result in the

necessity of two identical probable cause hearings being held in the same case.

I therefore recommend that House Bill No. 6673 be amended by striking out Section 1 and inserting in place thereof the following section: —

SECTION 1. Chapter 119 of the General Laws is hereby amended by striking out Section 61, as most recently amended by Section 2 of Chapter 308 of the Acts of 1964, and inserting in place thereof the following section: —

Section 61. If it is alleged in a complaint made under Sections fifty-two to sixty-three, inclusive, that a child (a) who had previously been committed to the Department of Youth Services as a delinquent child has committed an offense against a law of the Commonwealth which, if he were an adult, would be punishable by imprisonment in the state prison; or (b) has committed an offense involving the infliction or threat of serious bodily harm which, if he were an adult, would be punishable by imprisonment in the state prison, and in either case if such alleged offense was committed while the child was between his fourteenth and seventeenth birthdays, and if the Court enters a written finding based upon clear and convincing evidence that the child presents a significant danger to the public as demonstrated by the nature of the offense charged and the child's past record of delinquent behavior, if any, and is not amenable to rehabilitation as a juvenile, the court may, after a transfer hearing held in accordance with such rules of court as shall be adopted for such purpose, dismiss the complaint.

At said transfer hearing, which shall be held before any hearing on the merits of the charges alleged, the court shall find whether probable cause exists to believe that the child has committed the offense or violation as charged. If the court so finds, the court shall then consider, but shall not be limited to, evidence of the following factors: (a) the seriousness of the alleged offense; (b) the child's family, school and social history, including his court and juvenile delinquency record, if any; (c) adequate protection of the public, (d) the nature of any past treatment efforts for the child, and (e) the likelihood of rehabilitation of the child.

If the court determines that the child should be treated as a

delinquent child, the court shall forthwith, on motion by or on behalf of the child, continue the proceedings until such further time as the court shall determine.

If the court orders that the delinquency complaint against a child be dismissed it shall cause to be issued a criminal complaint. The case shall thereafter proceed according to the usual course of criminal proceedings and in accordance with the provisions of Section 40 of Chapter 218 and Section 18 of Chapter 278. When such a complaint is issued, section 68 shall apply to any person committed under this section for failure to recognize pending final disposition in the Superior Court.

Unless the child by counsel shall waive this provision, the judge who conducts the transfer hearing shall not conduct any subsequent proceeding arising out of the facts alleged in the delinquency complaint.

And by inserting after Section 2 the following section: —

SECTION 2A. Section 75 of said chapter 119 is hereby repealed.

Respectfully submitted,

MICHAEL S. DUKAKIS