

will require ongoing provision into adulthood. This could fatally undermine the benefit derived from education provided up to that point. Second, the interpretation of Article 42.4 as conferring a right only to 'appropriate' rather than 'the best' education may result in some children having to settle for an inferior quality of education. Finally, the interpretation of the prohibition on religious discrimination in Article 44, as well as of the clause granting the right to opt out from religious instruction, has created a situation where an approach to religious education that could be seriously challenged under the CRC and ECHR has been deemed to be compatible with the Irish Constitution. In all three cases, a more child-centred interpretation was available to the Courts.

Non-commencement of Education for Persons with Special Educational Needs Act 2004

A major constraint on the adequate vindication of the rights of children with special educational needs is the continuing non-commencement of the Education for Persons with Special Educational Needs Act 2004. As noted above, this was intended to come into effect in 2009, but its commencement was indefinitely postponed after the economic crisis of 2008. As a matter of individual rights, all children are entitled to an adequate education that is appropriate to their individual needs, irrespective of cost, and the 2004 Act provides a far more effective model for ensuring this than existing law. Moreover, from an economic perspective, investment in education is cost effective in the long term. Therefore, as the economy stabilises, the commencement of this legislation should be a priority for the Department of Education.

6.5 RECOMMENDATIONS TO STRENGTHEN THE PROTECTION OF RIGHTS

- > The constitutional right to free education should be extended to cover secondary education.
- > The right to free education should be determined on the basis of need rather than age.
- > The right to free primary education should, in line with the definition set down in *O'Donoghue v Minister for Health*, allow children to make the best possible use of their inherent and potential capacities, however limited those capacities may be.
- > The Education for Persons with Special Educational Needs Act 2004 should be commenced and fully implemented without further delay.
- > The recommendation of the Forum for Patronage and Pluralism with respect to the integrated curriculum should be implemented immediately—at least in areas where no multi-denominational alternative is available within a reasonable distance.
- > A more extensive programme of divestment of schools from religious denominations should be undertaken, with a view to providing genuine diversity and freedom of choice within the primary school system.

CHAPTER 7:

Youth Justice

Sarah Jane Judge, BL

7.1 INTRODUCTION

The United Nations Convention on the Rights of the Child provides an effective benchmark against which domestic provisions for the treatment of children in conflict with the law can be measured and evaluated. Its provisions and the rights contained therein recognise and reflect best practice across jurisdictions while also representing minimum standards for the criminal prosecution of children.¹ It provides a rights based framework for the creation of domestic youth justice law, policy and practice.² The specific rights it affords to children in conflict with the law places the child as a rights holder within the criminal justice system. The CRC does not form part of Irish law and is not enforceable in Irish Courts.

Youth justice in Ireland is founded in legislation and implemented by policy. It applies to those under the age of 18³ that come into conflict with the law. The Children Act 2001⁴ outlines the principles and provisions of youth justice in Ireland. This Act is the blueprint from which policies and procedures of youth justice are developed and implemented by a network of government agencies.

This chapter seeks to evaluate the operation of the youth justice system in Ireland in light of the due process rights of the child as contained in the CRC. Reference is also made to the provisions of the non-binding guidelines published by the UN Committee on the Rights the Child (CRC) that direct the implementation of the CRC. These include the Beijing Rules⁵ and the Riyadh Rules.⁶ This evaluation is not exhaustive due to the length and nature of this chapter, however salient areas necessitating examination and discussion have been selected. These include the provisions of the Children Act and the operation of a number of agencies involved in the administration of youth justice in Ireland.

7.2 YOUNG PEOPLE IN CONFLICT WITH THE LAW

Before beginning an analysis of the rights held by children involved in the criminal justice process, it is imperative to understand the abilities, limitations and realities of these children. The capacities of children and adolescents, in general, are influenced by a lack of future orientation, a lack of risk aversion, impulsivity and suggestibility⁷ and

have been found to be less risk averse than adults and tend to weigh anticipated gains more heavily than losses in making choices.⁸ Children and adolescents tend to focus on the short term implications of decisions and to pay less attention to the long term consequences.⁹ During the period of early to mid-adolescence, decisions are often driven by acquiescence or opposition to authority or by efforts to gain peer approval.¹⁰

These cognitive and emotional limitations have been held to directly impact on the ability of the child to participate effectively in legal proceedings. Grisso et al conclude that psychosocial immaturity may affect the performance of youths as defendants, in ways that extend beyond the elements of understanding and reasoning.¹¹ Adolescents may be more likely to make choices that reflect a propensity to comply with authority figures such as making statements or admissions to the police.¹² Furthermore they are less capable than others to recognise the risks inherent in the various choices they face such as choosing and consulting a lawyer and evaluating the various factors in entering a plea.¹³ Children and adolescents are less likely to consider the long-term implications of their decisions, instead concentrating on the immediate consequences.¹⁴

Previous academic research conducted in the Children Court illustrated the key characteristics of many young offenders in the Irish criminal justice system. Children appearing before the Court were predominantly male (90%),¹⁵ lived in specific disadvantaged areas (81%)¹⁶ and did not live with both parents (71%).¹⁷ The majority of accused (86%) had no engagement with mainstream education.¹⁸ The presence of minority communities was significant. Of the young people studied 22.5% were from the Traveller or ethnic community.¹⁹ The most common offences were public order, petty theft offences and road traffic offences.²⁰

A further study conducted within a number of Irish detention schools came to similar conclusions.²¹ Staff within the schools could expect 80% of the male children surveyed

1 Ursula Kilkelly, *Youth Justice in Ireland, Tough Lives, Rough Justice* (Irish Academic Press 2006) xv.

2 *ibid.*

3 Children Act 2001 s 3.

4 Children Act 2001 as amended by the Criminal Justice Act 2006.

5 UN General Assembly, 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") : resolution / adopted by the General Assembly' (29 November 1985) A/RES/40/33.

6 UN General Assembly, 'United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") : resolution / adopted by the General Assembly' (14 December 1990) A/RES/45/112.

7 Ido Weijers, 'Requirements for Communication in the Courtroom: A Comparative Perspective on the Youth Court in England/Wales and The Netherlands' (2004) 4(1) Youth Justice 25.

8 Elizabeth Scott & Thomas Grisso, 'Developmental Incompetence, Due Process and Juvenile Justice Policy' (2004) 11 University of Virginia Law Scholl: Public Law and Legal Theory Working Paper 23-24.

9 *ibid.* 25.

10 *ibid.* 26.

11 Thomas Grisso and others, 'Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants' (2003) 27(2) Law and Human Behavior 357.

12 *ibid.*

13 *ibid.*

14 *ibid.*

15 Jennifer Carroll, Emer Meehan and Sinead McPhillips, *The Children Court: A National Study* (Association for Criminal Justice Research and Development 2007) 18.

16 *ibid.* 19, 20.

17 *ibid.* 20.

18 *ibid.* 23.

19 *ibid.* 26.

20 *ibid.*

21 J. Hayes, G. O'Reilly 'Emotional Intelligence, Mental Health and Juvenile Delinquency' (Juvenile Mental Health Matters 2007). <http://www.juvenilementalhealthmatters.com/Publications_files/Mental%20Health%20%26%20EI%20Report.pdf> accessed: 4 September 2010.

to satisfy diagnostic criteria for at least one psychological disorder²² and for most boys, their mental health difficulties were compounded by co-morbidity.²³ That is to say that separate psychiatric diagnostic criteria are observable in the same young offender. A further one third of detainees could be expected to meet diagnostic criteria for a mood or anxiety disorder,²⁴ with two thirds experiencing an externalising or disruptive psychological disorder further compounded by a substance related disorder.²⁵ Cannabis and cocaine abuse was noted in males between the ages of 13-14 years.²⁶ Lower cognitive abilities are also manifest with impaired levels of emotional intelligence and competence.²⁷ Detainee subjects were found to have a reduced ability to identify emotions accurately and to employ emotional information to influence and regulate thinking.²⁸

This psychological and background data charts the emotional and physical vulnerability of many young offenders and the psychological challenges and sociological barriers that they face. The fair trial rights of the child account for the age and vulnerability of young offenders by requiring the implementation of a number of safeguards throughout the Children Court process. These safeguards help to ensure the effective participation of the child throughout the Court proceedings.

Number of Children in the Criminal Justice System in Ireland

In 2014, the Courts Service reported that court orders were made in respect of 4,877 offences committed by children.²⁹ This was a reduction of 9% from 2013.³⁰ The most common offences were larceny and public order offences with 50% of all offences having been struck out or taken into consideration.³¹ In 2013, one hundred and eighteen offences committed by children were returned to a higher court for trial.³² Such data is not available for 2014. Furthermore, no data is available concerning whether the children, against whom orders were made, reoffended or whether the children convicted had previous convictions.

22 *ibid* 37.
 23 *ibid*.
 24 *ibid*.
 25 *ibid*.
 26 *ibid* 44.
 27 *ibid* 55.
 28 *ibid*.
 29 Courts Service, *Annual Report 2014* (The Courts Service 2014) 40.
 30 *ibid*.
 31 *ibid*.
 32 *ibid*.

7.3 WHAT ARE THE RIGHTS OF THE CHILD UNDER THE CRC?

The CRC contains three fundamental principles which are applicable to all children.³³ Article 2 provides that there shall be no discrimination between children in the enjoyment of Convention rights on any grounds³⁴ while Article 3 states that the best interests of the child shall be the primary consideration in all actions taken concerning the child.³⁵ Article 12 requires that States assure to every child, who is capable of forming a view, has the right to express that view freely in all matters concerning him or her. These views are to be given due weight in accordance with the child's age and maturity.³⁶ The Committee on the Rights of the Child (CRC) states that each principle establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.³⁷ This includes the interpretation of the child's due process rights.

Article 37 and Article 40 address the due process rights of the child. These include a number of basic fair trial rights similar to those provided to adults such as the right to the presumption of innocence,³⁸ the right to legal representation;³⁹ not to be compelled to give testimony⁴⁰ and the right to have the judicial decision in relation to the offence reviewed by a higher, competent, independent and impartial authority or judicial body according to law.⁴¹ Article 37 and 40 also provide specific protections for children in conflict with the law in light of their age and maturity. Article 40 mandates that State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law and to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.⁴² The desirability of promoting the child's reintegration into society where the child can assume a constructive role is also recognised.⁴³

The various stages of the criminal justice process and the rights of the child from detection and apprehension through to adjudication, disposition and possible detention are also addressed. The child has the right to be informed promptly and directly of the charges against him or her. The matter must then be determined without delay

33 UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard (20 July 2009) CRC/C/GC/12, at 2.34 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) Art 2.
 34 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) Art 2.
 35 *ibid* Art 3.
 36 *ibid* Art 12.
 37 United Nations Committee on the Rights of the Child, General Comment No. 12 (n 33) at 2.
 38 Convention on the Rights of the Child (n 34) Art 40(2)(b)(i)
 39 *ibid* Art 40(2)(b)(ii).
 40 *ibid* Art 40 (2)(b)(iv).
 41 *ibid* Art 40(2)(b)(vi).
 42 *ibid* Art 40(1).
 43 *ibid*.

by a competent, independent and impartial authority or judicial body in a fair hearing according to law.⁴⁴ This should take place in the presence of legal or other appropriate assistance and the child's parents or legal guardians.⁴⁵ This recognises the need for urgency in dealing with children due to both their cognitive ability but also in light of the adverse impact of the criminal justice system on the child. The right of the child to privacy also must be fully respected at all stages of the proceedings.⁴⁶

Capital punishment or life imprisonment of the child without possibility of release is prohibited.⁴⁷ Detention may only be imposed as a measure of last resort and for the shortest appropriate period of time.⁴⁸ This is a clear recognition of the adverse impact of detention on the child. Every child deprived of liberty must also be treated in manner which takes into account the needs of the child.⁴⁹ The detained child must also be separated from adults unless it is considered in the child's best interest not to do so. The importance of the child's family is also addressed. The child has a right to maintain contact with his or her family through correspondence and visits. This can only be dispensed within exceptional circumstances.⁵⁰

A multidisciplinary approach is also advocated by Article 40. It requires that a variety of dispositions be available in addressing the child's offending behaviour.⁵¹ This should include care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care.⁵²

Kilkelly (2008) states that, taken together, these provisions of the CRC reflect the key obligations States must fulfil to ensure the implementation of the Convention as a whole.⁵³ The notions of treating children as equals, taking a child-centred approach and listening to children thus capture what the Convention as a whole is trying to achieve in bringing about a sea change in attitudes towards children.⁵⁴

The Children Act 2001

The culmination of three decades of debate,⁵⁵ the Children Act 2001 attempts to put

in place a modern statutory framework for dealing with juvenile justice in Ireland.⁵⁶ Drawing on a number of rights afforded to the child under the CRC, the Act emphasises community based non-custodial measures as alternative approaches for dealing with young offenders. These include restorative justice, cautioning, family group conferences and the strengthening of the Garda Diversion Programme (GDP) by placing it on a statutory footing.⁵⁷ The underlying principle of the Act is detention as a last resort and should only be undertaken after all other community based sanctions have been exhausted. This recognises and upholds the provisions of the CRC,⁵⁸ that those under 18 should only be detained as a measure of last resort and for the shortest appropriate period of time.

The Act also provides that if the child is not eligible for admission to the GDP, the child will face prosecution in the District Court sitting as the Children Court. The Children Court must sit at a separate time or location to the District Court and the child's parents are required to attend the proceedings. The child's identity is also protected with restricted reporting measures. A number of alternative sentencing options are provided which allow the Court to not only punish but address the child's behaviour. Children who come before the Children Court found to be in need or at risk can be diverted to the attention of the Child and Family Agency (formally the Health Service Executive). A family welfare conference can then be undertaken with a view to deciding the best course of action in addressing the child's needs.⁵⁹ This has been seen by commentators as an attempt by the Act to *bridge the gap* between the justice and welfare systems that the Children Court operates within.⁶⁰

The Act also increased the age of criminal responsibility from seven to twelve years. Children below twelve were now deemed not to have the capacity to commit an offence. This placed the common law presumption of *doli incapax* on a statutory footing. This is a rebuttable presumption and acts as protection for those who lack the maturity to understand the implications of the offence committed.

The Act was not fully implemented on introduction and was fundamentally altered by the Criminal Justice Act 2006. Originally undertaken to implement the Youth Justice Review,⁶¹ the amendments also introduced a number of other significant reforms which were independent of the Review's recommendations. These included a lower age of criminal responsibility of ten years for all children found to have committed serious

44 *ibid* Art 40(2)(b)(iii).

45 *ibid*.

46 *ibid* Art 40(2)(b)(vii).

47 *ibid* Art 37(a).

48 *ibid* Art 37(b).

49 *ibid* Art 37(c).

50 *ibid*.

51 *ibid* Art 40(4).

52 *ibid*.

53 Ursula Kilkelly, *Children's rights in Ireland: Law, policy and practice* (Tottel Publishing 2008) 27.

54 *ibid*.

55 The Kennedy Report (1970); the Henchy Report (1974), the Task Force on Child Care Services (1980); the Whitaker Report (1985); and the Report of the Dail Select Committee on Crime (1992).

56 Geoffrey Shannon, *Child Law* (Thomson Roundhall 2005) 393.

57 Raymond Dooley & Maria Corbett, 'Child Care, Juvenile Justice and the Children Act, 2001' in Ursula Kilkelly (ed) *Justice In Controversy; Youth Justice in Ireland, Tough Lives, Rough Justice* (Irish Academic Press 2006).

58 Convention on the Rights of the Child (n 34) art 37(b).

59 Children Act 2001 s 77.

60 Ursula Kilkelly, *Youth Justice in Ireland, Tough Lives, Rough Justice* (Irish Academic Press 2006) 35.

61 See Department of Justice Equality and Law Reform, *Report on the Youth Justice Review* (Government of Ireland 2006).

62 These crimes include murder, manslaughter and aggravated sexual assault.

63 Children Act 2001 as am. the Criminal Justice Act 2006, [hereinafter the Act] s 52(3).

crimes.⁶² *Doli incapax*⁶³ was abolished with the reference to the child's capacity to commit a criminal offence being replaced by a commitment not to charge children below that age.⁶⁴ In justifying the lowering of the age of criminal responsibility, the then Minister for Justice, Equality and Law Reform described the age under the original Act as 'unduly optimistic' and that lowering the age to ten years was 'a reasonable step'. The Minister averted to increasing sexual activity among younger people and the implications for 'social confidence' in the criminal justice system if 'all sexual activity up to the age of 12 years, was in every circumstance, incapable of being regarded as criminal'.⁶⁵ Anti-social behaviour warnings⁶⁶ and orders were introduced⁶⁷ with the GDP being expanded to those less than twelve years of age.⁶⁸ The 2006 Act also limits the absolute *in camera* rule, making it subject to the public interest. Evidence of any involvement in the GDP will now be admissible in any other criminal proceedings the child may face.⁶⁹

The Children Act (as amended by the Criminal Justice Act 2006) fails to follow the child's rights perspective of the CRC. No broad express principles are provided to promote the child's sense of dignity and worth.⁷⁰ Furthermore, the 2001 Act fails to provide and promote any guidance as to what the objectives of the youth justice system are. No direction is given as to how its principles should be implemented.⁷¹ Any rights of the child such as those to privacy (Section 93) or liberty (Section 96) are subject to the interests of the victim or the protection of society as a whole. A failure to protect and observe children's rights is most manifest in the lowering of the age of criminal responsibility. No account is taken for the psychological ability of a child to differentiate between childish naughtiness and criminal behaviour.⁷² The concept of responsibility for the crime is rendered meaningless with all reference to capacity of the child removed. This lower minimum age of criminal responsibility (MACR) also negates the scientific and developmental evidence regarding the capacity of children as discussed above. Adults, like children, do not always act in a considered and rational way and develop at different levels and speeds. Therefore the use of a standardised metric such as age in quantifying capacity raises serious concerns. As stated by Goldson, a low MACR leads to the

'institutionalised responsabilisation' and 'adultification' of children⁷³ while Bandalli argues that the abolition of *doli incapax* reflects a steady erosion of the special consideration afforded to children and extends the remit of the criminal law to address all manner of problems which young people face.⁷⁴

The use of a low MACR also reveals tangible incoherence regarding the manner in which the legal personality of the child is constructed and social rights and responsibilities are statutorily assigned in Ireland.⁷⁵ In civil law, the law serves to mediate the transition from childhood to adulthood whereby rights and responsibilities accumulate with age. For example, In Ireland, the child can take up employment at 16, drive at 17 and vote at 18. The child is allowed to garner greater rights and responsibilities as they develop. However, this approach is abandoned when the child's alleged behaviour is criminal in nature. The Irish justice system presupposes that all children reach a standardised level of criminal competency at a certain age. This gives rise to certain inconsistencies in the legal regulation of children. Reflecting this, Goldson questions how the *adultification* of young children in criminal proceedings can be rendered legitimate when, in every other area of law, the social rights and responsibilities that adulthood conveys are reserved for those aged 18 years and older.⁷⁶ Due process concerns also arise as it is unclear how children can be said to satisfy the basic legal test for the factual mental element for criminal culpability (*mens rea*).

7.4 IRELAND AND THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

Some of the CRC's Concluding Observations in 1998 and 2006 in relation to juvenile justice in Ireland have yet to be addressed. These include:

- > The requirement for statistical and other information for the development of indicators to monitor the implementation of the principles and provisions of the CRC;⁷⁷
- > The need for inter-agency coordination in promoting and protecting the rights of the child;⁷⁸
- > The absence of adequate and systematic training on the principles and provisions

64 Ursula Kilkelly, *Youth Justice in Ireland* (n 60).

65 Michael McDowell, 'Criminal Justice Bill 2004 Ministerial Presentation to the Joint Committee on Equality, Justice, Defence and Women's Rights, September 7 2001' in Ursula Kilkelly (ed), *Youth Justice in Ireland* (n 60).

66 *Children Act 2001*, s.257B.

67 *ibid* s 257D.

68 *ibid* s 23 as am. *Criminal Justice Act 2006* s 125.

69 *ibid* s 48 as am. *Criminal Justice Act 2006* s 126.

70 Convention on the Rights of the Child (n 34) Art 37(b).

71 Convention on the Rights of the Child (n 34) Art 40 (3): States shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the penal law.

72 'It is difficult to imagine a child fully understanding an indictment, the course of proceedings, the role of the jury and the personal and sociological consequences of a criminal conviction.' Brenda Campbell, 'Vulnerable Defendants' (Annual Fair Trials International Youth Advocacy Programme, University of Nottingham, 24 June 2009).

73 *ibid* 113.

74 S. Bandalli (2000) 'Children, Responsibility and the New Youth Justice' in Barry Goldson (ed), *The New Youth Justice* (Russell House 2000) 94 as cited in John Muncie, *Youth and Crime* (2nd ed, Sage Publications 2004) 252.

75 Bary Goldson, 'Unsafe, Unjust and Harmful to Wider Society: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales' (2013) 13(2) *Youth Justice* 119.

76 *ibid* 121.

77 UN Committee on the Rights of the Child (CRC), 'UN Committee on the Rights of the Child: Concluding Observations: Ireland' (4 February 1998) CRC/C/15/Add.85.

78 *ibid*.

of the Convention for professional groups working with and for children, such as judges, lawyers, law enforcement personnel was also a matter of concern;⁷⁹ Each of these ongoing concerns are discussed below.

Lack of statistical and other information concerning Children in Conflict with the Law in Ireland

Currently, a centralised source of information regarding young offenders and young offending in Ireland does not exist. As outlined by the CRC, this information is essential to establish effective systems for data collection and to ensure that the data collected is evaluated and used to assess progress in implementation, to identify problems and to inform all policy development for children.⁸⁰ The CRC reminds State Parties that data collection needs to extend over the whole period of childhood, up to the age of 18 years.⁸¹ It also needs to be coordinated throughout the jurisdiction, ensuring the development of nationally applicable indicators. These indicators should be related to all rights guaranteed by the Convention.⁸² The Commentary to Rule 13.3 of the Beijing Rules further highlights the importance of this information in light of the rapid and often drastic changes in the lifestyles of children and young people and how quickly the societal and justice responses to juvenile crime and delinquency quickly become outmoded and inadequate.⁸³

In 1985, the Whittaker Report outlined the continuing need for research analysis, discussion and deeper understanding of the issue of juvenile offenders in Ireland.⁸⁴ Much later in 2005, Walsh outlines that many of the data sources currently available suffer from inevitable agency bias and focus only on results pertaining to the key functions of the agency in question.⁸⁵ This is compounded by the fact that the data available only applies to crimes that have been detected.⁸⁶ One example of this is the data provided by the Annual Reports of the Garda Diversion Programme.⁸⁷ Although these reports are a valuable resource in assessing the success of the GDP, the Reports apply only to those children who are referred to the Programme. Kilkelly (2006) further highlights that these reports do not address the pathways of the GDP participants into crime or reoffending rates among these children who benefit from the Programme.⁸⁸

79 *ibid.*
 80 *ibid.* at 5.
 81 *ibid.*
 82 *ibid.* at 2.
 83 UN Committee on the Rights of the Child (CRC), 'UN Committee on the Rights of the Child: Concluding Observations: Ireland (n 77) at Rule 13.3.
 84 *The Report of the Committee of Inquiry into the Penal System* (Stationery Office 1985) in Dermot Wash, *Juvenile Justice* (Thomson Round Hall 2005) 484.
 85 Dermot Wash, *Juvenile Justice* (Thomson Round Hall 2005) 312-315.
 86 *ibid.* 313.
 87 See Committee Appointed to Monitor the Effectiveness of the Diversion Programme 'Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme 2012' (Garda Youth Diversion Office 2012).
 88 Ursula Kilkelly, *Youth Justice in Ireland* (n 60) 1.

In 2008, the Government recognised the importance of robust and consistent data on youth offending as part of the National Youth Justice Strategy.⁸⁹ Frameworks for the collection of this data have not been implemented. To date, no official reason has been provided for this. As to potential reasons for the difficulty in consolidating this data, the impact of data protection legislation has been cited as a possible reason for the inability of government agencies to share and collate this information.⁹⁰ Nevertheless, it can be concluded that any concerns regarding data protection could be addressed through cross-agency measures and safeguards to ensure that the identity of the child is protected and the data is stored safely and securely.

In 2013, the IYJS launched its Youth Justice Action Plan.⁹¹ A high level goal of this Plan is the development of an evidence base to support more effective policies and services, having regard to the voice of young people. This is to be achieved through the collection of robust, comprehensive and consistent data on young offenders tracking the pathways of these offenders through the youth justice system. The responsibility for this is to be owned by a number of stakeholders including the Central Statistics Office, the Prison Service, the Department of Justice and Equality and the Department of Children and Youth Affairs.⁹² The Action Plan does not state which government agency will have primary responsibility or accountability for the collection, coordination and dissemination of this data or where this data will be stored or accessed. This raises concern in light of the history of difficulties regarding inter-agency communication on youth justice matters in Ireland. It further highlights the need for an independent agency responsible for maintaining a centralised, contemporaneous resource of data pertaining to young offenders and youth offending in Ireland.

The need for inter-agency coordination in promoting and protecting the rights of the child

A number of government agencies were originally charged with developing policies and procedures to implement the principles and provisions of the 2001 Act. The Youth Justice Review (2005) highlighted the lack of communication and co-ordination among the agencies concerned. It highlighted that effective leadership and management were needed within the agencies. In response to these recommendations, the Irish Youth Justice Service (IYJS) was founded. An executive office of the Department of Justice and Equality, it has responsibility for leading and driving reform in the area of youth justice. The IYJS is guided by the principles of the Children Act 2001 and works with the Department of Children and Youth Affairs.⁹³ However, the IYJS does not act

89 Irish Youth Justice Service, *The National Youth Justice Strategy 2008 – 2009* <http://www.iyjs.ie/en/IYJS/IYJS_NYST_2008_10.pdf/Files/IYJS_NYST_2008_10.pdf> accessed 16 July 2015, 37-39.
 90 'Juvenile Justice in Times of Economic Constraint' (Honorable Society of Kings Inns Roundtable Discussion 2014). Present at Roundtable Discussion: Minister for Children and Youth Affairs Francis Fitzgerald, Prof. Ursula Kilkelly, Judge Ann Ryan, Justice Michael Moriarty, Mr. Geoffrey Shannon
 91 Irish Youth Justice Service, *Tackling Youth Crime: Youth Justice Action Plan 2014 – 2018* (Irish Youth Justice Service 2013) 15.
 92 *ibid.*
 93 Irish Youth Justice Service, 'About Us' <<http://www.iyjs.ie/en/IYJS/Pages/Home>> accessed 16 July 2015.

as the co-ordinating body with accountability for the management of the Irish youth justice system. Many of the difficulties noted in the operation of the system before the establishment of the IYJS continue to prevail. These include the requirement for guidelines for the implementation of the provisions of the 2001 Act; the lack of a comprehensive data source on youth offending; the requirement for a case management system in the Children Court and the need for specialist training of all those working with young offenders within the youth justice system in Ireland.

Requirement for Guidelines and Resource Allocation

Limited guidelines are available for the implementation of the Children Act. This has resulted in an *ad hoc* approach in implementing the Act across the agencies within the youth justice system. In the past, this has been compounded by a lack of inter-agency communication and cooperation. The need for guidelines is most evident in the operation of the Children Court. Studies of the Children Court have reported varying levels of implementation of the protections afforded to the child under the 2001 Act.⁹⁴ This has been observed in various court districts as part of these studies.

Furthermore, limited resources are available for the implementation of the 2001 Act despite the requirements made by its provisions for significant physical changes to the youth justice system. An example of this is the requirement under Section 56 of the Act that children are separated from adults in Garda custody. Full implementation of this provision would require the construction of a separate area of cells in each Garda Station in the event that a child is arrested. In the alternative, one Garda Station in each district could be designated as a child friendly station. Nevertheless, both options would require the construction of extra, specialist, segregated police cells or, at the very least, an increase in Gardaí to supervise specialist, designated Garda stations.

The scope of the limited guidelines that are available for the implementation of the Children Act 2001 also requires examination. The recent Practice Direction for the operation of Dublin Metropolitan Children Courts⁹⁵ provides much needed procedural guidelines as to how the provisions of the 2001 Act pertaining to the Children Court should be implemented. However, the Direction states that it applies to Dublin Metropolitan Children Courts and does not state that it applies to all District Courts sitting in their capacity as a Children Court.⁹⁶ Providing additional guidance to Dublin

Metropolitan Children Courts and not all District Courts sitting in their capacity as the Children Court arguably places children brought before Dublin Children Court in more favourable position as those children brought before another Children Court which does not benefit from the guidance of the direction. This could be deemed as discriminatory against the latter group of children. A recent positive development has been the introduction of the Children Court Bench Book.

It is described as a practical tool for District Court Judges working in the area of youth justice in Ireland.⁹⁷ This will hopefully go some way to ensuring the systematic application of the principles of the 2001 Act and best practice in all Children Courts in Ireland.

The viability of the Direction is also adversely affected by the lack of specialist training provided to judges and legal representatives. This training is imperative in ensuring that the discretion exercised by the presiding judge, as referred to in the Direction, is correctly applied. Similarly, this is crucial to ensure that the child friendly representation required by practitioners, under the Direction, is undertaken. Currently, no state sponsored specialist training exists for judges, legal representatives, an Garda Síochána or any other person working with children within the Irish youth justice system.

Requirement for Specialist Training and Development

Paragraph 9 of the Riyadh Guidelines requires specialised personnel at all levels in the youth justice system⁹⁸ while paragraph 58 recommends that personnel be trained to respond to the special needs of young persons and be familiar with dedicated programmes and referral possibilities for the diversion of young people from the justice system.⁹⁹ Rule 1.6 of the Beijing Rules states that juvenile justice services must be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.¹⁰⁰ Professional education, in-service training, refresher courses and other appropriate modes of instruction are recommended to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases.¹⁰¹ The accompanying commentary to the Beijing Rules recommends that a minimum training in law, sociology, psychology, criminology and behavioural sciences is required.¹⁰² Furthermore, the CRC has stated that the training of the child's legal representative is paramount and should take place in a systematic and ongoing manner.¹⁰³ The

94 Ursula Kilkelly, 'Youth Courts and Children's Rights - The Irish Experience' (2008) 8(1) Youth Justice 51; Ursula Kilkelly, 'The Children Court: A Children's Rights Audit' <<http://www.ucc.ie/en/lawsite/research/research-projects/children-court/DocumentFile,11029,en.pdf>> accessed 16 July 2015, 63; K. Hehemann and R. Willemsen, 'The Irish Youth Justice System - An evaluation of the compliance of the Irish Youth Justice System with the International Standards of Youth Justice.' (2010) Unpublished LLM Thesis, University of Utrecht, Utrecht Law School, 45

95 The Courts Service of Ireland, 'Practice Direction DC04 - Children Court, Dublin Metropolitan Children Court' <<http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/de2140128f4c0e1580257c7800515bb1?OpenDocument>> accessed 16 July 2015.

96 *ibid* para 1.

97 Children Court Bench Book, District Court, March 2015 at iii.

98 UN General Assembly, 'United Nations Guidelines for the Prevention of Juvenile Delinquency (n 6) para 9.

99 *ibid* para 58.

100 UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (n 5) rule 1.6.

101 *ibid* rule 22.

102 *ibid* rule 22, Commentary.

103 Committee on the Rights of the Child, 'General comment No. 10 (2007): Children's Rights in Juvenile Justice' (25 April 2007) CRC/C/GC/2007 para 40.

Committee has highlighted that this training should not be limited to information on the relevant national and international legal provisions¹⁰⁴ and should include information on the causes of juvenile delinquency, psychological, cognitive and behavioural aspects of the development of children in general and the client in particular.¹⁰⁵

The Children Act 2001 makes minimal reference to the necessity of the specialist training of those working with children within the youth justice system in Ireland. Section 72 provides that a judge of the District Court must participate in any relevant course of training or education required by the President of the District Court before transacting business in the Children Court.¹⁰⁶ The 2001 Act does not specifically outline the minimum duration and nature of training that judges of the Children Court are expected to complete. The Act does not place any obligation on the Children Court judges to engage in continuous professional development or refresher training. A previous study of the Children Court concluded that Children Court judges had not been given any training regarding effective communication methods with children.¹⁰⁷ This is concerning in light of the continuous communication and dialogue necessitated by the child's right to heard and effectively participate in all proceedings concerning him or her. Other presiding judges appeared to be unfamiliar with the exact provisions of the Children Act.¹⁰⁸ This undermines the due process rights of the child and is a clear indication of the need for ongoing and systematic training for Children Court judges.

Apprehending children, determining cases concerning alleged young offenders and representing these children can be a difficult task. The child may lack any form of familial support such as fixed accommodation or the presence of a parent or guardian in Court.¹⁰⁹ Furthermore, the child may be reluctant to comply with the court process due to learning and emotional difficulties, involvement with a negative peer group or the presence of intergenerational crime within the child's family. Children also have limited understanding and levels of concentration compared to adult clients. This requires that Gardai, judges and solicitors engage with children in age appropriate language and in a manner that ensures that the child understands the criminal justice process and the outcome of same for the child. This understanding is central to the child's right to be heard.

104 *ibid* para 97.

105 *ibid*. See also UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (n 5). The Beijing Rules require that solicitors, like judges, receive professional education, in-service training, refresher courses and other appropriate modes of instruction to establish and maintain the necessary professional competence in dealing with juvenile cases.

106 This infers that training should be provided to the judge after his appointment to the Children Court and should be additional to the judicial training he/she has already received when appointed as a District Court judge.

107 K. Hehemann and R. Willemsen (n 94) 48.

108 *ibid*.

109 Section 91 of the Children Act 2001 states that the parents or guardian of a child shall attend at all stages of any proceedings against the child unless the Court is of opinion that the interests of justice would not be served by such attendance.

The importance of specialist training for judges and legal representatives working with young offenders has also been recognised in other jurisdictions. Bench books are utilised in jurisdictions like England and Wales to provide procedural guidance to Children Court judges in sentencing, as well as in communicating and engaging with children.¹¹⁰ In Northern Ireland, and in England and Wales, all solicitors who wish to become involved in the criminal defence of children must apply for membership of an accredited children's panel.¹¹¹ These panels require that solicitors reach standardised levels of competency in the area of juvenile justice before representing children.¹¹² In New Zealand, Legal Aid Services provide a specialist children's legal service that advises and represents children involved in criminal cases in the Children Court.¹¹³

While the Children Court Bench Book has been recently published, there appears to be little opportunity for judges to share their experiences and apply any learning acquired in a practical way. The Law Society of Ireland and the Bar Council do not require that a solicitor or barrister involved in the criminal representation of children undertake any specialised training before practicing in the Children Court. This is concerning in light of the difficulties that can arise in representing children and the best practice approaches adopted in other jurisdictions as discussed above.

7.5 YOUTH JUSTICE AGENCIES

Examination is now provided of three key agencies involved in youth justice in Ireland. These are the Garda Diversion Programme, the Children Court and the Children Detention Schools.

The Garda Diversion Programme

As discussed earlier, the format of the Garda Diversion Programme (GDP) was changed under the Criminal Justice Act 2006. The scope of the programme was extended to ten and eleven year old children without stating whether this applies to children charged with serious crimes only.¹¹⁴ If this is applicable to all crimes, the 2006 Act

110 Judicial Studies Board, 'Equal Treatment Bench Book - Children and the Courts and Tribunals' (Judicial Studies Board 2009) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf> accessed 16 July 2015.

111 The Law Society, 'Children Panel Accreditation Scheme - Assessment questionnaire - private practice applicants' <<http://www.lawsociety.org.uk/productsandservices/accreditation/accreditationchildrenlaw.page#one>> accessed 14 August 2010. This panel provides guidance and standards of best practice which solicitors must follow when representing children in public law cases. In applying to the Panel, solicitors must detail their relevant qualifications and practical experience in representing children. A number of summaries of cases undertaken by the solicitor involving children must be submitted while an in-depth case study is also required. This assessment helps to ensure that solicitors reach a certain level of competency in the area of juvenile justice before being permitted to represent children.

112 *ibid*.

113 Legal Aid Service, New South Wales, 'Children and Young People' <<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=591>> accessed: 14 August 2010.

114 Criminal Justice Act 2006 s 125.

effectively ignores the age of criminal responsibility. Furthermore, the child's acceptance of responsibility, admission and involvement in the GDP can now be introduced as evidence in subsequent criminal proceedings. This is counterintuitive to the ethos of the GDP as a diversionary mechanism from the criminal justice process and vitiates the importance of diversionary programmes as outlined in the CRC.¹¹⁵

Further examination is also needed of the admission process applied to all children who are referred to the GDP. Between 2007 and 2012 an average of 15% of children referred to the GDP per year were deemed unsuitable for the programme.¹¹⁶ Information is also not available as to how the criteria for admission to the GDP are applied by the Director of the Programme. This data is imperative in light of the requirement under the Act that the interests and views of the victim as well as the best interests of the child are accessed in deciding the suitability of the child for the programme.¹¹⁷ The need for this data is further compounded by the adverse impact of the criminal justice system for any child who fails to gain admission to the GDP. This information could inform the creation of other diversionary mechanisms in dealing with children who are deemed unsuitable for the GDP. Although the decision of the director regarding admission is subject to judicial review, this course of action is not sufficient in ensuring that discretion is applied in a transparent and consistent manner on a case by case basis.

The Children Court

The Children Court is the sole prosecuting body for children charged with minor crimes in Ireland. A specifically designated Children Court is located in Smithfield, Dublin 7. This Court only has remit to deal with cases arising within the Dublin Metropolitan District. Outside this District, all District Courts have jurisdiction to sit as a Children Court.

The operation of the Children Court since its establishment in 2001 has been observed in four research studies. These studies span from 2005 to 2010.¹¹⁸ Each evaluation produced similar findings. Delays in court lists, the habitual use of adjournments and remands on continuing bail were common. Although these mechanisms appeared to be utilised in order to expedite the Court's business, they failed to uphold the instruction to minimise the child's involvement in the Court process. In addition, the accumulation of extra charges while on continuing bail has become prevalent. This serves to remove the connection for the child between the original offence and the punitive sanction attendant on that offence as the number of accumulated offences depreciates the significance of the original crime.

The role of Children Court judge presents unique challenges that are different from those faced by any other judge. To fulfil the requirements of the Act the judge is

required to account for the age and immaturity of the child¹¹⁹ while interfering as little as possible in the child's legitimate activities.¹²⁰ As discussed, Children Court judges, until recently with the publication of the Children Court Bench Book, were required to this without any procedural guidelines as to how the provisions of the 2001 Act are to be implemented. Previous research has reported a lack of communication and interaction between the judge and the child. This occurred throughout the Court proceedings from the explanation of bail to the imposition of sentence. This served to disengage the child from the court process and substantiated the irrelevance of the child's presence at the Court proceedings. This disengagement was evidenced in the behaviour of many children observed as part of research conducted in 2010.¹²¹ They often stared into space or played with their hands.¹²² This is a clear indication of a failure to ensure that that child effectively participates in the proceedings and thus the right of the child to be heard being fully implemented. Breaches of the child's right to privacy during court proceedings have also been reported.¹²³ This most commonly occurred when the child's name was called into the public waiting area.¹²⁴ Furthermore, separation of children from adult offenders as required by Section 71(2) is habitually ignored. While the 2001 Act requires that the Court sit at a different time or place than the adult court, this is only guaranteed in the Dublin Children Court where the Court deals exclusively with children's cases.¹²⁵ As outlined by Kilkelly, in other District Court buildings, adults and children share the facilities.¹²⁶ This is still a problem in certain regional District Courts where the criminal court lists for adults and children sit at the same time and place. Kilkelly also notes that in one particular regional courthouse, two courtrooms face each other, separated only by a small shared waiting area, meaning that separation is not achieved in practice.¹²⁷

From previous research concerning the Children Court, it was clear that a number of conflicting demands are placed on Children Court judges. They must implement the fair trial rights of the child, case manage the matters before the Court while adjudicating the case itself. This spectrum of responsibilities compels the need for specialised training of Children Court judges, as previously discussed. Guidelines for an efficient case management system within all Children Courts are urgently required. Bail support schemes should be considered to provide structure and supervision for children released on continuing bail. This is prevalent in light of the success of these schemes in other jurisdictions in preventing re-offending and ensuring young people abide by bail conditions and attend court.¹²⁸

115 Convention on the Rights of the Child (n 34) art 40(3)(b).

116 Committee Appointed to Monitor the Effectiveness of the Diversion Programme (n 87) 24.

117 Children Act 2001 s 23.

118 See Jennifer. Carroll (n 15); Ursula. Kilkelly (n 94); K. Hehemann (n 94).

119 Children Act 2001, s 96(3).

120 Children Act 2001, s 96(2)(a) – (d).

121 Sarah Judge, 'The Children Court in Ireland: An Evaluation in Light of the Fair Trial Rights of the Child' (UCC LLM Thesis 2010). See Appendix A, Observed Case 2, 15, 17, 22, 38, 46, 48, 57, 60.

122 *ibid* at Appendix A, Observed Case 2, 15, 17, 22, 38, 46, 48, 57, 60.

123 *ibid* 61.

124 *ibid* 70.

125 Ursula Kilkelly, *Youth Justice in Ireland* (n 60) 136-137.

126 *ibid*.

127 *ibid*.

128 Sinead Freeman, 'The Experience of Young People Remanded in Custody: A Case for Bail Support and Supervision Schemes' (2008) <www.arrow.dit.ie/aaschslarts/29> accessed 23 August 2010, 11.

Furthermore, the physical environment and formalities of the Court should recognise the limitations and vulnerabilities of the child. Standard style courtrooms, legal jargon and a marked Garda presence, as observed, all serve to distance the child from the court process.¹²⁹ Ideally, age appropriate language should be adopted by all legal personnel in small, single level courtrooms that encourage and facilitate the participation of the child. Currently, it is unlikely that adequate funding will be provided for these facilities. However, this is not to say that an environment cannot be created to facilitate the effective participation of the child within the facilities that are currently available. This can be achieved by engaging the child in child friendly dialogue and ensuring that the child stands or sits close to the judge and legal representative.

Children charged with Serious Crimes

The Children Court has jurisdiction to deal summarily with a child charged with any indictable offence, other than those offences which are required to be tried by the Central Criminal Court. Indictable offences encompass a broad spectrum of offences including burglary, robbery, drug offences, assault crimes and sexual offences. If the Children Court is of the opinion that the offence does not constitute an indictable offence fit to be tried summarily, the Court has jurisdiction to send the child forward for trial on indictment to the Circuit Criminal Court.¹³⁰ To date, no legislative mandate, procedural safeguards or practice guidelines exists to govern the trial of a child in the event that he/she is sent forward for trial on indictment in the Circuit or Central Criminal Courts. A child charged with a serious crime in the Circuit or Central Criminal Courts faces trial as an adult in this jurisdiction.

This is concerning for a number of reasons. The Convention makes extensive provision in this area in Article 40 and the CRC have outlined that trial proceedings should be conducted in an atmosphere enabling the child to participate and to express him/herself freely.¹³¹ It further states that exceptions to this rule should be very limited.¹³² Furthermore, the European Court of Human Rights (ECtHR) has developed jurisprudence which develops and recognises the specific fair trial rights of children.¹³³ In the seminal cases of *T v. UK* and *V v. UK*, the ECtHR stated that it is essential that the child's age, level of maturity and intellectual and emotional capacities be taken into account when a child faces criminal charges.¹³⁴ The Court outlined that a public trial in an adult court must be regarded in the case of a child as a severely intimidating procedure and having regard to the applicant's age, the application of the full rigours

of an adult public trial deprived him of the opportunity to participate effectively in the determination of the criminal charges against him.¹³⁵ The ECtHR suggested that these interests could be met through a modified juvenile procedure.¹³⁶ Failing to adopt child friendly trial procedures for the prosecution of any child for any offence undermines and ignores the position of the child as a right's holder under the UNCRC. Furthermore, it fails to reflect fundamental due process principles as the child is unable to understand or participate in the proceedings against him or her.

Children Detention Schools

The detention of children in Ireland spans a diverse range of legal, societal, governmental and child's rights issues. Reports of the abuses of children in reformatory and industrial schools has occupied news headlines and haunted the public consciousness for the past two decades. The reports of the Inspector of Prisons into St. Patrick's Institution further emphasised the ongoing concerns and complex issues pertaining to the detention of children in conflict with the law in Ireland. A full discussion of all these issues would require a specially designated chapter on the detention of children. As a result this section only seeks to deal with the use of remand custody, in particular the need for bail support schemes and the use of remands for assessment.

Detention Schools in Ireland

Currently, the new National Children Detention Facility is being developed at the Oberstown campus in Co. Dublin. Six new units are being built – three to house 17-year-old boys and three to replace existing accommodation. The three existing Children Detention Schools will be integrated with the new units to form one single National Children Detention Facility. The facility will accommodate all children on remand or serving a custodial sentence, as originally provided for in the Children Act 2001. An amendment to the Children Act 2001 is planned to provide a secure legal framework for the operation of the campus as a single integrated facility and a programme of operational reforms and recruitment is underway.

The Health Information and Quality Authority (HIQA) is the body charged with inspecting the children detention schools. In 2015, HIQA found that the Children Detention Schools met just one of the 10 national standards in full: the education standard.¹³⁷ Six standards were found to require improvement.¹³⁸ The failure to meet standards regarding the use of single separation, management of medication, and staffing and training issues were cited by HIQA as posing 'a significant risk'.¹³⁹ Furthermore, HIQA identified that

129 See Jennifer. Carroll (n 15); Ursula. Kilkelly (n 94); K. Hehemann (n 94).

130 Children Act 2001, s. 75.

131 United Nations Committee on the Rights of the Child, General Comment No. 12 (n 33) para 60.

132 *ibid* para 61.

133 *Tyler v. the United Kingdom* App no 5856/72 (ECtHR 25 April 1978) para 31: The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. See also *Soering v. the United Kingdom* App no 14038/88 (ECtHR 7 July 1989) para 102.

134 *ibid* para 84.

135 *ibid*.

136 *ibid* para 87: The ECtHR also stated that the pre-introduction of the defendants to the courtroom and the shortening of hearing

137 Health Information and Quality Authority, 'Inspection Report on National Children's Detention School Campus' (2015) <hiqa.ie/social-care/find-a-centre/childrens-detention-schools> accessed 1 May 2015, 10.

138 Health Information and Quality Authority, 'Action Plan: National Children's Detention Campus' (2015) <http://www.hiqa.ie/system/files/DS_Action_Plan.pdf> accessed 31 March 2015, 10.

139 *ibid* 10.

children had limited awareness of their rights and there was no mechanism in place for ensuring consultation and participation of children.¹⁴⁰ A centralised mechanism for recording and acting on complaints was not available.¹⁴¹

The Use of Remand Custody

One constant issue noted in previous studies of the Children Court and independent studies concerning the detention of children in Ireland is the use of remand custody. This is where the child is remanded in custody by a Children Court judge. This occurs before sentence has been imposed for the offence in question. The child may receive a custodial sanction and serve a period in detention. Once sentenced the child is no longer remanded in custody for that particular offence. This can occur at any point from the child's first appearance in court regarding the alleged offences right up until the imposition of sentence. Non-compliance with bail conditions has emerged as a common route to remand custody. Seymour's study of young offenders on remand in 2008 concluded that almost all of the sample prisoners interviewed had been originally released on bail but were later remanded in custody due to reoffending.¹⁴² The implications of remand custody for children are significant. In spite of their presumption of innocence, children in remand custody have a similar experience as those serving a sentence such as the prison lock-up regime.¹⁴³

The most common reasons for remand custody have been noted as a breach of bail conditions,¹⁴⁴ the seriousness of the offence,¹⁴⁵ or the inability of the defendant to provide surety for bail.¹⁴⁶ Furthermore, remand appears to be most predominant where the child was already remanded in custody from his/her first appearance before the Children Court.¹⁴⁷ Seymour asserts that the ideology underlying such remands is counterproductive in that it identifies a problem area in the young offender's inability to obey restrictive demands but in turn increases the likelihood that the delay can give rise to the accumulation of charges that are in addition to the original charge.¹⁴⁸ The use of remand custody for such individuals seems to be both an inappropriate and disproportionate measure, particularly in light of the principles under Section 96 of the Children Act which promotes the use of custody as a measure of last resort and the provisions limiting the use of custody under the UNCRC.¹⁴⁹ Remand custody also fails to address the issues that result in the child failing to comply with bail. Rather, as stated by Freeman, 'the implication is that custodial remand may make future breaches of bail

an increasing possibility on release due to its disruptive impact on the child's already unstable life'.¹⁵⁰

Over the last few decades, a number of jurisdictions including England¹⁵¹ and Australia¹⁵² have introduced bail support schemes (BSS schemes) and youth offending teams. These aim to minimise the use of custodial remand among those who breach bail but do not pose a threat to public safety.¹⁵³ This is provided by specialist divisions of the Probation Services.¹⁵⁴ They are designed to help individuals to attend court, abide by bail conditions and not re-offend during the bail period. Following this assessment, a customised support and supervision programme tailored to each individual is presented and agreed before the Court, subject to continual review during the bail period.¹⁵⁵ Research undertaken in England and Wales suggests that bail support programmes have the potential to reduce the number of young people re-offending while on bail and the number detained on remand.¹⁵⁶ Freeman concludes that such schemes could 'help young people to cope better with the actual remand process by allowing them to deal with the uncertainty of their case in a familiar, less transient environment and encourage greater feelings of responsibility and control when it comes to attending court, abiding by bail conditions and desisting from crime'.¹⁵⁷ A similar bail support programme for young offenders was to be implemented in Ireland under the National Youth Justice Strategy in 2008. The Department of Justice outlined that the scheme was not implemented due to the costs of the programme and a number of planning issues.¹⁵⁸

Remanding of Children for Assessment

Under the Children Act, where the Children Court is satisfied of the guilt of a child, it may defer taking a decision to allow time for the preparation of a probation report or for other sufficient reason. The child may then be remanded in custody for the minimum period necessary for the preparation of any such report. This detention period cannot exceed 28 days. The Act also states that the Court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child. No provision exists for the remand of an assessment.

Remand for assessment occurs when the remand warrant for the child sent to the detention centre states that the child is being remanded on criminal charges. However,

140 ibid 4.
 141 ibid.
 142 Sinead Freeman (n 128) 4.
 143 ibid 7.
 144 S. Judge (n 121) Observed Case 50.
 145 ibid Observed Case 13, 61.
 146 ibid Observed Case 3.
 147 ibid Observed Case 58, 61.
 148 Sinead Freeman (n 128) 9.
 149 Convention on the Rights of the Child (n 34) Art 37(b).

150 Sinead Freeman (n 128) 9.
 151 Youth Justice Board, 'Youth Offending Teams, who are they, what do they do?' <<http://www.yjb.gov.uk/en-gb/yjs/Youthoffendingteams/>> accessed 12 September 2010.
 152 Indigenous Youth Justice, 'Bail Support in Australia' <<http://www.indigenousjustice.gov.au/briefs/brief002.pdf>> accessed 11 September 2010.
 153 Sinead Freeman (n 128) 9.
 154 ibid 22.
 155 Ibid 10.
 156 Audit Commission, *Youth Justice 2004, A Review of the Reformed Youth Justice System* (Audit Commission, 2004) 2.
 157 Sinead Freeman (n 128) 12.
 158 J. Hough, 'Bail support service for young offenders never rolled out' *Irish Examiner* (Cork, 16 July 2010).

the remand also states that that the remand is for a court ordered assessment. The judge must state which type of assessment he or she requires to be carried out on the child during the remand period. These assessments include behavioural, educational and psychological assessments are conducted by professionals within the detention centres and not by probation officers. This practice raises a number of due process concerns.

The remand of a child for assessment is not provided for under the Children Act 2001. This may be what is alluded to by remand for 'other sufficient reason' as contained in Section 100. However, this is not clarified in the 2001 Act or any statutory document. As a result, no clear statutory power exists allowing this form of remand under the 2001 Act. In the event that these remands were permissible under the heading of 'other sufficient reason', the remand remains a clear breach of Section 96 if the remand is not primarily based on the criminal offending of the child. Therefore, before remanding a child for any report or assessment, it must be clear that the child's criminal behaviour or inability to comply with community based services warrants that detention and that while in detention the report in question can be completed. Concerns also arise regarding the availability of existing reports regarding the child's wellbeing and why these cannot be utilised. Further questions arise as to why such assessments cannot be completed in the community. Clarity as to the exact reasons for these remands and evaluation of the legality of this practice would serve to address these questions.

Nevertheless, even if the purpose and legality of these remands is clarified, the completion of assessment remains outside the remit of the detention schools. Section 158 of the 2001 Act, in outlining the function of the detention schools does not outline any assessment function to be provided by the schools.

This lack of clarity regarding the practice of remanding for assessment raises serious concerns regarding the legality of these remands. This is caused and compounded by a lack of clarity within the Children Act. This fails to ensure that detention is only used as a measure of last resort. It also indicates the importance of community based resources as opposed to relying on detention schools to provide these services. Confirmation regarding the legal basis for these remands is urgently needed. Once this is provided training is required for all legal personnel as to how these remands can be appropriately utilised in light of the rights of the child.

7.6 CONCLUSION

This chapter has sought to evaluate the youth justice system in Ireland according to the rights of the child as contained in the UNCRC. These rights operate as standards of best practice and form part of binding international law which the State has ratified and agreed to implement. These rights are recognised, in part, in the Children Act 2001 which, as a legal document, is progressive, welfare focused and an improvement on the Children Act 1908.

However, the lack of procedural guidelines and resource allocation for the implementation of the Act has resulted in structural and administrative confusions and inefficiencies in the Youth Justice System. Concerns regarding transparency, delays in court lists, lack of case management, a failure to provide specialist training for legal personnel, recurring and frequent remands in custody all serve to undermine and impinge on the due process rights of the child and need to be addressed. Furthermore, the vulnerability and capacities of children within the criminal justice system must be accounted for. Interagency cooperation and communication between all agencies working with children in the criminal justice system is necessitated. These agencies include An Garda Síochána, the Courts Service, the Child and Family Agency, the Probation Service and the Irish Youth Justice Service. Reliance on principles of data protection laws as a reason for a lack of communication only serves to retain the child in the criminal justice process and undermines any progress in fully realising and implementing effective, child friendly interventions to prevent youth offending going forward. The trial of children as adults for serious crimes also requires urgent reform. Such practices are in breach of the UNCRC and have been criticised by the European Court of Human Rights.

From previous reports of the Children Court it was clear that a number of conflicting demands are placed on Children Court judges. They must implement the fair trial rights of the child, case manage the matters before the Court while adjudicating the case itself. This spectrum of responsibilities compels the need for specialised training of Children Court judges. This training should include theoretical and experiential modules on communication techniques and implementation of the fair trial rights of the child. As required in international legislation, this training should be adopted on a systematic and ongoing basis to ensure consistency in the application of juvenile justice throughout the jurisdiction.

Lawyers who choose to represent children should be obligated to undertake a course of specific training to facilitate the effective representation of young offenders. Following the practice in other jurisdictions, statutory requirements for the specialised training of legal representatives working with children and young people should be implemented. Such training should also be a condition which must be satisfied before a legal aid certificate can be claimed by the solicitor or barrister on behalf of a juvenile client.

This chapter identifies that the Children Act is inadequate in its current form. It essentially founders on a failure to establish clearly defined structures, protocols and procedures that serve to ensure that the due process rights of the child are defining of the youth justice system. What is absent is a clear mandate for specialised training, case management, guidelines and adequate resources. Implementations of these measures will help to ensure that best practice, complying with UNCRC, is attained.