

**Balancing Due Process Values with Welfare Objectives
in Juvenile Justice Procedure:
Some Strengths and Weaknesses in the Irish Approach**

By

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Introduction

It has long been accepted that it would be unjust and contrary to the best interests of the child offender and society as a whole to process him or her through the criminal justice system as if he or she was an adult. Protecting the welfare of the child offender is now considered to be a primary objective in the juvenile justice system. This is reflected directly in the growth of measures which encroach upon the freedom and autonomy of the child for the purpose of rehabilitation as distinct from punishment, and indirectly through measures which protect him from the full rigours of the regular criminal process. Indeed, it might not be an exaggeration to say that the child offender has a right to have his or her welfare needs catered for in the criminal process.¹ It would also seem self evident that the welfare rights of the child in the criminal process should increase as his or her age decreases.

At the same time it is increasingly being acknowledged that the child has other rights as an independent, autonomous human being and that those rights cannot always be overridden to satisfy what adults or the State consider to be in the best interests of the child. In the criminal context these rights include the right to due process in the determination of criminal liability and in the application of penal measures.² They relate to basic values such as the right not to be subjected to punishment or similar constraints on personal freedom and autonomy, unless convicted of a criminal offence in a court chaired by a competent independent judge and in accordance with fair procedures. Related values include: the right to legal advice and assistance, the right to equality of treatment and the right to proportionality between the severity of the penalty or coercive measure and the gravity of the offence. It must also be remembered that due process values are not concerned only with the defendant. They also concern the victim and the public as a whole. So, for example, they require that the criminal trial should normally be heard in public.

Inevitably, there is potential for conflict between these welfare rights and due process rights in the juvenile justice system. How that conflict can best be resolved in theory and in practice has been the subject of debate among researchers and policy-makers

¹ See UN Convention on the Rights of the Child, Articles 3 and 40(1), (2)(vii), (3) and (4).
² *Ibid.* Articles 12, 37 and 40(2).

for quite some time and no doubt will continue for the foreseeable future as new ideas are explored and experiences examined.

I am afraid I have not come here today with any grand theory or solution. My objective is much more modest. It is to examine the Garda diversion and trial stages of the Irish juvenile justice system with a view to clarifying the full nature, extent and implications of the shift from the traditional due process model of criminal justice to a welfare model. For each of these two stages I will outline the primary welfare features before proceeding to an examination of the due process sacrifices that have been made to deliver them. What emerges is that the Irish system incorporates a strong welfare component at the heart of both the prosecution and trial stages. While some commendable efforts have been made to balance these with due process protections, the underlying reality would appear to be the displacement of due process values by the growth of executive control and privatisation. Of greater concern, perhaps, is the lack of comprehensive, detailed and consistent data which can be used to assess the operation of the system.

I should emphasise at the outset that I am focusing only on the Garda diversion and trial stages of the juvenile justice system for the purposes of this paper. As will be seen, the traditional sharp distinction between diversion and trial is becoming increasingly blurred in the Irish juvenile justice system.

The Garda Diversion Programme

The Garda Diversion Programme can now be described as one of the major welfare oriented features of the juvenile justice system. Its statutory objective is defined as being to divert a child from committing further offences where the child has accepted responsibility for his or criminal behaviour. Implicit in this is the notion that the child is not punished for the offence of which he has accepted responsibility. Instead of seeking retribution for the harm done by the child's offending, the Programme offers support to the child to help him come to terms with his criminal or anti-social behaviour and to render it less likely that he will engage in repeat behaviour. Accordingly, the child is cautioned instead of being formally punished. This can be accompanied by a period of supervision by a Garda juvenile liaison officer and a restorative justice type conference.

Broadly, supervision entails the child meeting with a Garda juvenile liaison officer at regular intervals to review his behaviour and progress and compliance with an action plan, if any. It can also entail the officer calling at the child's home and liaising with parents, guardians, teachers/employer etc. The officer is also a source of advice and assistance to the child in matters such as relationships, schooling, training and employment.

The conference is an interesting innovation in the Diversion Programme. It is a meeting of persons concerned with the welfare of the child with a view to:

- establishing why the child became involved in the behaviour;
- discussing how they can help the child to avoid engaging in such behaviour in the future; and
- reviewing the child's behaviour since admission.

One of the primary functions of the conference is to draw up an action plan for the child which can include:

- making an apology and reparation to the victim;
- attendance at school or a training programme;
- participation in sport or recreational activity;
- being at home at certain times; and
- staying away from certain places.

In effect, it represents a major injection of restorative justice methods at the diversion stage, with the needs of the child being prioritised over those of the victim.

It is worth noting that the Diversion Programme has an unusually broad scope. Potentially it can be applied to any criminal offence from the most minor to the most serious. It is also applicable to children who have behaved anti-socially (not a criminal offence) and to children as young as 10 years of age. From a welfare perspective this reflects a determination to reach out to as many 'at risk' children as possible and to intervene as early as possible.

In 2005, which is the last year for which statistics on the Programme seem to have been published, 17,567 children were considered for admission on 21,497 occasions.

In the course of the year more than 14,000 child offenders were processed through the Programme rather than the courts. These figures give some idea of the extent to which child offenders are being dealt with by the State beneath the radar of the public courts system. It is important to consider, therefore, how and to what extent due process values are preserved.

A positive feature from a due process perspective is that the Programme is now placed on a statutory foundation and operates in accordance with law. The principles and procedure governing the eligibility of a child for admission are set out in the Children Act 2001. Moreover, the Programme is managed by a statutory Director who is a senior member of the Garda Síochána appointed by and answerable to the Garda Commissioner. He or she is given certain specific powers and duties by the legislation, including the decision whether to admit a child in any individual case. The administration of cautions is also the subject of statutory regulation.

A key element in the procedure is the requirement for the child to accept responsibility for his or her criminal or anti-social behaviour in order to be admitted to the Programme. This is the equivalent of a guilty plea and an acceptance of remedial interventions in his autonomy and freedom. These interventions can be far-reaching and prolonged, and can be more severe than punishment that may have been inflicted by a Court if it had found the child guilty of the behaviour in question. It is vital, therefore, that the child should be afforded due process protections equivalent to those that would attach to the accused in respect of a plea and sentencing in the criminal process.

Commendably the child retains a veto over admission. He or she can refuse to accept that he or she committed a criminal offence or engaged in anti-social behaviour, thereby placing the onus on the Garda and the DPP to consider prosecution. Critically, before making this key decision, the child must be given a reasonable opportunity to seek advice from his or her parents and legal advice.

However, once the child has admitted responsibility for his or her behaviour, the due process protections diminish. The substance and direction of the subsequent procedure, while broadly regulated by law, are heavily dependant on the discretion of

the Director, gardai and, where relevant, Probation and Welfare officers. It is a matter for the Director to decide whether or not to admit the child. He also decides whether the caution shall be a formal caution or an informal caution. Despite the fact that there are significant differences between the two, the Director has a very extensive discretion to choose between them in any individual case.

The Director's discretion extends to the conference. He enjoys a very broad discretion in determining whether the conference option should be offered in any individual case. The Director also appoints the convenor and chair of the conference (they can be, and usually are, the same person). The former is designated the facilitator in the conference proceedings. Critically, he or she enjoys extensive discretion over the composition, timing and location of the conference, the procedure to be followed and the manner in which it conducts its business. Clearly the facilitator plays a key role in the conduct and outcome of the conference. Significantly, he or she is almost invariably a member of the Garda Siochana.

The action plan which may result from a conference can be viewed as a significant departure from due process norms. Despite the fact that it can impose obligations on the child more severe than those that would have been imposed by a court, it is more like a private contract drawn up among several unequal parties, rather than a public judicial decision handed down by an impartial judge applying established sentencing principles. The child, in particular, is potentially in a very weak bargaining position in such a conference. There is no guarantee that family members will represent his or her interests and he or she is not represented by a solicitor. It is possible, therefore that the child will be confronted by a large number of adults, all of whom appear to be pressurising him or her to accept the action plan.

There is no requirement or facility for an action plan to be approved by a court. Instead a report on the conference and the plan is submitted to the Director. He then has a discretion to determine whether the child's period and level of supervision should be varied and, if so, to what extent.

What emerges from all of this is a process that is almost wholly under the control of gardai acting in an executive capacity as distinct from judges or other independent

officials acting in a judicial capacity. The emphasis is on a negotiated agreement to which the child is a relatively weak and passive party. There is also a distinct lack of transparency in that it all happens behind closed doors, and the victim may not necessarily be a participant. In short, the diversion process reflects a major departure from due process norms, even though it deals with a child for a criminal offence by imposing constraints on his freedom and autonomy that can surpass those that would ensue from the formal criminal process. The welfare trade off is that the child is spared the experience of the formal criminal process and is given support to avoid getting sucked in to further criminal activity.

The Children Court's jurisdiction and procedure

The jurisdiction and procedure of the Children Court reflect several welfare oriented modifications compared with the criminal trial procedure for adults. Two of the major procedural modifications have the effect of blurring the distinction between formal criminal proceedings and extra judicial interventions aimed at rehabilitating the child.

The first of these enables the Court to divert the child out of the criminal process and into the care and supervision jurisdiction of the Health Service Executive (HSE). Instead of proceeding with the trial of the child the Court can direct the HSE to convene a family welfare conference (as distinct from the 'conference' of the Garda Diversion Programme). This is another restorative justice type conference which considers the circumstances of the child with a view to recommending the making of a care and supervision order application under the civil procedure of the Child Care Act 1991. On being informed of the HSE's action in the matter, the Court may dismiss the charge against the child on its merits if it is satisfied that it is appropriate to do so.

The second major modification is the power of the Court to adjourn the criminal proceedings and set up a family conference (as distinct from a conference or a family welfare conference) to devise an action plan to address the child's offending. A fundamental pre-requisite for this action is that the child accepts responsibility for his or her criminal behaviour. The family conference is another restorative justice type mechanism, very similar to the conference in the Garda Diversion Programme, except

that it is chaired by a Probation and Welfare Officer as distinct from a member of the Garda.

The role of the family conference is to:

- identify why the child became involved in criminal behaviour;
- determine how he or she can be diverted from such behaviour;
- mediate between the child and the victim; and
- address the concerns of the victim.

The overall aim is to formulate an action plan which the child will be expected to follow over a defined period. This may include matters such as

- attendance at school or work;
- participation in a training programme;
- staying at home at specified times;
- staying away from specified places or persons; and
- an apology and/or compensation to the victim.

The plan is submitted to the Court for approval. Where this is forthcoming the Court will dispose of the case on the basis of the plan. Otherwise it will proceed with the criminal proceedings and impose a sentence in the normal way.

This family conference option represents the adoption of a distinctly restorative justice procedure at the heart of the criminal trial. In effect the twin objects of rehabilitating the child offender and reconciling him with the victim displaces the administration of justice through the formal adversarial and accusatorial procedure.

The sentencing jurisdiction of the Children Court also reflects a distinct welfare orientation. The Children Act 2001 lays down a set of statutory principles to guide courts, and family conferences, in dealing with a child offender. It will be seen later that they include respect for due process values. Nevertheless, the clear emphasis is on the welfare, as distinct from the punishment, of the child offender. They stipulate that any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits. It should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances. The importance of

preserving the child - family relationship and the uninterrupted education, training or employment of the child is emphasised. A period of detention should be imposed only as a last resort.

It is also worth noting the more visible modifications to the trial procedure which have been devised specifically to cater for the special needs of the child. Most of them can be clearly related to welfare or rehabilitative objectives. These include the establishment of a separate Children's Court, the protections for the privacy of the child and the restriction on publicity. Others promote welfare objectives, but also have a due process spin off. These include: the efforts to achieve a more informal atmosphere, restrictions on public access, dispensing with the wigs and gowns and the avoidance of technical language. By enhancing the capacity of the child's awareness and participation these measures enhance due process values.

Despite these welfare-oriented features, there is still also a heavy emphasis on due process in the Children Court. A child will only appear before the Court to answer charges consequent on a lawful arrest or as a result of being summonsed to appear before the Court at a specified date, time and location. Either way he or she is entitled to be legally represented in the proceedings. The legal representation will be paid for by the State where the defendant cannot afford it. If charged with an indictable offence the child can assert his right to a jury trial. In the event of a guilty plea the case will often be adjourned to allow for the preparation of probation reports etc. on the child to assist the judge in determining an appropriate sentence. In the event of a not guilty plea the trial proceeds in the normal way. The decision on guilt and sentence is made by the judge in accordance with established principles of law and procedure. It is worth noting at this point that he or she is an independent judge of the District Court. Where a child is convicted and sentenced in the Children Court he has a right of appeal to the Circuit Court.

Even the statutory sentencing principles retain a strong sense of due process values. It is significant, for example, that the first principle underpins the court's duty to have regard to the rights of the child as an autonomous individual. It states that the court must have regard to the principle that children have rights and freedoms before the law equal to those enjoyed by adults. In particular, they have the right to be heard and

to participate in any proceedings of the court that can affect them. A related principle is that criminal proceedings cannot be used solely to provide any assistance or service needed to care for or protect a child. It follows that a child cannot be treated as a criminal even to ensure his or her basic entitlements of bodily safety, food, clothing, shelter, medical care, education and a modicum of family life. Equally, the child's rights to due process in criminal proceedings cannot be set aside in order to pursue paternalistic goals of rehabilitation which are likely to be in the longer term interests of the child. The court is specifically permitted to take into consideration as mitigating factors the child's age and level of maturity when determining the nature of any penalty, unless the penalty is fixed by law. The Act goes on to say that the penalty imposed on a child should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind. The due process rights of the victim are also given express recognition. When dealing with a child offender, the court is specifically required to have regard to the interests of any victim and the protection of society as well as the best interests of the child.

Does it follow that the welfare based modifications to procedure and jurisdiction have been achieved without impacting significantly on core due process values?

The results of Kilkelly's work on the Children Court would suggest that the experiences of child defendants continue to fall significantly below due process standards. Despite the modifications the trial procedure operates in practice more like an administrative bureaucracy where the defendants are processed in a manner that leaves them largely detached from and confused by the proceedings and decisions affecting them. In addition to excessive pre-trial delays caused by repetitive adjournments, contributory factors include: 'hanging around' outside the courtroom for several hours while waiting for their cases to be called; poor acoustics in the courtroom; rushed proceedings; judges with no specialist training in juvenile justice issues attempting to cope with excessively heavy caseloads; prosecutors and defence lawyers with no specialist training in juvenile justice issues; lack of coordination between agencies; and significant differences between court areas. Kilkelly's findings on these matters are supported by the findings of Carroll and Meehan in their research on the Children Court for the Association for Criminal Justice Research and Development Ltd.

Even more fundamental questions are raised by the family conference. Where a conference is convened the immediate effect is to remove the substance of the sentencing stage from the floor of the court and judicial procedure to the closed room of private negotiation. The conference is convened by a Probation and Welfare officer, as distinct from an independent judicial figure. Apart from that, its purpose and procedure largely follow that of the conference in the Garda Diversion Programme. Ultimately, the whole process can result in the child's freedom and autonomy being restrained considerably more than might have been the case had he simply been sentenced in the normal manner by the court. As with the conference in the Garda Diversion Programme, the formal rights of the child offender are diminished in the pursuit of his rehabilitation.

As with the Garda conference, the child enjoys the protection of a veto and legal advice in respect of submitting to a conference. The fact that the victim must be invited helps ensure that it does not function purely as an administrative procedure dealing only with the circumstances of the child. A further important protection in this regard is the retention of judicial oversight. Any action plan agreed by the conference must be approved by the Children Court. If agreement is not reached then the court proceedings resume and proceed to a conclusion in the normal manner.

While these due process concessions are useful, they do not change the reality that the family conference largely replaces the more transparent judicial procedure with a private executive process for dealing with a child offender. While the argument can be made that this is more conducive to the common good and the longer term interests of the child, such benefits are being purchased at the price of a major concession to an executive role in criminal trial procedure.

It remains to be seen whether the family conference will contribute to a more speedy disposal of cases. While compliance with due process can be time consuming, excessive delay can operate to deny the benefits of due process to the accused. This is especially the case where the accused is a child. Unfortunately, delay has been a feature of the Irish juvenile justice system for several years. Even before the restorative justice modifications were introduced it was normal for a child offender to

appear several times over a period of at least 6 months before his or her case was completed. In their study of 400 cases dealt with by the Children Court in 2004, Carroll and Meehan found that each child had an average of 8 Court appearances before his or her case was finalised (4 children had over 50 appearances each). This was compounded by the fact that each child waited on average for 6 months for his or her first Court appearance.

Conclusion

The prosecution and trial stages of the Irish juvenile justice system clearly incorporate significant 'welfare' measures aimed at the rehabilitation of the child offender. Some of these actually have the potential to enhance the due process rights of the defendant by making the trial process more accessible and meaningful to him. Others, however, entail a significant departure from traditional due process values in the criminal process. The primary examples are the Garda Diversion Programme and the family conference set up by the Children Court. Both of these require the child to forego his right to have his guilt determined in accordance with due process norms in return for the welfare benefits that they are believed to offer. They both reflect a distinct move away from a model based on judicial norms and process to one which is controlled by the executive in the shape of the police and the Probation and Welfare Service. Another distinctive ingredient in this shift is the increasing privatisation of the process through the incorporation of the extended family and others in persuading the child to admit his guilt and to submit to rehabilitative measures in the implementation of which they will play an important role.

The pragmatist might be inclined to say 'but does it work' in the sense of steering large numbers of child offenders away from criminality. Others might also want to know how it is working with a view to assessing its fairness against relevant international norms. Providing answers to these questions will require the availability of comprehensive, consistent, detailed, hard data on the operation of all aspects of the system. That, however, is not available. Indeed, it is hardly an exaggeration to say that the data on juvenile justice in Ireland is an appalling state.

There is no single source of data. The officially published data that exists is spread over at least five sources, each dealing with distinct aspects of the subject. Some of

them overlap, but none of them seem to be consistent with each other in terms of methodology or coverage. Some are not even internally consistent in these matters. The most valuable and extensive source traditionally was the annual report of the Garda Commissioner. It provided data on numbers of juvenile offenders broken down by offence and age group. Separate data was provided for offenders dealt with by the courts and through the Garda Diversion Programme. The former was affected by changes in the age groups and the offence classifications used to the extent that it is impossible to construct meaningful trends from them. In any event they ceased publication in 2005. The Central Statistics Office now has responsibility for publishing crime data. Its data, however, is not broken down into age group and does not include the Garda Diversion Programme data at all. In effect we have virtually no published data on juvenile crime, prosecutions, trial outcomes and the Garda Diversion Programme since 2005.

Useful as the Garda Commissioner's annual reports were, they did not provide data on all aspects of the juvenile justice system. They did not include data on, for example: arrests, charges, bail, remands in custody, restorative justice hearings, sentences or criminal records. Nor did any of the other sources provide comprehensive data on any of these matters. The only other useful source worth mentioning is the annual report of the Department of Education and Science which provides sparse data on children detained in special schools. Even that is presented in a form which affords little scope for extracting trends on basics such as committals and lengths of detentions.

The state of the data on juvenile crime and the operation of the juvenile justice system is a sad reflection on the adherence to basic values of democratic accountability in this country. Equally worrying is the fact that transparency through the publication of data on the juvenile justice system is deteriorating just as executive control and privatisation are expanding within the system. If we are going to swap traditional due process protections for the welfare benefits that the Diversion Programme and restorative justice methods can bring, then we must publish comprehensive, consistent and detailed data which will enable independent observers scrutinise and report on their operation. Concealing that data compounds the flight from due process and provides a cover for injustice.

We are fortunate in this country to have first class researchers on juvenile crime and justice. I have already adverted to the excellent work carried out by Dr Ursula Kilkelly of UCC and Jennifer Carroll and Emer Meehan of the ACJRD. To that can be added the work of the Garda Research Unit. I know that they carried out a research project on the Garda Diversion Programme under the guidance of Kieran O'Dwyer, but it would appear that it is not publicly available. If we are to enhance further the qualities of our juvenile justice system, we need to support the work of these and other researchers. That can be done not just by funding but also, critically, by taking a more professional and coherent approach to the compilation and publication of data on juvenile crime and the operation of the juvenile justice system.