Judicial Discretion and the Justice and Welfare Dichotomy: The Sentencing of Children in the Irish Youth Justice System*

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Summary: The sentencing of children in juvenile sexual offending cases is a most challenging issue for judges, and research into this area had not previously been done in Ireland. The author's doctoral study placed particular emphasis on practice-based research and praxis to provide a bridge between academic theory and professional practice, thereby providing insights into how the youth justice system might address the justice and welfare dichotomy. This paper reviews the growing scientific knowledge on child development and international court innovations in sentencing of young offenders, as well as exploring issues in evolving capacity and the age of criminal responsibility. The author examines the concepts underpinning the Children Act, 2001 and related strategies, as well as some welfare aspects of sentencing, before outlining key findings from his research.

What is needed is a redefinition of the Irish sentencing model for juvenile sexual offences that is not exclusively wedded to a twentieth-century justice/welfare concept. Sentencing for sexual offences needs to recognise that children's rights and needs are progressing and changing rapidly. This requires recognition of the role of scientific developments and academic research.

The paper concludes by posing a challenge to come up with a bespoke holistic sentence for children that satisfies the demands of the child, the victim and public policy.

Keywords: Children, courts, youth justice, sentencing, discretion, justice, welfare, sexual offences, victims, child development, age of responsibility, public policy.

Introduction

I am honoured to have been asked by the ACJRD to deliver the Annual Martin Tansey Memorial Lecture and I would like to thank Maura Butler and the Committee of the ACJRD for this unique privilege.

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While I did not know Martin Tansey personally, I am only too aware he was Director of the Irish Probation Service, had a long and distinguished service as a public servant and that he inspired an ethos which embraced that rehabilitation of offenders is a supremely rational social objective.

Martin was a West of Ireland man, like myself, and I hope, bearing in mind my research with his beloved Probation Service and the judiciary, that I can do some justice to his name. I am also only too conscious of the distinguished lecturers who have preceded me in the fifteen years since the first Memorial Lecture in 2008.

In the summer of 2016, I read some of the historic ledgers which contained the sentences of children who were sent to industrial homes in the twentieth century. It was not just penal welfarism at the expense of children's rights; it went further and blotted our nation's history. It was a historic neglect where many children were subject to inhumane and degrading treatment. It gave me the impetus to commence my doctorate.

My overall ethos

Child and adolescent crime is not a natural occurring behaviour but a product of human making (Rogers, 2010). Our knowledge of childhood and adolescence is evolving. New issues are constantly emerging. Best interests and rights are not mutually exclusive. This needs to be interpreted and balanced according to international best practice (Liefaard, 2015) and not in a subjective manner which may involve unconscious bias. Children have a right to be heard in matters that concern them and due weight should be attached to their views in accordance with their age and maturity.

Focus and format

While this paper is concerned with the sentencing of children, there is a heavy focus on juvenile sexual offending sentencing, which was the primary focus of my doctorate. It is regarded as the most challenging area of juvenile justice for judges, and research into this area had not been done before in Ireland.

My doctorate incorporated a heavy emphasis on practice-based research and praxis, in the sense of developing legal practice (O'Connor, 2021). Its aim was to provide a bridge between academic theory and professional practice, by providing insights into how the youth justice system might address the justice and welfare dichotomy in sentencing. It entailed a methodology which respected the existing judicial doctrinal approach to sentencing but also

advocated best practice by reference to international treaties, scientific developments and rights-compliant youth judicial systems. It therefore needed a comprehensive methodology to enable research questions to be addressed, which was achieved by adopting a combination of a legal doctrinal model as its primary model, with socio-legal and comparative analysis as subsidiary or complimentary processes. This methodology recognised that new issues are constantly emerging such as, for example, neuroscientific and behavioural research and also acknowledged that new academic studies and judicial thinking create a greater understanding of child and adolescent behaviour.

The research comprised an extensive literature review, interviews with 22 judges (eighteen practising judges and four retired judges as a pilot study), twelve Young Persons' Probation Officers (YPPOs), and a study of Irish and international case law. My intention was not to rate the work of judges but to observe how judges and others such as probation officers observe themselves and the Irish Youth Justice System.

UN Convention on the Rights of the Child 1989 – A changed world and new neurological research

In doing this, I was cognisant of international best practice. Although the almost universal acceptance of the United Nations Convention on the Rights of the Child (the UNCRC) 1989 and its cross-reference with regional bodies such as the European Convention on Human Rights (ECHR) gives us a template of what a good juvenile justice system should be, the reality is: that was then, and the world has changed dramatically.

Societal changes have meant that twenty-first-century adolescents grow up in a much more mobile and globalised world than we did, amplified by contemporary technologies such as the internet and social media where children can negotiate their social identities, but which can give rise to exposure to extreme exploitation and peer abuse (Sawyer, Azzopardi and Parton, 2018). We now also live in a multi-ethnic, multicultural society.

However, while technology such as phones may be the most visible aspect of recent changes, it is our recent understanding of neurological brain development which is the most dramatic aspect of how we as judges should deal with children. Effectively, changes to the brain can now be accurately detected from magnetic resonance imaging or MRI, which was unknown twenty years ago. It has shown that the prefrontal cortex is developing

dramatically in teenagers and young adults. The implications for assessing risk behaviour, autonomy and the effects of intimacy with peers are profound. MRI imaging takes a snapshot or a photograph, at really high resolution, of inside the living human brain. The prefrontal cortex is proportionally much bigger in humans than in any other species, and it is involved in a whole range of high-level cognitive functions – things like decision-making and inhibiting inappropriate behaviour. It is also involved in social interaction, understanding other people, and self-awareness. In simple terms, it has been compared to a rose bush being pruned away at the start of adolescence and sprouting robustly again.

For my research, it had the practical implications of how we as judges deal with rehabilitation and therapeutic intervention for children in conflict with the law.

It is accepted that the environment and trauma, or in some cases multiple traumas, can and do shape the developing adolescent brain.

Court innovations in youth sentencing: International

US Supreme Court

Of significance are innovations by the US Supreme Court in youth sentencing, starting with the cases of *Roper v. Simmons* US 551 (2001) ('*Roper*'); *Graham v. Florida* 560 US 48 (2010) ('*Graham*'); *Miller v. Alabama* 132 S Ct 2455 (2012) ('*Miller*'), and more recently the decision in *Jones v Mississippi* 141 S Ct 1307 (2021) ('*Jones*').

The US Supreme Court has the potential to inform the Irish Appellate Courts in developing a robust constitutional response to the use of neuroscience developments in youth justice sentencing.

These cases represent a radical assessment of psychological and neuro-biological research and the consequent legal implications for sentencing. Thus, *Roper* emphasised that juveniles still struggle to define their own unique identity, which means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. The *Graham* case took up this theme and emphasised that children are less culpable than adults due to their underdeveloped brains and characters, while *Miller* reasoned that children are constitutionally different from adults for purposes of sentencing.

The emphasis in *Miller* on the transient immaturity has recently been reassessed by the US Supreme Court in *Jones v Mississippi*. It held that the

court need not make a specific finding that a youth is 'permanently incorrigible' or even give a specific *Miller* rationale for sentencing. It is sufficient that the judge understands that they have a discretion in the matter. Arguably, the judicial discretionary nature of this test could give rise to justice by geography depending on the state or judge that the child appears before. On the other hand, shifting the focus from 'permanent incorrigibility' (which cannot be predicted in a scientifically reliable manner) to 'transient immaturity' (which is already established by robust development research and neuroscience) may provide opportunities for counsel and courts at trial or sentencing phases, and upon appellate reviews.[1]

Court of Appeal of England and Wales (18–25-year-olds)

Since 2018, the Lord Chief Justice Burnett has brought this further and offered a new approach to the issues concerning a child over 18 years who commits a crime. The importance of the change is that it recognises that young adults between the ages of 18 years and 25 years must be given consideration for special treatment, as opposed to being treated as mature adults. This is now enshrined in the UK sentencing guidelines (Janes *et al.*, 2020). The first case to outline the new sentencing approach, *R v. Clark* [2018] 1 Cr App R(S) 52, involved a teenage boy who kidnapped, falsely imprisoned and threatened the victim with weapons. In the course of his judgment, Lord Chief Justice observed:

> Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear…. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research … is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision.
>
> (para. 5)

R v. Clarke was followed by some very serious and savage cases but robustly dealt with by the Court of Appeal. *R v. Hobbs* [2018] 2 Cr App R(S) 36 involved the manslaughter of a man who had burned to death after the

1 MGH Center for Law, Brain and Behaviour, 'White paper on the science of late adolescence: A Guide for judges' (Harvard Medical School, 2022)

defendants had ignited a flare in the car in which he was sleeping. Holroyd J. observed that the modern approach to sentencing in that case required the court to 'look carefully at the age, maturity and progress of the young offender in each case'. The case significantly outlined that the principles that applied to young offenders under 18 years also applied to young people who offend in early adulthood but are far from the maturity of adults. In *R v. Balogun* [2018] EWCA Crim 2933, the defendant was convicted of a campaign of rape against teenage girls.

Issues which might be regarded as aggravating factors in an adult sentence were put into context in *R v. Quartey* [2019] EWCA Crim 374, which involved a gang murder, an inhumane and savage attack. The Lord Chief Justice drew specific attention to the appellant's background of falling out of mainstream education and into gang-based behaviour, which he interpreted as indicative of immaturity and a lack of strength to resist peer pressure.

Concept of evolving capacity

So, this relatively recent emergence of scientific developments in neuroscience concerning child development and brain development has informed the children's rights framework and international juvenile justice standards. In turn, this has led to a renewed interest in the concept of evolving capacity as envisaged by Article 5 of the UNCRC (Kilkelly, 2020). The net effect is that, internationally, the concept of best interests is now being interpreted in terms of prevailing standards and understanding of developments of children and young people.

In short, it is about balancing rights and best interests of a child within the broader context of child-friendly justice, which in turn stresses the importance of treating children differently from adults. In addition, these instruments emphasise accountability in determination and that sentencing should take account of the vulnerability and immaturity of children who encounter the criminal justice system.

Minimum age of criminal responsibility

Internationally, General Comment 24 of the UNCRC states emphatically that the minimum age of criminal responsibility (MACR) should be not less than 14 (United Nations, 2023). Irish law, which has an MACR of 10 for serious crime and 12 for other crimes, is somewhat illogical when one considers that the law also deems children incapable of consenting to sexual activity until

the age of 17, or even 18 in some cases, and prohibits the drinking of alcohol until 18 years. I accept there are exceptions.

Ireland has been criticised repeatedly by the UNCRC in this respect. Ireland's response is that we have never prosecuted a 10- or 11-year-old and that it is rare for children of 12 and 13 to be prosecuted, though accepting that there are some very recent high-profile cases (Department of Justice, 2021, p. 33). While nearly all judges and YPPOs interviewed would, in my view, correctly believe that age alone is a poor indicator of maturity, the reality is that we must have an MACR for criminal law.

Various research studies relating to the evolving capacities of children noted that children, especially those under the age of 15, are likely not able to exhibit sufficient competency in either children or criminal courts. Furthermore, 'a substantial percentage of children especially those under age 15, lacked legal competency as a defendant due to their own developmental immaturity' (O'Connor, 2021).

More recent results (Rap, 2013) show:

- Children below 14 years of age are less likely to be familiar with trial-related material;
- 15-year-olds and under are more likely to be impaired in their ability to understand criminal proceedings;
- Capacities of 16- to 17-year-olds are like young adults though they do not have the life experiences necessary to enhance their capacity.

While many children can be either behind or ahead in their development, physically, cognitively, emotionally or medically, most children in the criminal justice system also suffer from intellectual and emotional problems, which in turn feeds into the child's capacity to participate.

The Committee on the Rights of the Child has noted that it is not possible for a child to be effectively heard in an intimidating environment or one that is 'hostile, insensitive or inappropriate for her or his age'. Proceedings must be both accessible and child appropriate.

Attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of courtrooms, clothing of judges, sight screens, and separate waiting rooms. In addition, the European Court of Human Rights (ECtHR) has held that an accused child must enjoy the right to understand what is happening at the trial and to play an active role in their defence; physical presence alone is not enough.

Certain features have been pointed out as hindering effective participation, such as intense public scrutiny, a tense courtroom, inability to consult with lawyers due to immaturity and disturbed emotional state, inability to contribute to the defence, intimidating formal settings and public hostility. Breaches of the in-camera rule, such as people walking in and out of courtrooms, have been particularly noted by YPPOs as very upsetting for children.

Best interests of the child goes beyond dualism

While I acknowledge the effects of dualism and the constitutional obligations on the Oireachtas to change the domestic law, the reality is that best interests are now an integral part of international child law. As Baroness Hale observed, the jurisprudence of the ECHR makes it clear that it expects national authorities to apply Article 3(1) of the UNCRC and treat the best interests of the child as a primary consideration (*ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2011] UKSC 4). In effect, balancing the rights and best interests of a child should be interpreted around prevailing standards of developments of children and young people.

The Children Act, 2001

The Children Act, 2001 codified juvenile justice law governing interactions between children below the age of 18 years to comply with the UNCRC. It was heavily influenced by international juvenile justice best practice and, in particular, by the family group conference (FGC) trailblazing developments in the field of youth justice in New Zealand. According to the then Minister for Justice, John O'Donoghue, the Act was designed to underpin the future development of the juvenile justice system in Ireland in response to changing circumstances in a way not anticipated at the time. It placed on a statutory basis the diversion programme and probation-led family conferencing, as well as creating a Children Court in Ireland (O'Donoghue, 2000).

Both Tom O'Malley (2016) and Dermot Walsh (2005) state that the principles of the Act are heavily biased towards rehabilitation in 'rehabilitation takes centre stage in the punishment of a child for a criminal offence' (Walsh, 2005, p. 190). This is very much in keeping with the principles of the UNCRC.

Department of Justice *Youth Justice Strategy Plan (2021–2027)*

I note that Department of Justice Criminal Policy, in line with the Department of Children, is constantly developing regarding children. While I am not dealing with this area here, it is only fair to acknowledge their ongoing work. In my time as a judge in the Children Court, in common with other Irish youth justice agencies then coordinated in policy by Irish Youth Justice Service (IYJS), there was very much a collaborative approach to children and adolescents in conflict with the law. I also welcome the emphasis on Family Conferencing in the Department of Justice *Youth Justice Strategy Plan (2021–2027)*.

Welfare aspect of sentencing – probation and welfare reports

Section 96 of the Act requires:

> any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; a period of detention should be imposed only as a measure of last resort.

Section 96, combined with the principles, such as detention as a measure of last resort (Section 143),[2] the emphasis in Section 99 on a probation and welfare report before sentencing, the alternatives to detention such as the ten community sanctions,[3] collectively create a substantial welfare ethos. The welfare aspect is particularly pronounced for summary and minor indictable offences in the Children Court where Part 8 of the Act authorises the judge to request the attendance of a representative of the Child and Family Agency (Tusla) to attend court. It also allows a court, for example, to dismiss a case

2 Section 143 mirrors Article 37of the UNCRC which provides inter alia: '(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'

3 Ten community sanctions provided for under sections 115–141 of the 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, section 125 of the 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).

on its merits, analogous to the abolished *doli incapax* presumption for a child under 14 years of age, provided that the judge, having had due regard to the child's age and level of maturity, determines that the child did not have a full understanding of what was involved in the commission of the offence (section 52(3) the Act). Reflecting the crossover between welfare and rights, the Act allows the Children Court judge to direct Tusla under section 77 of the Act to convene a family welfare conference to consider if care and protection orders are needed.

A family welfare conference under section 77 of the Children Act, 2001 represents the interface between welfare and justice. However, it is rarely used in practice. In my own case of *DPP v. AB* [2017] IEDC 12, AB was a child in special care under the inherent jurisdiction of the High Court. The child was a victim of abuse, including sexual offending, and a detention sanction (which was refused) would have resulted in the child losing the benefit of very high therapeutic special care, as criminal detention takes precedence over care orders even if made by the High Court.

Section 78 of the Act is the only reference to a legislative 'Restorative Justice-type' sentence for children. It allows a Children Court judge to direct the Probation and Welfare Service to arrange for the convening of a family conference in respect of the child. This, unlike the conference under section 77, is a type of Restorative Justice conference modelled on the New Zealand model. Court statistics have revealed that family conferences are rarely used by the courts. However, a recent youth strategic plan of the Department of Justice (2021, p. 33) states that 'Family Conferencing could be the catalyst for addressing the personal welfare and circumstances of the child.'

The most significant welfare aspect of sentencing children is the importance of probation and welfare reports. Section 99 of the Act, 2001 permits a court to order a report from a probation and welfare officer in every case. However, it mandates it in the case of a detention order or a community sanction. While obtaining a report is mandatory, irrespective of a child's wishes, the Act is silent on the content of the report. Therefore, a lack of co-operation by a child can result in a meaningless report, and the acceptance of same has been held by the High Court within a court's discretion. It is opined that this view is somewhat at variance with the concept of child-friendly justice, which recognises that participation in proceedings also requires a child's views to be heard on the possible sanctions.

The rights and best interests of the child do not require that the child's views determine the sentence but that the child is aware of the possible

outcomes. While this issue could be alleviated by the child's lawyer assistance, it is also problematic where the lawyer and judges lack appropriate specialised training. In this regard, the court should also consider any additional supports available for a troubled child, which needs to be dealt with in a child-appropriate way.

Therefore, while the purpose of a probation and welfare report is to ensure that the needs of the child are addressed, my research has demonstrated that it is usually not sufficient, particularly in sexual abuse cases where specialised therapeutic interventions and treatments such as the AIM project (see below) are required.

A probation welfare report may need to be supplemented with a psychologist report or psychiatrist report. Indeed, the estate agent's mantra of 'location, location, location' should in the case of children be replaced with 'reports, reports, reports'. I accept that there are practical dangers of obtaining additional welfare-type reports which can reveal information such as other undisclosed potential offences, which would breach a child's presumption of innocence.

Child and adolescent sexual crimes

Few crimes shock as much as sexual assault, and this is particularly disturbing where the victims are also children and young persons. Teenage sex-offenders also create challenges that parents and families, including siblings of abusers, must face in coming to terms with the abuse or where some of the abusers require care and protection as well as welfare interventions.

While it is impossible to determine accurately the true extent of the problem of teenagers who sexually abuse in Ireland, we do know that it is a significant issue. Various Garda pulse records estimated it at 20 per cent of the total number of sexual abuse cases they dealt with. Research and statistics in other countries indicate that it is much higher and that it can vary from a quarter to a third of all sexual abuse that comes to the attention of professionals (Hackett *et al.*, 2014). However, even this figure may be conservative as it does not include unknown cases that have not come to the attention of the criminal justice system or child-protection agencies.

A very diverse group unlike other areas of juvenile justice

What we know from existing research is that children who sexually abuse are a very heterogeneous group in terms of age, personal vulnerabilities and the

risks they present to others (Erooga and Mason, 2006). While there is diversity in motivations, age and victims, existing research also suggests that early adolescence represents the peak of children committing sexual offences against young persons, whereas sexual offending against other teenagers appears to peak in mid to late adolescence. Many children have extensive prior experience of supports from social services, problematic family backgrounds and multiple disadvantages and adversities. Hackett *et al*. (2013) also found that two-thirds of teenage sexual abusers have experienced abuse, rejection, domestic violence or parental rejection, while a prior US research team found in its sample that the rate was as high as 92 per cent (Vizard *et al*., 2007). Specifically, in relation to prior sexual abuse, Hackett *et al*. found that 31 per cent of young males had been sexually victimised earlier in their childhood, a figure which is replicated in other studies, leading to a view that there may be some parallel between children who are sexually abused and their own sexually abusive behaviour.

However, we also know that teenage sex-offenders rarely grow up to be adult paedophiles, and when treated appropriately, such as on the National Inter-Agency Prevention Programme (NIAPP), the recidivism rate is generally little different from non-offenders. Therefore, we know how to deal with it, but it is very difficult and time-consuming and needs adequate resources and specialisation.

The judges' dilemma and issues arising

In this regard, judges are struggling to understand and define what is harmful and sexually abusive, as opposed to inappropriate, for children in a digital communication age that did not exist when we were teenagers.

This, in turn, raises new and important challenges for judges in understanding what are societal norms around capacity, consent, coercion, sexual identity and sexual agency for children. However, the identification of more homogeneous sub-groups of offenders, such as peer-based sexual abuse and exploitation, co-morbid mental health, non-sexual offending adolescents or offenders who have suffered trauma, children and family dysfunction (Calder *et al*., 1997; McAlinden, 2018), does, in my view, improve treatment for specific needs of offenders and inform sentencing structures. The statistics suggest that the clear majority are young males, even considering under-reporting and the lack of services for young women.

From a criminal justice point of view, it is accepted that diversion from the traditional court process is the preferred route, and under the Children Act,

2001 it is compulsory to consider it for all crimes, even in the most serious crimes (Kilkelly, 2006). However, in practice, it is not always an option, such as, for example, children in the special care of the State due to their high therapeutic needs. However, exclusion from diversionary treatment should not mean that a child or young adult does not receive adequate therapeutic interventions.

The judges' view of juvenile justice in Ireland

We will now take a step back and observe how Irish judges view the Juvenile Justice System.

Some key findings of my research (O'Connor, 2019) include:

- Only one-fifth (20 per cent) of judges believed that the existing adversarial system was adequate, whereas 27 per cent preferred an inquisitorial system. This might imply a radical solution such as the Barnhus Model found in Scandinavia. However, 53 per cent favoured a combination of adversarial and inquisitorial system for children, and I felt that, overall, we are not going to ditch the existing adversarial system, at least in the short term.
- Nearly all judges (95 per cent) believed that the best interests of the child, public policy and victim interests could be achieved in sentencing. Yet less than half of the judges (43.75 per cent) were positive about the Children Act, 2001, with just over a third (37.5 per cent) feeling that the Act was trying to achieve too much. Lack of resources, particularly outside Dublin, was frequently mentioned.
- All judges were positive about pre-sanction probation reports but two-thirds (66 per cent) of judges felt that Children Court judges should have more discretion in sentencing.
- 75 per cent of judges felt that retribution should not be a factor in sentencing children, which would comply with the principles of the UNCRC. However, significantly, one senior very experienced judge felt that retribution is an integral part of the proportionality principle, even though rehabilitation must also be considered.
- 70 per cent of judges were positive about Restorative Justice, though my research shows it is rarely used in practice and never in sexual offending.
- 100 per cent of judges believed that the age and maturity of the child matter in practice, and all judges, in accordance with international best

practice, disapproved of having two ages of criminal responsibility. However, there was little agreement as to what the minimum age should be. Not surprisingly, therefore, a significant number of judges (38.89 per cent) in this research felt that chronological age alone was not sufficient and that there should be some form of capacity test. Uniquely, Judges of the Children Court have the authority to dismiss a case on its merits for a child under 14 years, under section 76(c) of the Children Act, 2001.

- Regarding the current level of assessment of age and maturity, approximately one-third believed that the current system was adequate, one-third believed it was not and one-third were unsure.
- 100 per cent of judges believed that personal issues such as mental health, severe learning disabilities, e.g. ADHD, were significant factors to be considered in sentencing.
- 90 per cent of judges felt that children who commit sexual offences could be rehabilitated.
- Nearly 60 per cent of judges felt that juvenile sexual offending was transient.
- 95 per cent of judges would welcome guidance on sexual-offending sentencing but only 28 per cent felt that the guidelines should be mandatory.
- 93 per cent of judges believed that the press influence the debate on juvenile sexual offences and 28 per cent believed it had the potential to influence the actual sentence. A more positive way of framing this is that 72 per cent of judges felt that the press did not influence them and referred to their Oath of Office.
- 88 per cent of judges favoured greater specialisation in juvenile justice and 100 per cent of judges believed that there should be a trained panel of judges; 38 per cent of judges favoured specialist regional courts, as opposed to the existing 25 District Courts. In addition, 61 per cent of judges favoured special facilitates for children in courts.

Most significant key finding

The need for specialisation and training of judges, which was loud and clear from the judges themselves.

Young Persons' Probation Officers' experiences of working with children who sexually offend

According to my research (O'Connor, 2020), YPPOs' experience of children who sexually offend is that they are few in number compared to those who commit other offences. The numbers rise, however, from single digits to treble digits when the children become young adults. Notwithstanding this, all YPPOs were very experienced in working with children who offend generally, and some Dublin YPPOs worked with NIAPP and had extensive experience. Generally, YPPOs were positive about judges but they wanted judges to take the lead, not just rely on them.

YPP assessments in respect of teenage sexual offending

To contextualise YPP assessment, it is necessary to look at the two assessment tools. First, the Youth Level of Service/Case Management Inventory (YLS/CMI). All YPPOs interviewed were proficient and have considerable experience in general risk assessment for children who offend generally. The second assessment is known as Assessment, Intervention, Moving On (AIM), and is not strictly a risk assessment. It is used for males only and there was a consensus that it is very challenging work. They also referenced the need for additional professional reports, such as medical and psychiatric reports. However, there was a view that judges were not always aware of what is needed in sanctioning children who sexually offend.

Many YPPOs were concerned about a court imposing very difficult supervision conditions such as, for example, restricting the child's movements or prohibiting the child from being in the same room with the victim.

Impact of the developmental needs of male adolescents who sexually offend

All YPPOs agreed with the findings from judges in asserting that age and maturity matter in ascertaining culpability. However, only a third of the judges were prepared to state that the current assessment procedure for children was adequate. In regard to sexual offending, all YPPOs believed that the manner in which the criminal justice system dealt with children was currently problematic.

YPP quotes and perspectives

> 'In my opinion, all of the boys I dealt with were three or four years behind developmentally. A 15-year-old was roughly compatible with a 10-year-old. So, there are developmental needs but physically/sexually was a 15-year-old.'
>
> (Focus Group 3, Interview 4)

However, while YPPOs interviewed by phone were aware of the problem, YPPOs in Focus Groups 1 and 2 delved much deeper into current YPPO practice:

> 'We need to be more open to looking at sexually harmful behaviour in young people – the brain isn't fully developed until 24 or 25. All of us around the table know that people can change and do change when treatment is available to them.'
>
> (Focus Group 2)

Research findings – Perspectives of YPPOs

The Focus Groups also suggested that the issues were more complex than just age and maturity; there was a general lack of understanding around the impact of peers on sexual crime. The issue becomes even more acute when children are tried in adult courts.

Use of the internet by young teenagers was a particular cause of concern for all the YPPOs but particularly in the Focus Groups:

> 'You can have a 13-year-old accessing the wrong stuff on the internet or a 17-year-old who hasn't accessed anything to get the right information on the internet.'
>
> (Focus Group 2)

The impact of inappropriate use of social media is that:

> 'They are less sexually active and are reliant on online for meeting, dating etc. They have lots of superficial relationships.'
>
> (Focus Group 1)

In turn, this has an effect on sexual offending. The two YPPOs who worked in NIAPP were particularly aware of this:

> 'We find that early access, unsupervised access, inappropriate images, [creates] opportunity. [Therefore, our job] is helping to understand, re-educate them, helping them to understand their own emerging sexual identity, the world has changed vastly. There seems to be hyper-sensitivity concerning issues of a sexual nature these days.'
>
> (Focus Group 2)

This is compounded by a lack of awareness among parents that their teenagers have sexual needs; this issue has been clearly identified by Finlay, a youth disability rights campaigner (LRC, 2006). As one YPPO who worked with NIAPP pointed out:

> 'It's about the parents realising that their children are sexual beings and will be interested in sex; some of the parents that we worked with couldn't get to grips with how their children could be interested in sex at such a young age and "why not" was our message to them. There was a lack of knowledge; they still saw their child as a child not as an emerging adult.'
>
> (Focus Group 2)

YPPOs believed that issues such as learning difficulties and child offenders with autism spectrum disorder (ASD) could be dealt with satisfactorily provided that there were adequate resources, such as access to NIAPP, as happens in Dublin:

> 'From the [Dublin] Northside NIAPP point of view, they do run three groups and one of the groups caters specifically for people who may have learning difficulties or may have ASD and that group works really well, maybe even better than some of the other groups.'
>
> (Focus Group 2)

However, teenagers have access to NIAPP only in Dublin and other large urban areas such as Cork city. Similar to the Child and Mental Health Services (CAMHS), there is no access to NIAPP after a child reaches 18 years. In sharp contrast, the YPP service works with children until the child is at least 21. Sometimes, the child is even older, in cases where the YPP service has been working with the child before the child turned 18 years.

The resulting effect is that the first-time child offender aged under 18 years who commits a sexual offence but is sentenced after 18 years is treated as an adult and will be dealt with by the Adult Probation Service:

> 'We work with them until they are 21 but other services are gone like NIAPP and CAMHS and sentencing is different. Where it is custodial sentence, it is now a prison sentence … which is hard because these people won't have committed general offending…. They [first-time offenders over 18 at date of sentence] are not the type of children who have committed a range of offences. They are normally squeaky clean and they come with this 'big bang' of a charge. I had one lad with NIAPP who found himself in Cork Prison on remand. He also found himself all over the papers with his name, address disclosed. That had a massive effect on the child.'
>
> (Focus Group 2)

Loss of welfare benefits such as YPP support, and other agencies such as NIAPP and CAMHS, have not been considered by the courts.

All YPPOs were in agreement with the assertion of Stone (2019) that:

> … the classic and central focus for students and practitioners of youth justice rests on young persons who offend and are then convicted and sentenced while remaining juveniles.
>
> (Stone, 2019, p. 158)

In Document 3 of my research (O'Connor, 2019), almost 60 per cent of judges were of the view that much adolescent behaviour is experimental or transient in line with the UK Sentence Council (2017). However, one study has disputed this emphasis (Hackett *et al.*, 2013), while YPPOs suggested that the factors of brain development and exposure to the internet make matters even more complex. Studies have suggested that up to 93 per cent of children in the youth justice system have adverse childhood experiences, such as trauma, which impairs brain development (Evans-Chase, 2014; Williams, 2020). As one YPPO stated:

> 'I am conscious of trauma to children. If the brain has three or four traumas against non-trauma, that can have a big impact.'
>
> (Focus Group 3)

However, attempts to find solutions to these issues are not straightforward. For example, senior probation officers believed that a multidisciplinary approach to child sexual offending might sound admirable in principle, but great care is required. In this regard, they were of the view that unhelpful blurring of professional roles may occur unless roles are clearly defined:

> 'Everybody says multidisciplinary, [however], it is based on trust, knowledge, and boundaries … policemen and probation officers can stray into doing each other's jobs, resulting in information sharing becoming confused.'
>
> (Focus Group 1)

Victims and public opinion

Much juvenile sexual offending is familial, which creates particular distress for parents, and that parental disbelief is often a defence mechanism.

In the conflict between loving their children and protecting them, parents tend to self-blame. In this regard, YPPOs believed that much depends on how a court deals with victim impact statements. They felt it was important that parents believe that the consequences of making a statement should not necessarily mean a harsher sentence for the offending child.

Teenage sexual abuse can also have significant collateral damage for the wider family (who themselves may end up as victims due, for example, to parental neglect):

> 'NIAPP had a client where the parents were on board, but they were almost over the top. The parents had a safety plan sellotaped in every room and there was an older sibling who was 16 years who was forgotten about. It transpired after a few months that this young person was suffering with suicidal ideation because he was the buffer. It was as if 'ah, he's all right'. They were trying to manage the young person who has harmed, manage the victim, but the older brother of them was ignored and this older child ended up with suicidal ideation.'
>
> (Focus Group 2)

Therefore, there is a disconnect for the child between his behaviour and the trauma caused by the sexual offending to the victim:

> 'It can be hard for them to fully buy into the victim empathy module because they are victims themselves and there was nothing done about their abuse. It was tied up in the family or nobody knew enough about what happened to them, so it is hard for them to get into that space of empathy.'
>
> (Focus Group 2)

One of the striking factors uncovered in this research relates to the group therapy with NIAPP; children who are referred may also include children referred by Tusla, by the Diversion Programme and by the courts for similar offences. Three different referral systems are therefore evident. The child who is referred by the courts may struggle to understand why he is treated more harshly than the other (non-court) children, particularly if the crime was, in effect, the same.

The media and public opinion and judges taking control

YPPOs accepted that public opinion is much harsher around sexual offending than other more general areas of offending. On the positive side, they also felt it could have an educational benefit, particularly in relation to revealing issues such as sexting by teenagers who are often unaware that they are committing an offence. Significantly, particular concern was expressed about perceived media pressure on the victims – which, they believed, may result in victims being put under pressure to submit a victim impact statement when they do not wish to do so or where too much confidential information is revealed.

YPPOs were unanimous in asserting that sentencing is a matter for the judge who should take control. Breaches of the in-camera rule were frequently mentioned by YPPOs. One child who committed a sexual offence told the YPPO that he was deeply upset by the way lawyers and other people unconnected with his case walked in and out of court without any correction from the judge.

Restorative Justice, sentencing guidelines and judicial training

Restorative Justice

YPPOs have a restorative practice officer who provides information and workshops to schools.

There was a consensus that an apology from a child offender in court is usually drafted by a lawyer and incomprehensible to a child offender and child victim.

Sentencing guidelines

The response of the majority of YPPOs in this study was that guidance rather than strict guidelines for the courts are required. Consistency by judges is important for the child and their legal advisors. A few YPPOs opined that the

potential risk for a child to receive a custodial sentence depended on the judge before whom a child appears.

However, a minority of YPPOs were in favour of mandatory guidelines:

> 'Judges come from their own background and they may not be aware of all the issues.'
>
> (Focus Group 3)

Training and specialisation

All YPPOs in this study believed that training and specialisation were necessary.

The 'other' child

The most significant challenge for judges is to apply a sentence that promotes rehabilitation and accountability for the child defendant but also provides justice and safety for victims and the public. We know that a significant portion of child sexual offending also involves younger children as victims, including children from the same household as the child offenders. One of the unfortunate side-effects is the idea of what Professor Hackett calls the victim-to-offender cycle, whereby individuals abused in childhood go on to complete the cycle by victimising others. However, the evidence also suggests that most victims of sexual abuse do not go on to abuse others.

Many children who are abused encounter post-traumatic disorder, which may not manifest itself for many years. It will not be rectified solely by a victim impact statement. Indeed, the legal process leading to a sentence can result in more, rather than less, trauma for the victim. As Beijer and Liefaard (2011) cogently point out, it can lead to 'secondary victimisation i.e., victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim' (p. 70).

Frequently, the perceived 'safe' approach to sentencing the child is to give a custodial sentence, and thereby remove the child from the family for a period. However, it is not always evaluated whether it is desirable for the victim, the child offender and their families. Child victims are unlikely to be effective self-advocates.

In addition, a victim impact report written by a family member (which is broadly defined[4]), furnishing an assessment of the effects of the offence on

4 A family member can be: spouse or partner; child, grandchild, parent, grandparent, brother, sister, uncle, aunt, niece or nephew of the person; person in loco parentis of the person; dependant of the person; any other person whom the court considers to have close connection with the person.

the victim, may also be furnished to the court before sentencing. While judges take cognisance of victims, there is a dearth of research on how the changing conceptualisation of the role of victims influences the judicial process, including the final sentence, bearing in mind that many children (both victims and perpetrators) have learning and speech and language issues. Tom O'Malley suggests that the sole purpose of victim impact evidence is to assist the sentencing court but it does not obligate the court to increase the sentence because of the impact on the victim.

Sibling Sexual Abuse (SSA)

While empirical research on Sibling Sexual Abuse (SSA) is scarce (Finkelhor *et al.*, 1983), data from the US indicate that it is a significant issue, with at least 2.3 per cent of children victimised by a sibling, compared with 0.12 per cent who were sexually abused by an adult family member (Caffaro, 2021, citing US Department of Health and Human Services, 2016). SSA can also create significant collateral damage for the wider family who themselves may end up as victims. In this regard, many YPPOs interviewed for my research were of the view that much depends on how courts deal with victim impact statements and, in particular, that the consequences of the victim making a statement should not necessarily mean a harsher sentence for the offending child. It should be borne in mind that many child-offenders are themselves victims, which may become apparent only when the child has sexually offended.

The New Zealand approach (Lynch, 2016)

- New Zealand youth justice system – Oranga Tamarika Act, 1989.
- Re-integration, Restorative Justice, Diversion and family empowerment are strong components of its ethos.
- It is primarily achieved through the Family Group Conference (FGC) in the Youth Court.
- Section 282 is a complete and unconditional discharge developed in a welfare ethos by the New Zealand Youth Court judges rather than by legislation.
- Section 283(a) discharge results in a record even though there is no other order or penalty.
- Very serious cases can be included in FGC. This involves a therapeutic process over a period, with constant court supervision followed possibly by a community sanction.

- Transfer to the New Zealand District Court is rare but emphasis is on rehabilitation, not detention.

Irish judges – A lot of positives

- Judges are largely empathic – 89 per cent of judges felt that children who committed sexual crimes could be rehabilitated and nearly all judges (95 per cent) felt that to consider a child's welfare needs in sentencing was important.
- Recognition that detention is a last resort evidenced by the low number of children in detention.
- Emergence of specialisation, particularly in some recent high-profile cases in the Central Criminal Court and in the Children Court 55.
- The development of the concept of reviewable sentences and the use of deferred detention orders even for high-end cases is commendable.
- Closure of St Patrick's Institution. Oberstown is a modern detention centre with heavy emphasis on rehabilitation for under 18-year-olds.
- Successful piloting of Bail Support Scheme in Court 55.
- Judicial Youth Justice Manual

Legislatively, the Children Act, 2001 is in compliance with the UNCRC – in particular, Parts 7 and 8 give extensible powers to the Children Court – but it would appear that it is not used to its full potential. It is anticipated that there will be significant legislative changes in the next few years, according to the most recent 2021–2027 Youth Justice Action Plan, particularly in Family Conferencing.

Key Findings (O'Connor, 2021)

In sentencing children and young persons who commit sexual crimes, judges are obliged to deal with several competing but divergent demands. First, a young offender's crime, personal life history, risk assessment and rehabilitation compete with the process of repairing harm to victims, many of whom are vulnerable children. Secondly, young victims and young offenders frequently must navigate a life-changing experience, including severe trauma in a largely adult criminal justice system. Thirdly, the political and media agendas frequently demand a robust justice approach, centring on retribution, incapacitation and protection of society. Yet most international studies acknowledge the relatively low rates of sexual recidivism, 'with non-sexual recidivism being nearly twice as

great' as other offences (Lambie, 2009). However, the Irish Court process has demonstrated considerable nostalgia for a jurisprudence embedded in the twentieth-century working of the Children Act, 1908.

Five key findings have come to the fore in this research, namely:

1. *Absence of court data*
   Firstly, the absence of court data from the Courts Service, the Director of Public Prosecutions and the Probation Service make it very difficult to evaluate judicial decisions in sentencing for sexual offences. In addition, the rationale for sentencing needs to be intelligible not just to an appellate court but also to the child defendant, child victim, their families, and the wider public. This, therefore, requires consideration to be given to written sentences such as exist in the New Zealand Youth Courts, which are subject to public scrutiny.
2. *Failure to take account of personal issues, such as scientific insights concerning the development and maturation of adolescents who sexually offend*
   A second key finding in this research is that while the age and maturity of the child are recognised, it is within an adult justice status and through an adversarial model. While judges do take the age of the child into consideration as a mitigating factor and promote the development of the child in sentencing, it is frequently done according to the child's chronological age. There is an absence of detailed analysis of personal childhood issues, neuroscientific developments and mental health concerns that may be particularly pertinent to the child in question. This is particularly unfortunate in the case of children who are sentenced for sexual offences. Children who sexually offend are not a homogeneous group but there are defined sub-groups and, unlike other areas of youth crime, children who sexually offend respond particularly well to child-appropriate therapeutic treatment.

   Child victims, including siblings, are frequently exposed to revealing their own vulnerability in an adult adversarial court process and in victim impact statements, thus further exacerbating their trauma. Finally, there is currently an over-dependence on probation officer reports, to the detriment of other reports to fill the information gap.
3. *Lack of judicial training and specialisation in youth justice*
   Youth justice sentencing is generally largely instinctive judicial analysis, resulting in some inconsistencies in the Children Court. YPPOs have

noted that the absence of specialisation and training is also evident in the poor representation from the lawyers who represent children. This is demonstrated, for example, by their advocacy of inappropriate court sanctions, such as suspended sentences, or the pursuit of fruitless judicial review processes, which creates unnecessary delays for children.

4. *Appropriate sentences hampered by inadequate resources*
   As a fourth key finding, my research has demonstrated that the absence of legal aid for children charged with sexual offences and who are offered diversion can have dramatic consequences for a child who refuses diversion.

   There is also a wide variation in the facilities available to judges of the Children Court. Dublin is the only district to have a full-time Children Court with trained YPPOs to assess therapeutic interventions and with access to comprehensive facilities such as Day Centres required for community sanctions.

   Despite the discretion afforded to Children Court judges under section 75 of the Children Act, 2001, sexual abuse cases are invariably transferred to the Circuit Court for sentencing.

   While New Zealand and Northern Ireland experiences may not offer perfect templates, they do afford good comparator examples. This, in turn, calls for robust victim and family supports to enable an effective system, particularly in SSA. The principle that children and young people are best cared for in their own family is also applicable. In SSA, therefore, the orthodoxy that requires all interfamilial abusers to be removed from the home is too prescriptive. Children have a right to be sentenced in an environment that recognises their right to be treated in the least restrictive setting, whilst also recognising the need to acknowledge sibling and community safety.

5. *Delay and children who age-out*
   A fifth finding in this research relates to delays in court processes, which can manifest as a prosecution delay, historical abuse delay, judicial review or in the time required for a child or a victim to come to terms with the offence. Such delay results in cases of child sexual offending being dealt with as adult sexual offending; the child ages-out of childhood and accordingly loses the benefits of the Children Act, 2001. The cliff edge of adulthood at 18 years of age in current sentencing approaches in Ireland might be considered harsh in light of international standards for a young adult irrespective of when the offence was committed.

However, overall, arguably, victim and child offender's needs are not being met in the current sentencing regime in Irish courts. Instead, secondary victimisation is a real possibility due to the adult-like adversarial court criminal justice process for victims and offenders. For example, adult adversarial cross-examination is not suitable for vulnerable children. Furthermore, many child offender rights and victim rights are being disenfranchised because of the delays in the prosecution investigations and the length of the court process. What is needed, therefore, is a redefinition of the Irish sentencing model for juvenile sexual offences that is not exclusively wedded to a twentieth-century justice/welfare concept. Therefore, sentencing for sexual offences needs to recognise that children's rights and needs are progressing and changing rapidly. This means moving beyond the philosophy that underpinned the now-abolished concept of *doli incapax* and embracing the concept of the evolving capacity of children (Article 5, UNCRC). This requires holistic sentences, which should be incorporated into sentencing practice, recognising the role of scientific developments and academic research in the area.

Towards the future

I acknowledge that children in conflict with the law are inherently vulnerable. Courts must, therefore, recognise that children have underdeveloped capacities in comprehending harm, as evidenced in recent developments in neuroscience. These factors must also be borne in mind at sentencing stage. The need for a holistic approach to sentencing is desirable.

While I accept that neuroscience cannot accurately evaluate an age at which this vulnerability of adolescence ceases (Wishart, 2018), one must be forthright in stating that children below the age of 14 years are unable to participate effectively in the juvenile justice system, as a matter of science and of law (Rap, 2013; CRC/C/GC/24).

General Comment No. 24 (2019) also reveals that the UNCRC concept of best interests is now being interpreted in terms of prevailing standards and understanding of developments of children and young people. The relatively recent emergence of scientific developments in neuroscience concerning child development and brain development has informed the children's rights framework and international juvenile justice standards (Liefaard, 2020). In turn, this has led to a renewed interest in the concept of evolving capacity, as envisaged by Article 5 of the UNCRC (Kilkelly, 2020).

General Comment No. 24 (2019) Article 28 states that children with neurobiological disorders should not be in the criminal justice system and, if not excluded, they should be individually assessed.

Article 40 of the UNCRC refers to the right of a child to a fair trial. However, it goes further and emphasises that the special treatment of children should be in accordance with the age and maturity of the individual child. Therefore, in achieving proportionality, the child's developmental and mental health issues need to be ascertained.

Children have a right to be sentenced in an environment that recognises their right to be treated in the least restrictive setting while also recognising the need to acknowledge sibling and community safety (Banks, 2006; Erooga and Masson, 2006). Overall, the rationale for sentencing needs to be intelligible not just to an appellate court but also to the child defendant, child victim, their families, and the wider public. This, therefore, requires written sentences such as exist in New Zealand Youth Courts (Lynch, 2021) and which are subject to public scrutiny.

In keeping with the spirit of General Comment No. 24 (2019), child justice systems should also extend protection to children over 18 years, in acknowledgement of the developmental and neuroscience evidence that shows that brain development continues into the early twenties.

Conclusion

Therefore, in the spirit of Martin Tansey's commitment to rehabilitation of offenders, and to comply with international best practice, my conclusion is to embrace the UNCRC ethos as expressed by General Comment 24 CRC, and in doing so to challenge us as lawyers and judges to come up with a bespoke holistic sentence for children that satisfies the demands of the child, the victim and public policy. New Zealand has done so, where judges of first instance first took the initiative and the legislature then followed. We owe a historic debt to our children not to make the same mistakes as previous generations by simply ignoring the problem.

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