

REFLECTIONS ON THE JUSTICE AND WELFARE DEBATE FOR CHILDREN IN THE IRISH CRIMINAL JUSTICE SYSTEM

Abstract

An historic neglect of juvenile justice in Ireland was ultimately replaced with substantial legislative changes by the Children Act 2001. However, the Children Court still faces challenges. 'Childhood' is a transient status and children in conflict with the law frequently have multiple and complex issues. The question posed in this article is whether 'childhood' as a status deserves a wider recognition than just a narrow 'justice' versus 'welfare' debate. Victims' rights, serious crime and the recognition of adolescence as a transient state tests the courts response and much depends on the skills of lawyers and judges to deliver an effective youth justice system.

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Introduction

The history of juvenile justice policy is a profoundly political subject¹ characterised by conflict, contradictions, ambiguity, and compromise.² The debate has until the 1980's primarily been concerned with control, rehabilitation, and punishment of children. More recently the global converging of criminal justice policies appears to adopt a more managerial approach to juvenile crime, focusing on efficiency, legitimacy, identity, and equity with an emphasis on measurable risk assessments.³

The collapse of public confidence in national governance, financial collapse, terrorism and the fear of the bogus asylum seeker has had a negative impact on Welfarism and 'meeting needs' has been by overlaid by 'addressing fears'.⁴ In the context of juvenile justice, this could be detrimental to dealing effectively with children in conflict with the law, who, by their very nature of being a child, should be treated in a different manner from adult offenders. Here, the treatment of young offenders must be approached on a multifactorial basis and not solely attributable to the justice/welfare debate, particularly in light of their *childhood* status. Notwithstanding this, the commission of serious crimes raises an issue as to the approach to be taken by courts when dealing with child offenders, particularly in light of the increased protections afforded to victims by virtue of the strengthening of victims' rights.

If, as Bingham⁵ says, the rule of law is the closest thing to a secular religion we have, then arguably the United Nations Convention on the Rights of the Child (UNCRC)⁶ establishes the commandments of juvenile justice. All countries have ratified the UNCRC except the United States of America. However, after thirty years the UNCRC results cannot be called successful.⁷ Notwithstanding its near-universal acceptance, it is one of the most violated conventions in the

¹ John Muncie, *Youth and Crime* (4th edn, Sage Publishing 2014).

² James Austin and Barry Krisberg, 'Wider, stronger and different nets: the dialectics of criminal justice reform' (1981) 18(1) *Journal of Research in Crime and Delinquency* 165.

³ John Muncie, *Youth and Crime* (4th edn, Sage Publishing 2014).

⁴ *ibid*, 350.

⁵ Tom Bingham, *The rule of law* (Penguin 2011).

⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC).

⁷ Maria José Bernuz Beneitez and Els Dumortier, 'Why Children Obey the Law: Rethinking Juvenile Justice and Children's Rights in Europe through Procedural Justice' (2018) 18(1) *Youth Justice* 34.

world,⁸ and its weak control mechanisms allow some countries to provide ‘lip service to children rights simply to be granted recognition as a modern developed state’.⁹

Juvenile Justice: Then And Now

The origins of the Irish Youth Justice Service (IYJS) and the justice/welfare debate can be traced back to pre-independence (1922), British legislation and institutional developments relating to children.¹⁰ Though the legal landscape began to move prospectively in many respects, the Irish juvenile justice system remained in place and did not move from its nineteenth-century regime until the twenty-first century. There was some reform in 1924, which changed practice and procedure rather than principle,¹¹ but the majority of children continued to be detained in industrial schools, most of which were run by Catholic religious organisations.¹² Policy developments were thin on the ground,¹³ but there was also a considerable lack of Irish research on child care and juvenile justice.¹⁴

The Children Act 2001 (‘2001 Act’) replaced the Children Act 1908 Act (‘1908 Act’) regarding juvenile justice and was signed into law in July 2001, though not fully implemented until July 2007.¹⁵ The 2001 Act marked a significant step and explicitly provided for a system to deal with children in conflict with the law that was separate and distinct from the system for adult offenders. Notwithstanding this development, Ireland does not yet have a wholly separate Children Court, though the District Court doubles as a Children Court for summary and most indictable offences.¹⁶ Except for Dublin City, children in 2019 are still accommodated in adult courts in Ireland; however, the Children Court must sit at different rooms or buildings and at different times than the ordinary District Court.¹⁷ The physical environment, layout, and structure of the courtroom can have a significant impact on the extent to which young people can participate in proceedings.¹⁸

The ethos of treating children separately to adults and the importance of the *in camera* rule is reflected in the United Nations Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules 1985),¹⁹ the UNCRC (1989; 2007),²⁰ and the European Court of Human

⁸ Barry Goldson and John Muncie (eds), *Youth Crime & Justice* (2nd edn, SAGE 2015) 260.

⁹ Maria José Bernuz Beneitez and Elizabeth Dumortier, ‘Why Children Obey the Law: Rethinking Juvenile Justice and Children’s Rights in Europe through Procedural Justice’ (2018) 18(1) *Youth Justice* 34, 37.

¹⁰ Una Convery and Mairead Seymour, ‘Children, crime, and justice’ in Deirdre Healy, et al (eds), *The Routledge handbook of Irish criminology* (Routledge 2016).

¹¹ FSL Lyons, *Ireland Since the Famine* (Weidenfeld and Nicolson 1971).

¹² Paul Sargent, *Wild Arabs and savages: A history of juvenile justice in Ireland* (Manchester University Press 2013). The Children Act 2001 was preceded by a number of detailed Reports (including the Henchy Report - Interdepartmental Committee on Mentally Ill and Maladjusted Persons, *Third Interim Report: Treatment and care of persons suffering from mental disorder who appear before the courts on criminal charges* (Prl 8275, 1978) and the Whitaker Report - Committee of Inquiry into the Penal System, *Report of the Committee of Inquiry into the penal system* (1985) but Policy developments were thin on the ground and there was a considerable lack of Irish research on child care and juvenile justice.

¹³ *ibid.*

¹⁴ Committee on Reformatory and Industrial Schools, *Reformatory and industrial school’s system Report 1970* (Prl 1342, 1970) (Kennedy Report); Dermot Walsh, *Juvenile Justice* (1st edn, Thomas Round Hall 2005); Ursula Kilkelly, *Youth justice in Ireland: Tough lives, rough justice* (Irish Academic Press 2006).

¹⁵ There was a general Commencement of the whole Act on 23rd July 2007, which was commenced by Children Act 2001 (Commencement) (No. 3) Order 2007, SI 2007/524.

¹⁶ Dermot Walsh, *Criminal Procedure* (2nd edn, Round Hall 2016).

¹⁷ Children Act 2001, s 71.

¹⁸ Ursula Kilkelly, *Youth justice in Ireland: Tough lives, rough justice* (Irish Academic Press 2006); *T and V v United Kingdom* App no 24724/94 (ECtHR, 16 December 1999).

¹⁹ UNGA United Nations Standard Minimum Rules for the Administration of Juvenile Justice UN A/RES/40/33 (1985).

²⁰ UNCRC (n 6) – in 2007, the Committee on the Rights of the Child published General Comment 10 on Children’s rights in juvenile justice.

Rights (ECtHR) in the cases of *T v UK*, *V v UK* and *SC v UK*²¹ which held that the children's right to a fair trial was infringed under Article 6(1) of the European Convention on Human Rights (ECHR) where they were tried in an adult court that had the characteristics of an adult trial.²² Section 71(2) of the 2001 Act states that sittings of the court 'should be so arranged that persons attending are not brought into contact with persons in attendance at a sitting of any other court', which mirrors section 111(1) of the 1908 Act. The failure to adapt courts for children in any substantial way has been the subject of strong criticism.²³

Promoting Youth Justice

The twenty-first century saw an appetite for policy change²⁴ and the Report on the Juvenile Justice Review²⁵ rebranded the juvenile justice system as 'the youth Justice system' and described the 2001 Act, as 'a twin-tract, child welfare and justice approach'.²⁶ This 'twin-tract' approach has variously been described as a dominant philosophy of welfare²⁷ involving family welfare using multisystem treatment or alternatively a rights based model.²⁸ It allows considerable discretion for Gardaí whether to bring a case to court or not and provides a central role in the court process for Children Court judges.²⁹ The IYJS was established in 2006 and now operates as an executive office located in the Department of Children and Youth Affairs (DCYA). It has responsibility for leading and driving reform in Irish youth justice, and its objective is to improve delivery of youth justice services and reduce youth offending. According to its National Youth Strategy, IYJS is now 'guided by the principles of the Children Act, 2001 and is focused on diverting children from crime and the criminal justice system, promoting restorative justice, enforcing community sanctions, facilitating rehabilitation and, as a last resort, providing for detention'.³⁰ It is staffed by officials from the DCYA and the Department of Justice and Equality (DOJ). While both departments share overall responsibility for the implementation of the 2001 Act, the DOJ retains overall responsibility for Youth Justice Policy.³¹

The IYJS is focused on implementation of the Youth Justice Action Plan 2014 – 2018,³² which allows and enables the involvement of all the relevant criminal justice agencies, including An

²¹ *T v UK* and *V v UK* (2000) 30 EHRR 121; *SC v UK* (2004) ECHR 263. See Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(1).

²² The European Convention of Human Rights Act 2003 gives effect to the European Convention on Human Rights [ECHR] in Irish law.

²³ Thomas O'Malley, *Sentencing law and practice* (3rd edn, Round Hall 2016).

²⁴ Paul Sargent, *Wild Arabs and savages: A history of juvenile justice in Ireland* (Manchester University Press 2013).

²⁵ Department of Justice Equality and Reform, *Report on the Youth Justice Review* (Stationary Office 2006).

²⁶ *ibid* at 4.

²⁷ Scott W Henggeler, et al, 'Family preservation using multisystemic treatment: long-term follow-up to a clinical trial with serious juvenile offenders' (1993) 2(4) *Journal of Child & Family Studies* 283.

²⁸ Geoffrey Shannon, *Child Law* (Thomson Round Hall 2010).

²⁹ Ursula Kilkelly, *Youth justice in Ireland: Tough lives, rough justice* (Irish Academic Press 2006).

³⁰ Irish Youth Justice Service, *Report on the Implementation of the National Youth Justice Strategy 2008-2010* (Irish Youth Justice Services 2012) 2 <http://www.justice.ie/en/JELR/IYJS_NYST_2008_10.pdf/Files/IYJS_NYST_2008_10.pdf> accessed 02 April 2019.

³¹ In 2017, St Patricks Institution, a former borstal and criticised by ECHR, in the case of *DG v Ireland* App no 39474/98, (ECtHR, 16 May 2002) for its lack of therapeutic facilities, was closed resulting in one purpose-built juvenile centre in Oberstown and which is under the auspices of DCYA. The campus has facilities for 90 children, both remand and sentenced, but since 2015 years the numbers have not exceeded 50, though this figure could be misleading as nearly 50% of the children held in the detention centre are in on pre-trial remand. See Oberstown Children Detention Campus, 'Oberstown Annual Reports 2012 – 2016' (Oberstown Children Detention Campus 2017) <<https://www.oberstown.com/wp-content/uploads/2017/04/Oberstown-Annual-Report-2012-2016.pdf>> accessed 12 March 2019.

³² Irish Youth Justice Service, 'Tackling Youth Crime: Youth Justice Action Plan 2014-2018' (Department of Justice and Equality 2013) <<http://www.justice.ie/en/JELR/Tackling%20Youth%20Crime%20-%20Youth%20Justice%20Action%20Plan.pdf/Files/Tackling%20Youth%20Crime%20-%20Youth%20Justice%20Action%20Plan.pdf>> accessed 12 March 2019.

The Mission Statement of the Youth Justice Action Plan 2014 – 2018 is to create a safer society by working in partnership to reduce youth offending through appropriate interventions and linkages to service. The Plan sits within the National Policy Framework, Better Outcomes Brighter Futures, for children and young people. Implementation of the Action Plan is overseen by a multi-agency steering group.

Garda Síochána, The Probation Service, Irish Prison Service, Irish Youth Justice Service, Oberstown, and Tusla, the Child and Family Agency,³³ in providing services to young people in conflict with the law. Though it assists with information and conferences, such as the Annual Irish Criminal Justice Agencies Conferences,³⁴ it has no role in regard to the legal profession or the judiciary. Even though lawyers and judges are uniquely positioned to identify the broader issues of children,³⁵ there still appears to be a disconnect between law and practice.³⁶ Applications to court and sentences, for example, are construed without regard to the significant options available in the 2001 Act such as the ten-community sanctions.³⁷

Unlike medicine which has a speciality in paediatrics, Irish law has relegated youth justice to the bottom of the criminal justice system with little or no training for lawyers or judges. Legislatively at least, section 72 of the 2001 Act provides that before transacting business in the Children Court, judges should ‘participate in any relevant course of training or education which may be required by the President of the District Court’. Though this envisages that judicial training and education should precede a person taking up position in the Children Court, there is no elaboration on the type of training, level of experience and expertise required of judges up for appointment to the Children Court. It appears that this is another area where law and practice fail to coincide, with no formal training on youth justice being made available to the judiciary.³⁸

³³Tusla, The Child and Family Agency, is the dedicated State agency responsible for improving wellbeing and outcomes for children and ensuring that all decisions affecting children are guided by the best interests of the child. The Probation Service is an agency within the Department of Justice and Equality, which works with offenders to help change their behaviour and make good the harm done by crime. The Irish Prison Service operates as an executive agency within the Department of Justice and Equality and deals with offenders who are 18 years of age or over. The Oberstown Children Detention Campus is Ireland’s national facility for the detention of children remanded or sentenced by the criminal courts and is located on a single site in Oberstown, Lusk, Co Dublin. The facility is funded by IYJS.

³⁴The Irish Criminal Justice Agencies Conferences are a collaboration of the Department of Justice and Equality, the Department of Children and Youth Affairs, the Irish Prison Service, The Probation Service, An Garda Síochána and the ACJRD. The first Conference was held in September 2014. The 4th Annual Conference, which focussed on the topic of Youth Justice, was held in July 2017 on which the Minister for State, David Staton commented that ‘[a]s with previous years, the ICJA Conference presents us with the opportunity to take a topic or theme and to examine it in a detailed way having regard to the many different perspectives of a wide range of interested parties including academics, policy makers, state and non-state practitioners, non-governmental organisations and most importantly, given our conference theme, young people themselves. The tradition of informality normally associated with this conference lends itself greatly to the type of open discussions and exchanges of ideas necessary to inform our thinking about how our youth justice system might look in the future’. *ICJA Conference Report 2017 – Youth Justice Policy in Ireland: Where to Next?* (Association for Criminal Justice Research and Development 2017), 5 <https://www.acjrd.ie/files/ICJAC_Report_2017_-_Youth_Justice_Policy_in_Ireland_-_Where_to_next1.pdf> accessed 02 April 2019.

³⁵Shauneen Lambe, ‘Standing up for Kids: Just for Kids’ (Just For Kids Law) <<https://www.justforkidslaw.org/shauneen-lambe/>> accessed 14 August 2018.

³⁶Ursula Kilkelly, ‘Diverging or emerging from law? The practice of youth justice in Ireland’ (2014) 14(3) *Youth Justice* 212.

³⁷10 Community sanctions – sections 115-141 Children Act 2001: 1) Community Service Order; 2) Day Centre Order; 3) Probation Supervision Order; 4) Probation (Training or Activities Programme) Order; 5) Probation (Intensive Supervision) Order S.125 Children Act 2001; 6) Probation (Residential Supervision) Order; 7) Suitable Person (Care and Supervision) Order; 8) Mentor (Family Support) Order; 9) Restriction on Movement Order; and 10) Dual Order [combination of two orders for example Probation and a Restriction of Movement order.

³⁸Ursula Kilkelly, ‘The Children Court: A Childs’ Rights Audit’ (UCC 2005) <<https://www.ucc.ie/academic/law/faculty/staff/childrenscourt.pdf>> accessed 19 March 2019, at p 50 states that ‘[n]o preliminary or preparatory training appears to have been undertaken by assigned judges before taking up their position in the Children’s Court, and judges do not appear to have received any in-depth training or continuing professional development on the implementation of the Children Act 2001, the principles of youth justice or in any of the disciplines necessary to allow them to meet the challenges of their work. It is unclear, therefore, how the procedural and practical requirements of international standards are to be implemented in the absence of judicial training. Similarly, it is unclear how the duty to listen to children can be fulfilled without judges receiving training on to how to communicate with young people and facilitate their voices being heard in court’.

Representation of Vulnerable Children

The inadequate legal representation of children in the Children Court in Ireland was exposed in an audit carried out in 2005.³⁹ Much of the criticism is replicated in other jurisdictions such as in the 2014 UK Carlile Report which found:

There is a lack of specialist professionals throughout the youth justice system, with many practitioners, including the judiciary, insufficiently trained to recognise young offender's needs, and lacking knowledge specific to young defendants and youth court law. The youth court is often used as a place for junior legal practitioners to 'cut their teeth', with youth court law mistakenly perceived to be less complex and less important than adult court law. This results in poor representation, needs not being identified and inappropriate sentences being advocated.⁴⁰

The key findings of the UK Youth Proceedings Advocacy Review Report 2015 also acknowledged that the quality of advocacy in youth proceedings is regarded as highly variable, that there was a lack of specialist knowledge amongst some advocates of the statutory framework for dealing with young people and young offenders, that there was mixed ability amongst advocates to communicate clearly and appropriately with the young people whom they are representing and that there was a lack of specialist training for advocates undertaking work in youth court proceedings.⁴¹ Recently, the Lord Chief Justice of England has stated that: 'It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.'⁴² There is an increasing awareness in the UK on the importance of the use of clear language for vulnerable children based on the premise that due to their age and relative immaturity, that adaptations should be made to help children better understand the proceedings they are involved in. This was highlighted in the case of *R v Barker*,⁴³ and in the subsequent development of the Advocates Toolkit.⁴⁴ The Advocate's Gateway (TAG) provides free access to practical, evidence-based guidance on vulnerable witnesses and defendants. TAG toolkits provide advocates with general good practice guidance when preparing for trial in cases involving a witness or a defendant with communication needs. The Howard League Toolkit was developed to support children through the sentencing process and is aimed at lawyers, youth justice professionals, and other supporting adults. This development was supported by the Bar Standards Board (BSB),⁴⁵ which has introduced new rules that require barristers practising in the UK Youth Court to declare their competence to work with children. The comprehensive infrastructure provides for appropriately trained 'advocates' to assist communication-impaired witnesses at police interviews and trial.⁴⁶ So far, the various Irish Legal Services Regulatory Authorities⁴⁷ have not followed these logical

³⁹ Ursula Kilkelly, *Youth justice in Ireland: Tough lives, rough justice* (Irish Academic Press 2006).

⁴⁰ Lord Carlile of Berriew CBE QC, 'Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court' (Youth Justice Legal Centre 2014) <http://michaelsieff-foundation.org.uk/content/inquiry_into_the_operation_and_effectiveness_of_the_youth_court-uk-carlile-inquiry.pdf> accessed 12 March 2019.

⁴¹ Alis Wigzell, Amy Kirby and Jessica Jacobson, 'The Youth Proceedings Advocacy Review: Final Report' (Bar Standards Board/ Institute for Criminal Policy Research 2015) <<https://www.barstandardsboard.org.uk/media/1712097/yparfinalreportfinal.pdf>> accessed 12 March 2019.

⁴² *R v Grant-Murray and Henry*; *R v McGill, Hewitt and Hewitt* [2017] EWCA 1228, [226].

⁴³ *R v Barker* [2010] EWCA Crim 4.

⁴⁴ 'Toolkits' (The Advocate's Gateway) <www.theadvocatesgateway.org/toolkits> accessed 12 March 2019.

⁴⁵ Rule S59 of the Bar Standards Board Handbook. See Bar Standards Board, 'The Bar Standards Handbook' (3rd edn, Bar Standards Board 2018) <https://www.barstandardsboard.org.uk/media/1933294/bsb_handbook_version_3.3.pdf> accessed 12 March 2019, 113.

⁴⁶ Emily Henderson, 'A very valuable tool. Judges, advocates and intermediaries discuss the intermediary system in England and Wales' (2015) 19(3) *The International Journal of Evidence & Proof* 154.

⁴⁷ The Law Society of Ireland the Kings Inns, the Irish Bar Council and the Legal Services Regulatory Authority.

developments. Adjustments and safeguarding the vulnerable should be second nature in the criminal justice system in light of the ‘fair trial’ provisions of the ECHR, our Constitution and jurisprudence.⁴⁸ Though the 2001 Act is a step in the right direction, inspiration should be taken from other jurisdictions in the implementation of guidance to assist advocates in dealing with vulnerable people in legal proceedings, as above, especially in the case of children.⁴⁹

“Childhood” Issues

The age at which a person is deemed a ‘child’ differs according to civil law and criminal law and according to the various jurisdictions. Section 3 of the 2001 Act defines a ‘child’ as a person under 18 years of age. It is the dominant factor under section 75 of that Act that gives the Children Court the exclusive right to decide on jurisdiction for all indictable offences except for murder, rape, manslaughter and treason. In sentencing,⁵⁰ the court must ensure that any measure imposed interferes as little as possible with the child’s education, training or employment, promotes the development of the child and respects the principle that detention is a last resort. This is in keeping with the Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice, which states:

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. The right to education, vocational training, employment, rehabilitation and re-integration should be guaranteed.⁵¹

Ireland has a low age of criminal responsibility, generally from age 12. However, for serious crime such as murder and rape the age is 10 despite the fact that ‘early adolescence is a period of marked neuro-developmental immaturity, during which children's capacity is not equivalent to that of an older adolescent or adult’.⁵² Ireland has been called upon repeatedly at UN level to amend the minimum age of criminal responsibility.⁵³ The suggested minimum age is 14 years for all offences⁵⁴ and the Committee on the Rights of the Child asserts that multiple ages of criminal responsibility, which at present exist in Ireland, whereby younger children will be held responsible for more serious crimes, is not permissible.⁵⁵ The Special Rapporteur on Child Protection in Ireland has observed that:

The approach to the minimum age of criminal responsibility in Ireland, as it is in many countries, is highly illogical. The law deems children incapable of consenting to sexual activity until the age of seventeen years, and prohibits the drinking of alcohol until

⁴⁸ Article 40 of the UNCRC and Article 6 of the ECHR recognise these rights internationally; Article 38.1 of the Irish Constitution 1937 recognises these rights domestically. See *T v UK* and *V v UK* (2000) 30 EHRR 121; *SC v UK* (2004) ECHR 263.

⁴⁹ Penny Cooper and Linda Hunting (eds), *Addressing Vulnerability in Justice Systems* (Wildly, Simmonds and Hill Publishing 2016).

⁵⁰ Part 9 of the Children Act 2001 outlines the powers of the court with regards to sentencing child offenders.

⁵¹ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice* (Council of Europe 2011) Part IV, Rule 82.

⁵² Lord Dholakia, ‘Age of Criminal Responsibility’ (2016) 67(3) *Northern Ireland Legal Quarterly* 263.

⁵³ UNGA, ‘Universal Periodic Review Report of the Working Group on the Universal Periodic Review: Ireland’ (21 December 2011) 19th Session (2011) UN Doc A/HRC/19/9.

⁵⁴ United Nations Committee on the Rights of the Child, ‘Concluding observations on the combined third and fourth periodic reports of Ireland’ (01 March 2016) UN Doc CRC/C/IRL/CO/3-4, para. 72.

⁵⁵ United Nations Committee on the Rights of the Child, ‘General Comment No. 10: Children’s rights in juvenile justice’ (25 April 2007) UN Doc CRC/C/GC/10.

eighteen years, yet children as young as ten years are essentially held to have the necessary mental development to knowingly and intentionally engage in a criminal act.⁵⁶

Despite this, successive Governments have resisted the demands for the age of criminality to be raised.⁵⁷ Instead, it introduced Behaviour Orders Powers in 2006, similar to UK Anti-Social Behaviour Orders (ASBO), which give the Gardaí the power to issue a behaviour warning to a child who has behaved in an anti-social manner.⁵⁸ If the child fails to comply, the Gardaí may apply to the court for an order prohibiting the person from engaging in certain defined behaviour (an ASBO).⁵⁹ Such an order may be granted on the civil standard of proof⁶⁰ based on a potentially subjective and variable definition of anti-social behaviour which does not have to be formally proved.⁶¹ However, unlike the UK,⁶² they have largely been ignored in practice.⁶³

Historically, it was accepted that children aged seven to fourteen years were exempt from criminal responsibility under the rule of *doli incapax* because they did not have the capacity to understand the consequences of their actions and therefore could not be held entirely responsible for these actions.⁶⁴ The enactment of the Criminal Justice Act 2006 ('2006 Act')⁶⁵ amended the 2001 Act to abolish this rule. The literature argues that abolition of *doli incapax* has rendered obsolete the justice/welfare debate in the context of globalisation, in addition to the emergence of a 'risk society'⁶⁶ and the inability of the youth justice system to deal effectively with the perceived youth crime problem.⁶⁷ Notwithstanding this, the 2001 Act appears to partly compensate for the gap left by the abolition of *doli incapax* and makes an effort to prioritise children under fourteen in that:

- A. charges can only be brought if the DPP consents (section 52(4)); and
- B. the court can dismiss a charge on its merits if the court determines that the child doesn't understand the commission of the offence (section 76(c)).

Age alone, however, is not a valid indicator of maturity,⁶⁸ and there is an increasing awareness that the criminal justice system must take cognisance of these factors.⁶⁹ Children are on a developmental trajectory and are not trainee adults or mini-adults.⁷⁰ Adolescence is, therefore, a period of transition⁷¹ and profound change⁷² and this is a complex matter. Chronological age-

⁵⁶ Geoffrey Shannon, 'Tenth Report of the Special Rapporteur on Child Protection' (Department of Children and Youth Affairs 2016) <https://www.dca.gov.ie/documents/2017120710thReportSpecialRappChild_Protection.pdf> accessed 12 March 2019, 83.

⁵⁷ The UNCRC has called upon states parties worldwide to establish a minimum age 'below which children shall be presumed not to have the capacity to infringe the penal law'. The Committee on the Rights of the Child recommends states to set this minimum age at 12 or higher.

⁵⁸ Criminal Justice Act 2006, Part 11. See Crime and Disorder Act 1998 (CDA) s 1C.

⁵⁹ Criminal Justice Act 2006, s 115.

⁶⁰ Dermot Walsh, 'The criminal justice act 2006: a crushing defeat for due process values' (2007) 7(1) *Judicial Studies Institute Journal* 44.

⁶¹ Claire Hamilton and Mairéad Seymour, 'ASBOs and Behaviour Orders: Institutionalised Intolerance of Youth?' (2006) 1(1) *Youth Studies Ireland* 61.

⁶² Barry Goldson and John Muncie, *Youth Crime & Justice* (2nd edn, SAGE 2015).

⁶³ Ursula Kilkelly, 'Diverging or emerging from law? The practice of youth justice in Ireland' (2014) 14(3) *Youth Justice* 212.

⁶⁴ For a discussion on *doli incapax*, see the Law Reform Commission Report on Defences in Criminal Law (LRC 95 – 2009) at paras. 1.32 – 1.36 <https://www.lawreform.ie/_fileupload/reports/rdefencesincriminallaw.pdf> accessed 02 April 2019.

⁶⁵ Section 129 of the Criminal Justice Act 2006 amended s 52 of the Children Act 2001.

⁶⁶ Ulrich Beck, *Risk society: towards a new modernity* (Sage Publication 1992).

⁶⁷ Kevin Haines and Stephen Case, *Positive youth justice: Children first, offenders second* (Policy Press 2015).

⁶⁸ John Graham and Benjamin Bowling, *Young People and Crime, Home Office Research Study 145* (Home Office Research and Statistics Department 1995).

⁶⁹ Mairéad Seymour, *Youth justice in context: Community, compliance and young people* (4th edn, Routledge 2012).

⁷⁰ Kevin Haines and Stephen Case, *Positive youth justice: Children first, offenders second* (Policy Press 2015).

⁷¹ Anne-Marie R Iselin, Jamie DeCoster and Randall T Salekin, 'Maturity in adolescent and young adult offenders: The role of cognitive control Law and Human Behaviour' (2009) 33(6) *Law and Human Behaviour* 455.

boundaries are always arbitrary in the sense that children develop at a different pace and in different directions from their peers, particularly during adolescence and early adulthood,⁷³ whereby the biological, cognitive, social and emotive changes are different for each child.⁷⁴ However, a court does not necessarily determine the time at which the age of the child is relevant.⁷⁵

If there is an issue of the capacity of the child to commit the offence, the court will have to concern itself with the age of the child at the time the offence was committed rather than a later court date.⁷⁶ Similarly, if the issue is of an entry age to the youth justice system, section 52 of the 2001 Act states that a child under the age of twelve will not be charged with an offence and this applies irrespective of the age the child that is brought to court.⁷⁷ Regarding ageing out, the criminal law is less sympathetic. For example, in a jurisdiction hearing in the Children Court for indictable offences,⁷⁸ it is construed narrowly in that a person must be a child both at the time of charging and a child at the time of the jurisdiction hearing. The child can, therefore, be severely prejudiced by losing the benefit of the 2001 Act particularly as he/she also loses the benefit of section 95(6), which incorporates a best interest principle into sentencing and the statutory benefits of Diversion. The issue is a frequent one for judicial review as exemplified by *DPP v Donoghue*⁷⁹ and *G v DPP*.⁸⁰

The Justice Model

In the justice model, 'human beings are viewed as self-determining agents whose principle concern is to secure the maximum degree of liberty for themselves'.⁸¹ Goldson has described the Justice Model as central to the concept of justice which in respect of youth justice, 'is the proposal that the intensity of formal intervention should be proportionate to the severity or gravity of the offence, rather than the level of perceived need. This principle derives from a classical formula comprising due process and proportionality'.⁸² The justice model is predicated on a view of the child as primarily a rights bearer and rights claimant whose autonomy, privacy and entitlement to due process are required to be respected.⁸³ The classic purposes of criminal punishment are deterrence, incapacitation, rehabilitation, retribution, and restitution; but 'in the area of juvenile justice, there is wrestling competition between considerations of community safety and the importance of the possibility of rehabilitation of a child which is especially true when violent crimes are committed by children'.⁸⁴

⁷² Laurence Steinberg and Robert G Schwartz, 'Developmental psychology goes to court' in Thomas Grisso and Robert G Schwartz (eds), *Youth on trial: A developmental perspective on juvenile justice* (University of Chicago Press 2000).

⁷³ Thomas O'Malley, *Sentencing law and practice* (3rd edn, Round Hall 2016).

⁷⁴ Bonnie L Halpern-Felsher and Elizabeth Cauffman, 'Costs and benefits of a decision: Decision-making competence in adolescents and adults' (2001) 22(3) *Journal of Applied Developmental Psychology* 257; Mairéad Seymour, *Youth justice in context: Community, compliance and young people* (4th edn, Routledge 2012).

⁷⁵ Dermot Walsh, *Juvenile Justice* (1st edn, Thomas Round Hall 2005).

⁷⁶ *ibid.*

⁷⁷ *Forde v DPP* [2017] IEHC 799.

⁷⁸ Children Act 2001, s 75(1).

⁷⁹ [2014] IESC 56.

⁸⁰ [2014] IEHC 33.

⁸¹ Faye Gale, Ngaire Naffine and Joy Wundersitz (eds), *Philosophies of juvenile justice. Juvenile Justice: Debating the Issues* (Allen & Unwin 1993) 3.

⁸² Barry Goldson (ed), *Dictionary of Youth Justice* (Routledge 2013) 202.

⁸³ David Smith, *A new response to youth crime* (Routledge 2012).

⁸⁴ John D Elliott and Anna M Limoges, 'Deserts, Determinacy, And Adolescent Development in 'The Juvenile Court' (2017) 62(3) *South Dakota Law Review* 750.

The goal of the justice model for children, is predicated on the classic principles,⁸⁵ which assume that children can weigh up the potential of risks against the potential consequences of punishment. The Judge is expected to apply an appropriate sentence having considered the seriousness of the offending. The sentence applied should be the least restrictive sanction commensurate with the severity of the act.⁸⁶ This allows judges to treat juvenile sentencing as different to adults since children are, by virtue of their inherent psychological and neurobiological immaturity, not as responsible for their behaviour as adults.⁸⁷

Behavioural and neurobiological research has grown substantially, and it has been argued that findings⁸⁸ have strongly influenced recent judicial thinking on juvenile offending leading to a more welfare orientated sentencing even if the process is rights orientated.⁸⁹ However, the political response frequently disregards this research in favour of ‘just deserts’ and individual responsibility.⁹⁰ The 2017 Guidelines from the UK Sentencing Council on sentencing children for serious crimes does state that ‘children and young persons are not fully developed and they have not attained full maturity’.⁹¹ There are no guidelines in Ireland and sentencing is very much discretionary, a factor which could be very positive if approached in a holistic manner and subject to adequate training.

According to Steinberg ‘adolescence is not just a time of tremendous change in the brain's structure’,⁹² it is also a time of significant changes in how the brain works. In practice, the challenge should be to establish whether the policy involving young people takes this into account and how society should distinguish between adolescents who are ready for the rights and responsibilities of adulthood and those who are not and require a more needs-orientated approach.⁹³

In the UK and Ireland, courts generally accept that children are less culpable than adults and a greater emphasis is placed on rehabilitation and less on retribution and deterrence.⁹⁴ Lord Reed neatly summarized the UK situation in the serious case of *T & V v UK*, at paragraph 191, whereby he stated that: ‘[i]f children are tried and convicted, they then have to be sentenced; but it will not be appropriate to sentence them in the same way as an adult, if their immaturity has the consequence that they were less culpable or that reformative measures are more likely to be effective’.⁹⁵

The pendulum favouring a predominate justice model in Ireland is in keeping with the civil libertarians and liberal lawyers’ view of Welfarism, even if it is not explicitly described as such. The history of the Irish youth justice system, has swung towards a punitive Welfarism which

⁸⁵ Jeremy Bentham, *An introduction to the principles of morals and legislation* (JH Burns and HLA Hart eds, Clarendon Press 1996).

⁸⁶ David Smith, *A new response to youth crime* (Routledge 2012).

⁸⁷ See *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Miller v Alabama*, 132 S. Ct. 2455, 2460 (2012).

⁸⁸ Elizabeth S Scott and Laurence Steinberg, ‘Adolescent Development and the Regulation of Youth Crime’ (2008) 18(2) *Future Child* 15.

⁸⁹ Thomas O'Malley, *Sentencing law and practice* (3rd edn, Round Hall 2016).

⁹⁰ Barry Goldson and John Muncie, *Youth Crime & Justice* (2nd edn, SAGE 2015).

⁹¹ Sentencing Council, ‘Sentencing Children and Young People: Definitive Guideline’ (Sentencing Council 2017) <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-Young-People-definitive-guideline-Web.pdf>> accessed 12 March 2019, 1.5.

⁹² Laurence Steinberg, ‘Should the Science of Adolescent Brain Development Inform Public Policy?’ (2012) 28(3) *Issues in Science And Technology* 67, 70.

⁹³ Elizabeth Cauffman and Laurence Steinberg, ‘(Im)maturity of judgment in adolescence: Why adolescents may be less culpable than adults’ (2000) 18(6) *Behavioural sciences and the Law* 741.

⁹⁴ See *R v Ghaffor* [2002] EWCA Crim 1857; [2003] 1 C App R (S) and in Ireland *DPP v DG* [2005] IECCA 75.

⁹⁵ *T & V v UK* [2000] 30 EHRR 121.

largely ignored children's rights⁹⁶ particularly in institutional injustices.⁹⁷ However, 'rights' can be used to incorporate self-responsibility and obligation also.⁹⁸ It is difficult to ensure that a more progressive justice system would benefit everyone, particularly as we now live in multi-ethnic, multi-cultural, multi-faith society.⁹⁹ This justice/rights model is also conflicted with the recognition of childhood issues,¹⁰⁰ so that it is arguable that in all but the most serious crimes, pre-sentence issues may be dealt with in a justice/rights model and sentencing issues being dealt with in a welfare model.¹⁰¹

Central to the control of the youth justice system in Ireland is ensuring adherence to 'due process' rights, protected internationally by the ECHR and domestically by the Irish Constitution.¹⁰² In the event that this is breached by, for example, the abuse of the discretionary powers of An Garda Síochána and results in negative consequences for the defendant, the issue will be determined by the Superior Courts by virtue of judicial review.¹⁰³ 'Due process' lawyers emphasise an adjudicative model incorporating presumption of innocence and formal procedural rules to protect a defendant's rights.¹⁰⁴ 'Due process' is also essential for the issue of a fair trial and, for example, in *T & V v UK*,¹⁰⁵ the ECtHR required adaptations to the procedure in criminal trials for children so that they could effectively participate in the trial process. However, emphasising children's procedural rights at trial may result in a harsher punishment at the end of the process.¹⁰⁶ This risk has been described as the Trojan horse dilemma.¹⁰⁷ In the United States of America, the trend towards a justice model for juveniles was easily transformed into a plea to send progressively more children to the adult penal system¹⁰⁸ with consequences of a more punitive system.¹⁰⁹ There is some criticism of Ireland's judiciary's slow response from a progressive approach to a substantive approach to rights in all areas of law during the last thirty years – though it is acknowledged that the record on procedural rights is excellent,¹¹⁰ the reality is that judges can only make substantive rights judgments if lawyers are prepared to take the cases in the courts.

In practical terms, this has meant that, on the one hand, judicial review is an active ingredient of youth justice in that the High Court supervises the Children Court to ensure that it makes decisions in accordance with the law, i.e. the 2001 Act, but on the other hand, it is primarily concerned with the decision-making process rather than with the substance of the decision.¹¹¹ Effectively, this resulted in a situation such that, until recently, there have been limited Superior

⁹⁶ Ursula Kilkelly, *Youth justice in Ireland: Tough Lives, Rough Justice* (Irish Academic Press 2006); Ursula Kilkelly, 'Youth justice and children's rights: Measuring compliance with international standards' (2008) 8(3) *Youth Justice* 187; Geoffrey Shannon, *Child Law* (Thomson Round Hall 2010).

⁹⁷ Mary Raftery and Eoin O'Sullivan, *Suffer the little children: The inside story of Ireland's industrial schools* (New Island Books 1999).

⁹⁸ Digby C Anderson (ed), *The loss of virtue: moral confusion and social disorder in Britain and America* (Social Affairs Unit 1992).

⁹⁹ Judicial College 'Equal Treatment Bench book' (Judicial College 2018) <<https://www.judiciary.gov.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>> accessed on 12 March 2019.

¹⁰⁰ Mental health disorders, bereavement and separation of a parent, significant speech and language and learning difficulties, Attention Deficit Hyperactivity Disorder and identity issues.

¹⁰¹ Thomas O'Malley, *Sentencing law and practice* (3rd edn, Round Hall 2016).

¹⁰² Article 40 of the UNCRC and Article 6 of the ECHR recognise these rights internationally; Article 38.1 of the Irish Constitution 1937 recognises these rights domestically.

¹⁰³ See Mark de Blacam, *Judicial Review* (3rd edn, Bloomsbury Professional 2017) chapter 16 on the requirement of a fair hearing.

¹⁰⁴ James Austin and Barry Krisberg, 'Wider, stronger and different nets: the dialectics of criminal justice reform' (1981) 18(1) *Journal of Research in Crime and Delinquency* 165.

¹⁰⁵ (2000) 30 EHRR 121.

¹⁰⁶ Sonja Snacken and Els Dumortier (eds), *Resisting punitiveness in Europe? Welfare, Human Rights and Democracy* (Routledge 2012).

¹⁰⁷ Maria José Bernuz Beneitez and Elizabeth Dumortier, 'Why Children Obey the Law: Rethinking Juvenile Justice and Children's Rights in Europe through Procedural Justice' (2018) 18(1) *Youth Justice* 34, 38.

¹⁰⁸ *ibid.*

¹⁰⁹ Michael Cavatina and James Dignan, 'Penal policy and political economy' (2006) 6(4) *Criminology & Criminal Justice* 435.

¹¹⁰ Mary Carolan, 'Judge criticises 'baffling' Supreme Court rulings over past 30-year' *The Irish Times* (Dublin, 11 November 2017) - Mr Justice Gerard Hogan a Judge of the Court of Appeal.

¹¹¹ Hilary Delany and Declan McGrath, *Civil Procedure in the superior courts* (2nd edn, Round Hall Ltd 2012); RSC Order 84.

Court decisions concerning youth justice rights and the cases relating to children that do reach these courts, though recognising the fair trial rights of the defendant,¹¹² have largely turned into a review of blameworthy prosecutorial delay rather than other procedural rights and substantive rights.¹¹³ Aside from a Practice Direction covering Dublin City Children Court,¹¹⁴ there is no other systematic approach developed to implement the 2001 Act.¹¹⁵

The right to a fair trial does not always operate satisfactorily in practice. To take one example, the issue of prosecutorial delay, which is a matter of judicial review, has been tested on numerous occasions by the courts. Murray CJ clarified that the real issue in the delay in the prosecution of sex offences against children was not where the delay blame lay, but in the issue of a fair trial. He held that the test is '[w]hether there is a real or a serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case.'¹¹⁶ In the case of young offenders, however, delay runs the risk of the child ageing out, as noted above which means that the benefit of the 2001 Act can be lost and resulting in the child no longer being able to make representations to the Children Court to retain jurisdiction (section 75), loss of anonymity (section 252) and not getting the benefit of the expunging of criminal records in most cases (section 258).¹¹⁷

Invariably, the courts will look at the balance of convenience which frequently lies in the desirability of bringing a prosecution rather than the adverse consequence to a child defendant, as for example, Hedigan J in *Kelly v O'Malley*¹¹⁸ and Kearns P in *Aaron Daly v D.P.P.*¹¹⁹ One of the most enlightened judgments can be seen in *G v DPP*,¹²⁰ where it recognised that the child who committed a crime just short of his sixteenth birthday was not the same as the adult aged twenty who was being tried. In prohibiting the trial, the judge, O'Malley J, recognised that childhood is a transient status and stated that:

Children differ from adults, not just in their physical development and lesser experience of the world, but in their intellectual, social and emotional understanding. It is for this reason that it has long been recognised that it is unfair to hold a child to account for his or her behaviour to the extent that would be appropriate when dealing with an adult. Further, it has been accepted since, at least, the enactment of the Children Act of 1908, that the fact that these aspects of personality are still developing means that intervention at an early stage, rather a purely punitive approach, may assist in a positive outcome as the child reaches adulthood.¹²¹

The Welfare Model

The alternative to the justice model is the welfare model, which can be defined as severing the crime from the punishment so that neither gravity, nor the triviality of the criminal behaviour,

¹¹² Article 40 of the UNCRC, Article 6 of the ECHR and Article 38.1 of the Irish Constitution 1937. See discussion at n 48 above.

¹¹³ See *BF v DPP* [2001] 1 IR 656 (SC) and *Donoghue v DPP* [2014] IESC 56.

¹¹⁴ PD DC04 – Children Court.

¹¹⁵ Ursula Kilkelly, 'Diverging or emerging from law? The practice of youth justice in Ireland' (2014) 14(3) *Youth Justice* 212.

¹¹⁶ *SH v Director of Public Prosecutions* [2006] 3 IR 575 (SC) [47].

¹¹⁷ *DPP v Donoghue* [2014] 2 IR 762 (SC).

¹¹⁸ *Kelly v O'Malley* [2009] IEHC 200.

¹¹⁹ *Aaron Daly v DPP* [2014] IEHC 33.

¹²⁰ *G v DPP* [2014] IEHC 33.

¹²¹ *G v DPP* (n 120) [92].

necessarily determine the extent of the punishment thought appropriate.¹²² Welfare in youth justice is, therefore, based on the assumption that all state intervention such as probation, indeterminate sentencing, care orders, individualised treatment and separate custodial regimes should be directed to meet the needs of young people, rather than punishing their deeds.¹²³ The Committee on the Rights of the Child has observed that:

[c]hildren differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.¹²⁴

Historically, the welfare model has tended to see little differentiation between offending and non-offending troublesome behaviour; both are symptomatic of a more extensive deprivation, whether material neglect, a lack of moral guidance or a 'parenting deficit'.¹²⁵ It is associated with paternalistic and protectionist policies that children, because of their immaturity, cannot be regarded as rational and self-determining agents. They are the subject of their environment and that the criminal justice system should address the underlying cause of the child's offending rather than punishing the offence.¹²⁶ In contrast to the justice model, the welfare model looks at the individual circumstances of the child and to his/her future. It recognises social injustice and treatment based on the pathology of the child.¹²⁷ As McMenamin J said in *DPP v PT*,¹²⁸ 'it is impermissible that there should be a hybrid form of civil/criminal proceedings in any form,' but that the courts are 'also charged with a more vital relationship, that of assessing children's needs and prescribing treatment which, though punitive, is also remedial and constructive'.¹²⁹

From a contextual point of view, the Children Court operates a rights model with welfare wings. This means it is largely a justice model but, in a process, and particularly in sentencing,¹³⁰ it interacts with welfare issues by, for example, requiring a child's parents to attend¹³¹ and requiring proceedings are held *in camera* to protect the child's identity.¹³² However, the press is allowed to report on the proceedings provided the anonymity of the child is protected.¹³³ Section 77 of the 2001 Act is, in theory, a critical provision which aims to bridge the gap between the 'justice' and 'welfare' systems for vulnerable children before the Children Court.¹³⁴ It provides that a judge in a criminal trial can call on the Child and Family Agency (CFA) to convene a conference to

¹²² Faye Gale, Ngaire Naffine and Joy Wundersitz (eds), *Philosophies of juvenile justice. Juvenile Justice: Debating the Issues* (Allen & Unwin 1993).

¹²³ John Muncie, Gordon Hughes and Eugene McLaughlin (eds), *Youth justice: critical readings* (Sage in association with The Open University 2002).

¹²⁴ United Nations Committee on the Rights of the Child, 'General Comment No. 10: Children's rights in juvenile justice' (25 April 2007) UN Doc CRC/C/GC/10.

¹²⁵ John Muncie, *Youth and Crime* (4th edn, Sage Publishing 2014) 275.

¹²⁶ Christine Alder and Joy Wundersitz, 'New Directions in Juvenile Justice Reform in Australia' in Christine Alder and Joy Wundersitz (eds), *Family Conferencing and Juvenile Justice: The way forward or misplaced optimism* (Australian Institute of Criminology 1994).

¹²⁷ Lord Longford, *Crime: A Challenge to Us All. Report of the Labour Party's Study Group* (Labour Party 1964).

¹²⁸ *DPP v PT* [1999] 3 IR 254 (HC) [48].

¹²⁹ Dermot Walsh, *Juvenile Justice* (1st edn, Thomas Round Hall 2005) 71; James O'Connor, 'The juvenile offender' (1963) 52 *Irish Quarterly Review* 69, 71.

¹³⁰ Thomas O'Malley, *Sentencing law and practice* (3rd edn, Round Hall 2016).

¹³¹ Children Act 2001, s 91.

¹³² Children Act 2001, s 94.

¹³³ Children Act 2001, s 252.

¹³⁴ Ursula Kilkelly, *Youth justice in Ireland: Tough Lives, Rough Justice* (Irish Academic Press 2006).

coordinate the various supports for a child. This is particularly significant in the case of children who are in the care of the State and subject to ‘special care’ or children who are on a waiting list for ‘special care’. A question asked in *DPP v AB*¹³⁵ posited whether it was unfair to criminalise a child for issues that were also the basis for him already being in civil care incarceration. The Children Court held that the issues could be dealt with separately, but in a criminal context and for a community sanction to be imposed, the child had to have the capacity to carry out a community sanction sentence.¹³⁶ The reality is that the criminal law takes precedence over civil law in all matters concerning children in conflict with the law.¹³⁷

The mental element of a crime is concerned with legal, not with moral guilt¹³⁸ and the criminal law justice model makes few concessions to children.¹³⁹ While judicial discretion does allow for individualising of the sentence, the reality is that lack of legal training in Ireland, particularly in the context of childhood issues, can give rise to unintended adverse consequences for children from both a justice and welfare point of view. This is despite the fact that many children who enter the criminal justice system present with complex childhood behaviour issues, have multiple health issues (including mental health issues¹⁴⁰), come from chaotic backgrounds,¹⁴¹ are often themselves victims of violence, abuse or neglect and are unable to satisfactorily thrive in our society before they reach detention.¹⁴² Therefore, the needs of a child should be determined on a case by case basis, which involves an individualised assessment in the light of the specific circumstances of each child or group of children or children in general.¹⁴³

There is also a question of where the needs are to be met. Should they be achieved in the courts or through the families, schools, social and medical services?¹⁴⁴ Should education and treatment prevail over punishment and should court paternalism be replaced by a holistic non-criminal justice approach? In this regard, Scotland answered the question by ditching the justice model with the creation of the Children’s Hearing Systems (CHS) and an integrated juvenile care and justice system.¹⁴⁵

¹³⁵ *DP v AB* [2017] IEDC 12.

¹³⁶ *ibid.*

¹³⁷ *JD v DPP* [2004] 1 ILRM 202 (HC).

¹³⁸ Peter Charleton, Paul McDermott and Marguerite Bolger, *Criminal Law* (Butterworths 1999).

¹³⁹ Mark Ashford, Alex Chard and Naomi Redhouse, *Defending young people in the criminal justice system* (3rd edn, Legal Action Group 2006).

¹⁴⁰ Note, the World Health Organisation (WHO) describes mental disorder as: ‘... a broad range of problems, with different symptoms’ and that ‘Worldwide 10-20% of children and adolescents experience mental disorders. Half of all mental illnesses begin by the age of 14 and three-quarters by mid-20s. Neuropsychiatric conditions are the leading cause of disability in young people in all regions. If untreated, these conditions severely influence children’s development, their educational attainments and their potential to live fulfilling and productive lives. Children with mental disorders face major challenges with stigma, isolation and discrimination, as well as lack of access to health care and education facilities, in violation of their fundamental human right’. See World Health Organisation, ‘Mental Health’ (World Health Organisation) <www.who.int/mental_health/en> accessed 12 March 2019.

¹⁴¹ Such as Autism Spectrum Disorders, Attachment Disorder, Attention Deficit/Hyperactivity Disorder (ADHD/ADD), Conduct Disorder, Oppositional Defiant Disorder, etc., and that what is needed are strong level of supports and positive parenting. Attachment theory, created by John Bowlby (Mary D Salter Ainsworth and John Bowlby, ‘An Ethological Approach to Personality Development’ (1991) 46(4) *American Psychologist* 333) has demonstrated that a disorganized attachment relationship, created through instable relationships between a child and his or her parent, can produce significant negative long-term consequences, ranging from emotional to social effects. See Angelina Clay, ‘Rescuing Dependent Children from the Perils of Attachment Disorder: Analyzing the Legislative Intent of California Welfare and Institutions Code; Section 361.5’ (2014) 25 *Hastings Women’s Law Journal* 305.

¹⁴² British Medical Association Ethics Department, ‘Young lives behind Bars: the health and human rights of children and young people detained in the criminal justice system’ (British Medical Association 2014) <<https://www.bma.org.uk/-/media/files/pdfs/working%20for%20change/improving%20health/vulnerable%20people/po-younglivesbehindbars-31-10-2014.pdf?la=en>> accessed 12 March 2019.

¹⁴³ *ibid.*

¹⁴⁴ Stewart Asquith, ‘Justice, retribution and children’ in John Muncie, Gordon Hughes and Eugene McLaughlin (eds), *Youth Justice Critical Readings* (Sage in association with The Open University 2002).

¹⁴⁵ ‘History’ (Children’s Hearings Scotland) <<http://www.chscotland.gov.uk/the-childrens-hearings-system/history/>> accessed 01 April 2019.

In Ireland, a risk assessment is carried out by the Probation Service on children convicted of an offence based on the Youth Level of Service/Case Management Inventory (YLS/CMI), a standardized risk assessment tool, which is designed to assist the probation service and ultimately the Judge in evaluating risk and needs in youthful offenders.¹⁴⁶ However, principle of risk assessment is that services should be targeted to the highest-risk cases; however the use of such tools, in either the UK or Ireland focus explanation of both the child's past and potential future law-breaking.¹⁴⁷ The net effect of this, with the dominance of risk assessments and the rise of actuarial justice and managerialism, is a shift away from a benign Welfarism defined by rehabilitation, towards a repressive Welfarism defined by a drive to efficiency and effectiveness by managing the criminal population and the crime control agencies. This arises because the welfare needs of children in conflict with the law are shaped by the managerialism strategies of governance which renders the children more not less punishable.¹⁴⁸

Which Model Exists In Ireland?

In looking at which model is more prevalent in Ireland, the following circumstances are indicative of the approach that is currently being undertaken and applied to the youth justice system.

Diversion

In Ireland, it is compulsory in all cases that the Director of the Juvenile Diversion Programme (JDP) considers the suitability of a child in conflict with the law for diversion provided the child admits responsibility for the crime and agrees to be cautioned.¹⁴⁹ The child can receive an informal or formal caution. The Juvenile Liaison Officer (JLO) may also decide to convene a family conference, which could include the child's family, victims of the crime, and others involved in the child's life, such as social workers or teachers.¹⁵⁰ Should the child refuse admission¹⁵¹ to the programme or reoffend frequently, he may be prosecuted and brought before the Children Court.

In statistical terms, the number of children entering the Young Persons Diversion Scheme has decreased substantially in the last decade. For example, in 2005 there were 17,567 children referred to the programme, whereas the 2017 Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Program (the 2017 Report) showed the numbers decreasing each year to 2016 where 9,451 children were admitted to the JDP, though there was a 12% rise to 10,607 children being admitted in 2017. Of those admitted to the programme, 57% received an informal caution, 19% received a formal caution, 5% received no further action and 13% were deemed not suitable and, consequently, were prosecuted before the Children Court. In contrast to the Courts, of the children referred to the JDP, 30.5% related to theft offences, 21.9% related to public order offences, 9.9% related to damage to property, 8.7% related to assault offences and 5.8% related to road traffic matters.¹⁵² There were 477 restorative cautions,

¹⁴⁶ Paula O'Leary and Carmel Halton, 'Young Persons' Probation in the Republic of Ireland: An Evaluation of Risk Assessment' (2009) 6 *Irish Probation Journal* 97.

¹⁴⁷ Chris Baird, et al, 'A Comparison of Risk Assessment Instruments in Juvenile Justice' (National Council on Crime and Delinquency 2013) <http://www.nccdglobal.org/sites/default/files/publication_pdf/nccd_fire_report.pdf> accessed 12 March 2019.

¹⁴⁸ Jo Phoenix, 'Beyond risk assessment: the return of repressive welfarism.' in Monica Barry and Fergus McNeill (eds), *Youth Offending and Youth Justice* (Jessica Kingsley Publishers 2009).

¹⁴⁹ Children Act 2001, Part 4.

¹⁵⁰ Ursula Kilkelly, *Youth justice in Ireland: Tough Lives, Rough Justice* (Irish Academic Press 2006).

¹⁵¹ Rule 11.3 of the Beijing Rules (n 19) requires a child to consent.

¹⁵² Garda Youth Diversion and Crime Prevention Bureau, '2017 Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme' (An Garda Síochána/ Irish Youth Justice Service 2017)

which means that those offenders accepted responsibility for the offending behaviour, allowing the victim to have a voice and the offender to work towards rehabilitation.¹⁵³

Notwithstanding the increase in referrals for 2017, there has been a decreasing trend in those being admitted to the JDP and the reasons for this are not entirely clear. IYJS have stated since the first National Youth Justice Strategy commenced in 2008 that there is more proactive engagement by IYJS and its partners and that targeted interventions have achieved better outcomes for young people who get into trouble with the law.¹⁵⁴ The operation of the JDP is supported by the nationwide network of Garda Youth Diversion Projects (GYDPs). GYDPs are community-based, multi-agency, crime prevention initiatives which primarily seek to divert young people who have become involved in criminal or anti-social behaviour. A criticism of this initiative is that it is in effect disguised social control and may lead to an increase in the number of children entering the criminal justice system.¹⁵⁵

However, there is the lack of published criteria to guide the discretionary decision-making at several stages of the JDP, coupled with a poor credible complaint or review mechanism¹⁵⁶ for the children affected and a lack of independent monitoring¹⁵⁷ of the Irish programme,¹⁵⁸ where 50% of the Committee to review the programme are members of the Garda Síochána. A constant theme of literature is therefore lack of transparency, accountability, due process, and compliance with international children's rights.¹⁵⁹ However, justice and welfare traditionally hold very different views in regard to serious cases, one operating to keep children out of court and not subject them to questioning in an intimidating environment which is harmful to them, and the other that children should face the full rigour of the law.

Sentencing

Tom O'Malley¹⁶⁰ contends that welfare dominates the juvenile sentencing stage, but in serious offences, the issues are possibly more problematic in practice. The public and politicians appear to prefer risk management to reintegration for serious sex offending.¹⁶¹ The 2001 Act is a mixed justice/welfare measure regarding victims, child offenders and sentencing. In particular, section 96(5) of the 2001 Act originally provided that 'any measures for dealing with offending by children shall have due regard to the interests of any victims of their offending'. However, this

<<http://www.iyjs.ie/en/IYJS/Section%2044%20Monitoring%20Committee%20Report%202017.pdf/Files/Section%2044%20Monitoring%20Committee%20Report%202017.pdf>> accessed 12 March 2019, 20-21.

¹⁵³ *ibid*, 17.

¹⁵⁴ Irish Youth Justice Service, 'Tackling Youth Crime: Youth Justice Action Plan 2014-2018' (Department of Justice and Equality 2013) <<http://www.justice.ie/en/JELR/Tackling%20Youth%20Crime%20-%20Youth%20Justice%20Action%20Plan.pdf/Files/Tackling%20Youth%20Crime%20-%20Youth%20Justice%20Action%20Plan.pdf>> accessed 02 April 2019.

¹⁵⁵ David O'Mahony and Jonathan Doak, 'Restorative Justice—Is Better? The Experience of Police-led Restorative Cautioning Pilots in Northern Ireland' (2004) 43(5) *The Howard Journal of Crime and Justice* 484.

¹⁵⁶ Rules 3.5 and 3.6 Beijing Rules (n 19).

¹⁵⁷ Rule 30 of the Beijing Rules (n 19), rule 2.4 of the Tokyo Rules (UNGA United Nations Standard Minimum Rules for Non-custodial Measures UN A/RES/45/110 (1990)); Rachel Crasnow, et al 'Human Rights Brief No.5 - Best practice principles for the diversion of juvenile offenders (2001)' (Australian Human Rights and Equal Opportunity Commission 2001) <<https://www.humanrights.gov.au/publications/human-rights-brief-no5-best-practice-principles-diversion-juvenile-offenders-2001>> accessed 12 March 2019.

¹⁵⁸ Ursula Kilkelly, 'Policing, young people, diversion and accountability in Ireland' (2011) 55(2) *Crime, Law and Social Change* 133.

¹⁵⁹ Mairéad Seymour, 'Transition and reform: Juvenile justice in the Republic of Ireland' in Josine Junger-Tas and Scott H Decker (eds), *International Handbook of Juvenile Justice* (Springer 2006); Diarmuid Griffin, 'Restorative justice, diversion and social control: Potential problems' in Kevin Lalor, et al (eds), *Young People and Crime: Research, Policy and Practice* (Centre for Social and Educational Research 2007) <<https://arrow.dit.ie/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1000&context=csercon#page=131>> accessed 07 April 2019; Ursula Kilkelly, 'Diverging or emerging from law? The practice of youth justice in Ireland' (2014) 14(3) *Youth Justice* 212.

¹⁶⁰ Thomas O'Malley, *Sentencing Law and Practice* (3rd edn, Round Hall 2016).

¹⁶¹ Stacey Hannem and Michael Petrunik, 'Circles of support and accountability: A community justice initiative for the reintegration of high risk sex offenders' (2007) 10(2) *Contemporary Justice Review* 153.

was amended by the 2006 Act to read that ‘when dealing with a child charged with an offence, a court shall have due regard to the child’s best interests, the interests of the victim of the offence and the protection of society’.¹⁶² This sends a mixed message as the interests of the victim may not coincide with the best interests of the child and principles such as detention being imposed solely as a last resort. In these circumstances, it is unclear whom should receive priority where a conflict arises. But in deciding the issue, the court must also consider any supports for a troubled child which need to be dealt with in a child-appropriate way.¹⁶³

The traditional view of sentencing is that victims had little or no rights. Criminal law is a public law matter, not a private contract between defendant and victim. Ms Justice Susan Denham, as she then was, in the Irish Supreme Court case of *People (DPP) v M*¹⁶⁴ summarised the situation to be that ‘[s]entencing is neither an exercise in vengeance nor the retaliation by victims on a defendant’, a view echoed by the Court of Appeal in *R v Nunn*,¹⁶⁵ where it was stated that ‘the opinions of the victim...about the appropriate level of sentence do not provide any sound basis for reassessing a sentence’. Colbert has also observed that ‘[i]t used to be, that everyone was entitled to their own opinion, but not their own facts. But that’s not the case anymore. Facts matter not at all. Perception is everything’.¹⁶⁶

However, more recently, victims have come to play a more prominent role in the formulation of policy in both domestic and international criminal justice systems, with victims in some jurisdictions having acquired the right to participate in sentencing and diversion processes,¹⁶⁷ as echoed by the UN and the ECtHR.¹⁶⁸ In Ireland, section 5 of the Criminal Justice Act 1993 made formal provision for the introduction of victim impact evidence at sentencing, but only where the offence was of a violent or sexual nature.¹⁶⁹ However, the list of sexual offences is extensive.¹⁷⁰ It also applies to sentencing young offenders, where victim impact statements may be read in court. More recently the Victims’ Rights Directive 2012/29/EU, in Ireland, and the Criminal Justice (Victims of Crime) Act 2017 extended this to both sentencing generally and to victim information. The additional focus on a child-sensitive approach in cases involving vulnerable victims, as outlined by the Court of Justice of the European Union (CJEU) in the *Pupino* case¹⁷¹ and the ECtHR in *Kovac v Croatia*¹⁷² for example, creates difficulties in practice with regards to how a juvenile criminal court should balance the best interests of the child offender, the interests of the victim and the child’s rights to a fair trial.

Restorative Programmes

Dissatisfaction with the justice/welfare debate has led reformers to consider the merits of a third approach to the philosophies underlying youth justice, namely Restorative Justice (RJ).¹⁷³ Its

¹⁶²M Cherif Bassiouni, ‘International Recognition of Victims’ Rights’ (2006) 6(2) *Human Rights Law Review* 203; Criminal Justice Act 2006, s 136; Criminal Justice Act 2006 (Commencement) Order 2006, SI 2007/65.

¹⁶³Kevin Haines and Stephen Case, *Positive youth justice: Children first, offenders second* (Policy Press 2015).

¹⁶⁴*People (DPP) v M* [1994] 3 IR 306 (SC).

¹⁶⁵*R v Nunn* [1996] 2 Cr App R (S) 136.

¹⁶⁶Nathan Rabin, ‘Interview: Stephen Colbert’ (AV/TV Club.com 2006) <<https://tv.avclub.com/stephen-colbert-1798208958>> accessed 12 March 2019.

¹⁶⁷Jonathan Doak, ‘Victims’ Rights in Criminal Trials: Prospects for Participation’ (2005) 32 *Journal of Law and Society* 294.

¹⁶⁸The Declaration of Basic Principles for Victims of Crime and Abuse of Power in 1985 which focuses on domestic crimes and separately a Declaration in 2006 on Gross Violations of International Human Rights. See UNGA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power UN A/RES/40/34 (1985) and UNGA Res 60/147 (21 March 2006) UN Doc A/RES/60/147.

¹⁶⁹Thomas O’Malley, *Sentencing law and practice* (3rd edn, Round Hall 2016).

¹⁷⁰See Criminal Evidence Act 1992.

¹⁷¹Case-C-105/03 Criminal proceedings against Maria Pupino [2005] ECR I-05285, OJ C146/16.

¹⁷²*Kovac v Croatia* App No 503/05 (ECtHR, 12 July 2007).

¹⁷³Faye Gale, Ngaire Naffine and Joy Wundersitz (eds), *Philosophies of juvenile justice. Juvenile Justice: Debating the Issues* (Allen & Unwin 1993).

purpose is to bring together victims, offenders and their families to arrive at a solution to the crime. There is no single definition of RJ¹⁷⁴ and it can mean different things to different people.¹⁷⁵ It covers a range of practices that can occur at various points during the criminal justice system.¹⁷⁶ In general terms, RJ aims to resolve conflict and to repair the harm done by crime and involving victims as well as offenders in the process. Core elements of RJ include informality and layperson active participation, but at court stage or pre-sentence stage RJ becomes more formal, professional and potentially coercive.¹⁷⁷ RJ gives victims a voice by which they can describe their harm and have a control over the treatment of the offenders 'by helping to ensure that their experience is honoured, treated seriously and with respect, such that they gain some measure of justice'.¹⁷⁸

The emphasis on involving those most affected by crime resulted in increased use of restorative practices in youth and adult justice systems in different jurisdictions since the 1990's.¹⁷⁹ The least controversial application of RJ is for minor and middle-seriousness offence of a routine nature committed by juveniles.¹⁸⁰ Youth RJ is frequently represented by forms of diversion in Ireland, such as cautioning and family conferencing under the JDP under Part 4 of the 2001 Act or family conferencing ordered by the court under section 78 of the 2001 Act. Although, strictly speaking, a family conference is not an RJ programme and the term 'restorative justice' is not mentioned in the 2001 Act. However, whilst RJ is also not explicitly mentioned in the UNCRC,¹⁸¹ its use has been supported and encouraged by the Committee on the Rights of the Child and has become a central aspect of practice in many European youth justice systems.

In literature, there is a strong argument that serious crime, such as sexual offences, are in fact matters for public law and should not be the subject of a private conference process.¹⁸² Therefore, the formal criminal process is still largely regarded as the recognised way of demonstrating that society takes something seriously.¹⁸³ RJ sits uneasily with public enthusiasm for the greater use of incarceration and a more significant public intolerance of the criminal and anti-social behaviour of adolescents.¹⁸⁴ Sincere apologies in court are difficult to achieve and a victim's ability to recover from an offence is contingent, in part, on the distress it caused them particularly in reaction to assaults.¹⁸⁵ RJ for sexual offences is highly contentious as it may trivialise violence against women, re-victimise the vulnerable and endanger the safety of victim

¹⁷⁴ Barbara Hudson, 'Restorative justice and gendered violence: Diversion or effective justice?' (2002) 42(3) *British Journal of Criminology* 616.

¹⁷⁵ Loraine Gelsthorpe and Allison Morris, 'Restorative youth justice: The last vestiges of welfare' in John Muncie, Gordon Hughes and Eugene McLaughlin (eds), *Youth justice: critical readings* (Sage in association with The Open University 2002).

¹⁷⁶ Chris Cunneen and Barry Goldson, 'Chapter 9: Restorative justice? A critical analysis' in Barry Goldson and John Muncie (eds), *Youth Crime & Justice* (2nd edn, SAGE 2015).

¹⁷⁷ Joanna Shapland, et al, 'Situating restorative justice within criminal justice' (2006) 10(4) *Theoretical Criminology* 505; Meredith Rossner and Jasmine Bruce, 'Trajectories and typologies of pre-sentence restorative justice rituals' (2018) 51(4) *Australian & New Zealand Journal of Criminology* 502.

¹⁷⁸ Clare McGlynn, Nicole Westmarland and Nikki Godden, 'I just wanted him to hear me': Sexual violence and the possibilities of restorative justice' (2012) 39(2) *Journal of Law and Society* 213, 239.

¹⁷⁹ Bill Whyte, *Youth justice in practice: Making a difference* (Policy Press 2008).

¹⁸⁰ Barbara Hudson, 'Restorative justice and gendered violence: Diversion or effective justice?' (2002) 42(3) *British Journal of Criminology* 616 – examples of minor to mid serious offences would include theft offences, minor drugs offences and public order offences.

¹⁸¹ The UN Declaration on Basic Principles on the use of RJ Programmes in Criminal Matters (2000). See ECOSOC 'Basic principles on the use of restorative justice programmes in criminal matters' Res 2000/14 (27 July 2000).

¹⁸² Annie Cossins, 'Restorative justice and child sex offences: The theory and the practice' (2008) 48(3) *The British Journal of Criminology* 359.

¹⁸³ Barbara Hudson, 'Restorative justice and gendered violence: Diversion or effective justice?' (2002) 42(3) *British Journal of Criminology* 616.

¹⁸⁴ John Muncie, 'Pragmatic realism? Searching for criminology in the new youth justice' in Barry Goldson (ed), *The New Youth Justice* (Russell House Publishing 2000).

¹⁸⁵ Kathleen Daly, 'Girls, peer violence, and restorative justice' (2008) 41(1) *Australian & New Zealand Journal of Criminology* 109.

survivors.¹⁸⁶ The argument about empowerment of the victim through therapeutic aspects of RJ has taken place with little or no recognition of victim trauma¹⁸⁷ and the inability of conferencing to be a substitute for on-going trauma.¹⁸⁸ It would also be naive to consider that sex offending is rarely a once off discreet offence and particularly in familial situations it can consist of multiple offences escalating in seriousness over months or years.¹⁸⁹ There is evidence to suggest that victim satisfaction is likely to depend on the degree of trauma and distress suffered.¹⁹⁰

Case Study: Application of justice/welfare in Sexual Offences

The commission of sexual offences by children poses an issue in the context of the justice/welfare debate; namely, though child offenders are to be dealt with in accordance with the 2001 Act, victims of sexual crimes are entitled to justice. One of the most problematic matters when it comes to sentencing is when there is sexual offending by teenagers involving a much younger child. Here, the courts must balance the need to censure this behaviour while recognising the offender's immaturity. In addition, Stones notes that a child victim may also be inhibited in making a complaint or disclosure, whether through:

some sense of shame, embarrassment, distrust, fear of recrimination/blame or of not being believed, intimidation or emotional conflict over what is for the best. Alternatively, the victim may have disclosed in a timelier way informally but has been silenced either by disbelief or a response that the issue should be dealt with and resolved in some extra-penal manner.¹⁹¹

This reveals the failure of both the punitive response in the solution to victims, families and communities and in addressing the needs of a small known high-risk group.¹⁹²

While there is little published data, the Northsides Inter-Agency Project (NIAP) states one third of all sexual abuse is perpetrated by those under 18 years, with the majority of abuse taking place within a family unit, where the abuser is known to the victim.¹⁹³ These figures are in line with other literature and research from jurisdictions such as in the USA¹⁹⁴ and they demonstrate the practical difficulty of effecting a conviction in an adversarial system in that obtaining evidence in court is difficult.

¹⁸⁶ Clare McGlynn, Nicole Westmarland and Nikki Godden, 'I just wanted him to hear me': Sexual violence and the possibilities of restorative justice' (2012) 39(2) *Journal of Law and Society* 213.

¹⁸⁷ Julie Stubbs, 'Restorative justice, domestic violence and family violence' (2004) Australian Domestic and Family Violence Clearinghouse Issues Paper No 9, <http://pandora.nla.gov.au/pan/34659/20041101-0000/www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issues_Paper_9.pdf> accessed 12 March 2019.

¹⁸⁸ Annie Cossins, 'Restorative justice and child sex offences: The theory and the practice' (2008) 48(3) *The British Journal of Criminology* 359.

¹⁸⁹ *ibid.*

¹⁹⁰ Kathleen Daly, 'Girls, peer violence, and restorative justice' (2008) 41(1) *Australian & New Zealand Journal of Criminology* 109; Annie Cossins, 'Restorative justice and child sex offences: The theory and the practice' (2008) 48(3) *The British Journal of Criminology* 359.

¹⁹¹ Nigel Stone, 'Sentencing Children for Sexual Offending: A Prequel Case Study' (2017) 17(3) *Youth Justice* 268, 273.

¹⁹² Anne-Marie McAlinden, 'Restorative justice as a response to sexual offending—Addressing the failings of current punitive approaches' (2008) 3(1) *Sexual Offender Treatment* 1.

¹⁹³ NIAP provide a community-based treatment programme to children between 13-18 who have been sexually abused reported at a conference that in respect of its treatment of 240 adolescents. 'NIAP marks 21 years of treating 240 adolescents who sexually abuse and protecting the community against abusers' (Children's Health Ireland at Temple Street 2013) <<https://www.cuh.ie/2013/10/niap-marks-21-years-of-treating-240-adolescents-who-sexually-abuse-and-protecting-the-community-against-abusers/>> accessed 01 April 2019.

¹⁹⁴ Davis Finkelhor, Richard Ormrod and Mark Chaffin, 'Juveniles Who Commit Sex Offenses Against Minors' (2009) *Juvenile Justice Bulletin* <<https://www.ncjrs.gov/pdffiles1/ojdp/227763.pdf>> accessed 12 March 2019.

In addition, adolescents now embrace the use of electronic communication that may sometimes involve the sharing of indecent images of each other,¹⁹⁵ which is often referred to as ‘sexting’. It can take place within consensual relationships, but can also be associated with bullying and exploitation and it was estimated by the Youth Justice Board in February 2018¹⁹⁶ that up to 40% of teenagers engage in it.¹⁹⁷ However, this figure may be lower,¹⁹⁸ but with the wide availability of drugs, it is a high-risk behaviour¹⁹⁹ and recent research indicates that 1 in 6 of the individuals suspected of engaging in this behaviour who are reported to police in the UK being under 18 years of age.²⁰⁰ Although, the literature also shows that teenagers as opposed to adults are often unaware they are breaking the law as, in undertaking this activity, they are disseminating child pornography despite having reached the age of sexual relations in some cases.²⁰¹

Overall, the empirical research on juvenile sexual offending is limited; only recently has the subject gained the interest of the scientific community.²⁰² In Ireland in 2014, the last year the Irish Court Service recorded juvenile sexual crimes in the Children Court, there were only 12 cases out of a total number 4877 charges. Of this number, 9 were dismissed and 3 received minor sentences.²⁰³ However, these statistics do not reveal the nature of the offending or take account of cases sent forward to the Circuit Court or the Central Criminal Court, which deal with the most serious cases. In contrast, the 2017 Report of the Diversion Programme²⁰⁴ recorded 400 sexual offences; an annual increase of 20%, on 2016 (73 cases of rape and 59 of child pornography)²⁰⁵ leading to increased media awareness and calls for a stronger justice stance. For example, *The Irish Examiner*, one of the three main Irish Daily papers, commented on 17th February, 2018 as follows:

Juveniles committed 45% of sex offences in 2016 ... The shocking scale of involvement of children and teenagers aged 18 or under, in rape and sexual assaults, is revealed in an annual report of the Garda Juvenile Diversion Programme. Young offenders were linked to 45% of all sexual offences committed that year.²⁰⁶

¹⁹⁵ Nigel Stone, 'Sentencing Children for Sexual Offending: A Prequel Case Study' (2017) 17(3) *Youth Justice* 268.

¹⁹⁶Youth Justice Board, 'Youth Justice Board for England and Wales Strategic Plan 2018–21' (Youth Justice Board for England and Wales 2018) <<https://www.gov.uk/government/publications/youth-justice-board-for-england-and-wales-strategic-plan-2018-21>> accessed 12 March 2019.

¹⁹⁷ Andy Phippen, 'Sharing personal images and videos among young people' (Southwest Grid for Learning 2009) <<http://webfronter.com/surreymle/devonesafety/other/Sexting%20report%20-%20andy%20hippen.pdf>> accessed 12 March 2019.

¹⁹⁸ Nigel Stone, 'Sentencing Children for Sexual Offending: A Prequel Case Study' (2017) 17(3) *Youth Justice* 268.

¹⁹⁹ Katlin J Rhyner, Carolyn A Uhl and Cheryl A Terrance, 'Are Teens Being Unfairly Punished? Applying the Dual Systems Model of Adolescent Risk-Taking to Sexting Among Adolescents' (2017) 18(1) *Youth Justice* 52.

²⁰⁰Youth Justice Board, 'Youth Justice Board for England and Wales Strategic Plan 2018–21' (Youth Justice Board for England and Wales 2018) <<https://www.gov.uk/government/publications/youth-justice-board-for-england-and-wales-strategic-plan-2018-21>> accessed 12 March 2019.

²⁰¹ Katlin J Rhyner, Carolyn A Uhl and Cheryl A Terrance, 'Are Teens Being Unfairly Punished? Applying the Dual Systems Model of Adolescent Risk-Taking to Sexting Among Adolescents' (2017) 18(1) *Youth Justice* 52.

²⁰² Chantal Van den Berg, 'Juvenile Sex Offenders' in Christopher J Schreck, et al (eds), *The Encyclopaedia of Juvenile Delinquency and Justice* (Wiley 2017).

²⁰³ Courts Service of Ireland, 'Annual Report 2014' (Courts Service) <[http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/76D5C7C737385EFF80257E91002F3D7A/\\$FILE/Courts%20Service%20Annual%20Report%202014.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/76D5C7C737385EFF80257E91002F3D7A/$FILE/Courts%20Service%20Annual%20Report%202014.pdf)> accessed 07 April 2019 56.

²⁰⁴ Garda Youth Diversion and Crime Prevention Bureau, 'Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme' (An Garda Síochána/Irish Youth Justice Service 2017) 17, <<http://www.iyjs.ie/en/IYJS/Section%2044%20Monitoring%20Committee%20Report%202017.pdf/Files/Section%2044%20Monitoring%20Committee%20Report%202017.pdf>> accessed 02 April 2019.

²⁰⁵ *ibid.* The report also shows that there were 224 sexual assaults and 38 offences committed under the Criminal Law (Sexual Offences) Act 2006.

²⁰⁶ Seán McCárthaigh, 'Juveniles committed 45% of sex offences in 2016' *Irish Examiner* (Cork, 17 February 2018).

The general thrust of youth justice is also to avoid stigmatization and promote reintegration into society. Moral panic, righteous indignation, and truthiness²⁰⁷ have their allure and satisfaction,²⁰⁸ but the reality is that there is a danger that the media fascination with sex offender registers and community notification may exacerbate the difficulties of child sex offenders' reintegration and rehabilitation.²⁰⁹ Many children who commit sexual crimes have common learning and behaviour problems; but studies have also found that children with behavioural problems and who receive brief but focused welfare treatment were no different from those found among other children who receive outpatient treatment.²¹⁰ Similar findings were found among children who were in custody.²¹¹ Even where the recidivism of sexual offenders is slightly elevated, the chances of nonsexual reoffending as opposed to sexual offending were found to be substantially higher.²¹²

Professor Kathleen Daly has opined that where youth sexual assault was finalised by a conference process rather than a criminal court process it produced a more effective outcome.²¹³ However, caution must be exercised in this regard; though it can be argued that RJ research is not just at a rudimentary stage, it can never be rigorous enough and is rarely evidenced based research to evaluate this.²¹⁴ On the other hand, well-resourced and researched RJ, such as exists in Northern Ireland and New Zealand, appears to have a better success rate in promoting engagement and participation among both victims and offenders than what was in place under the former youth justice system. This is also true of statutory and court supervised Family Conferencing in sexual offences.²¹⁵

Therefore, the extension of RJ to sexual offending for children raises a number of interesting questions concerning what the appropriate territory for RJ and the legitimate role of the State in restorative practices is.²¹⁶ Participation in the criminal justice system should not be seen as a substitute for therapy, and can be particularly injurious to the psychological well-being of victims and witnesses; particularly children and complainants in cases of rape and sexual assault.²¹⁷ One of the challenges for future research in the area is to attempt to measure how these aspects of RJ can be dealt in the context of child offending and sexual offences.

Conclusion

As an adversarial criminal justice system, victims of crime are entitled to see offenders prosecuted and penalised - this penalty must be proportional and in observation of due process and fair trial rights. This is the justice model. In the context of children in conflict with the law,

²⁰⁷ The quality of being considered to be true because of what the believer wishes or feels, regardless of the facts.

²⁰⁸ Mark Chaffin, 'Our minds are made up—don't confuse us with the facts: Commentary on policies concerning children with sexual behaviour problems and juvenile sex offenders' (2008) 13(2) *Child Maltreatment* 110.

²⁰⁹ Anne-Marie McAlinden, 'Restorative justice as a response to sexual offending—Addressing the failings of current punitive approaches' (2008) 3(1) *Sexual Offender Treatment* 1.

²¹⁰ Mark Chaffin, 'Our minds are made up—don't confuse us with the facts: Commentary on policies concerning children with sexual behaviour problems and juvenile sex offenders' (2008) 13(2) *Child Maltreatment* 110.

²¹¹ Michael F Caldwell, 'Sexual offense adjudication and sexual recidivism among juvenile offenders' (2007) 19(2) *Sexual Abuse* 107.

²¹² Chantal Van den Berg, 'Juvenile Sex Offenders' in Christopher J Schreck, et al (eds), *The Encyclopaedia of Juvenile Delinquency and Justice* (Wiley 2017).

²¹³ Kathleen Daly, 'Girls, peer violence, and restorative justice' (2008) 41(1) *Australian & New Zealand Journal of Criminology* 109. See also Kathleen Daly and Danielle Wade, 'Sibling Sexual Violence and Victims' Justice Interests: A Comparison of Youth Conferencing and Judicial Sentencing' in Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge 2017).

²¹⁴ John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002).

²¹⁵ David O'Mahony and Jonathan Doak, *Reimagining Restorative Justice: Agency and Accountability in the Criminal Process* (Hart/Bloomsbury Publishing 2017).

²¹⁶ Anne-Marie McAlinden, 'Restorative justice as a response to sexual offending—Addressing the failings of current punitive approaches' (2008) 3(1) *Sexual Offender Treatment* 1.

²¹⁷ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart 2008).

however, this model is not necessarily transferrable to the youth justice system, particularly in light of the 2001 Act which has been enacted to create a different regime for children in acknowledgment of their vulnerable status. Not only are young offenders by their nature, immature, they also usually suffer with mental disabilities, learning difficulties or have family issues – research has shown during ‘childhood’ the brain is still developing and so children cannot be held to the same level of responsibility as adults. These are the considerations at play when we look to the welfare model, where the individual needs of the child are assessed and subsequently considered in dealing with the child using a non-punitive approach. Ultimately, in the context of the Children Court at least, as observed above, it appears to follow a justice based model with welfare wings - the welfare approach can be seen in the introduction of Diversion schemes, family conferencing and also sentencing where the courts, in considering detention as a last resort, must cause as little interference to the child as possible whereas a justice model is indicated by the low age of criminal responsibility holding children as young as ten years old criminally liable. The problem in identifying the more dominant model arises where serious offences are concerned, such as sexual offences – here, we are concerned with the rights of very vulnerable victims and as such, the circumstances might not call for the application of the welfare approach. The discussion above highlights that it is not a simple case of the model in Ireland being wholly justice based or wholly welfare based – the increased protection of victim’s rights, the internationally and domestically recognised rights of the offender as a child and the commission of serious crimes may in fact call for a careful balancing exercise on a case by case basis, supplemented by the increased level of research being conducted into youth justice and the additional insight into the issues surrounding ‘childhood’.