

The Development of the Irish Youth Justice System: Towards a Children's Rights Model of Youth Justice?

Abstract

The introduction of the Children Act 2001 signalled the beginning of a new era for Irish youth justice, though arguably represented a 'late start' for Ireland in modernising her youth justice system. Twenty years after the Act came into force, the recently published *Youth Justice Strategy 2021-2027* commits to developing a youth justice system underpinned by international children's rights principles. In setting out this vision, Ireland joins a number of other countries that are making efforts to develop their youth justice systems based on international children's rights principles. This article considers the extent to which Ireland can be said to have moved towards becoming a children's rights-respecting youth justice system, with reference to three specific areas – diversion, serious crime and detention. As a country with a hybrid welfare/justice approach to youth justice, and an incremental approach to the incorporation of its international obligations under the UNCRC, Ireland's path towards develop more rights-compliant approaches to youth justice – and the opportunities and barriers it has encountered – can contribute to global debates for other countries on a similar trajectory.

Introduction

The introduction of the *Children Act 2001* ('the 2001 Act') into Irish law signalled the beginning of a new era for the youth justice system in Ireland. Prior to this, the Irish youth justice system was governed by the *Children Act 1908*, which pre-dated independence and which was influential in defining the parameters and establishing key structures of the system. While Ireland is therefore something of a 'later starter' in modernising its youth justice system, the introduction of the 2001 Act has been said to have inspired "an era of optimism" (Buckley, 2021). Since then, work has been undertaken to develop progressive youth justice policies and practices in several areas. This progressive impulse is particularly evident in the recently published *Youth Justice Strategy 2021-2027* ('the *Strategy*'). Setting out a roadmap for the future development of the youth justice system, the *Strategy* is notable for its explicit commitment to ensuring compliance with Ireland's obligations under the UN Convention on the Rights of the Child (UNCRC) and the articulation of a set of guiding principles which mirror UNCRC provisions (DoJ, 2021).

In adopting a set of Guiding Principles based on UNCRC standards as "a lens through which youth justice policy is to be understood, delivered, assessed and monitored" (DoJ, 2021: 4), Ireland joins several other countries that are making efforts to develop their youth justice systems based on international children's rights principles. Notably, countries like New Zealand and Scotland – already known for their progressive approaches to youth justice based on restorative justice and welfare principles – are working to embed the UNCRC further into national law. New Zealand has incorporated a duty to respect children's UNCRC rights in its statutory framework for youth justice (Organa Tamariki Act, s.5; Forde, 2021), while Scotland has embedded aspects of the UNCRC into national youth justice policy and is now taking steps towards direct incorporation of UNCRC into Scottish law (Lightowler, 2020). In pursuing these goals, however, all countries face considerable challenges; youth justice remains an area where children's rights continue to be regularly violated internationally (Muncie, 2005; Liefgaard, 2015). The UN Committee on the Rights of the Child, for example, has raised concerns about the persistent use of deprivation of liberty, among other issues (UNCRC Committee, 2019).

Despite the fact that Ireland has not directly incorporated the UNCRC into national law, the 2001 Act has laid important groundwork for the development of a rights-based approach (Kilkelly, 2006a). The *Youth Justice Strategy 2021-2027* is now taking this a step further, in setting out a vision for the future development of a rights-respecting youth justice system in Ireland. This provides an opportunity to reflect on the progress that has been achieved and the challenges that remain. This article considers the extent to which Ireland can be said to have moved towards becoming a children's rights-respecting youth justice system, with reference to three specific areas – diversion, serious crime and detention. As a country with a hybrid welfare/justice approach to youth justice (Kilkelly, 2006b) and an incremental approach to the incorporation of UNCRC obligations (Forde & Kilkelly, 2021), Ireland's path towards the development of a more rights-compliant approaches to youth justice – and the opportunities and barriers it has encountered – can offer important insights for other countries on a similar trajectory.

Developing Children's Rights Approaches to Youth Justice

The UNCRC has been an important tool in advancing debate about the appropriate response to children who commit crimes globally. While all rights set out under the UNCRC are relevant to children in conflict with the law, Articles 37 and 40 are the most directly applicable, and set important benchmarks against which state progress can be measured (Kilkelly, 2008a). Important further guidance is available in the form of General Comments from the UN Committee on the Rights of the Child ('UNCRC Committee'), a range of supporting instruments at UN level, and regional instruments and guidelines developed by the Council of Europe (Hammarberg, 2008). These instruments highlight the core overarching principles that should guide the development of national youth justice systems, and setting out specific, detailed requirements on the operation of aspects of the youth justice system. The standards emphasise the need to emphasise reintegration over punitive approaches, the centrality of diversion, the need for attention to both the well-being of children and to their procedural rights, and for effective structures and systems to be put in place to support implementation (Forde, 2021).

Article 4 of the UNCRC requires State Parties to undertake "all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention, which encompasses a wide range of legal and non-legal measures" (UNCRC Committee, 2003). In light of these considerations, the following section provides an overview of the steps Ireland has taken since the introduction of the Children Act 2001, highlighting some of the key drivers in developing Ireland's youth justice system in line with UNCRC obligations. It then considers the extent to which Ireland's youth justice system has moved towards a rights-based approach to youth justice with respect to diversion, serious crime, and detention, identifying key enablers and barriers to change.

Developing Children's Rights-Compliant Approaches in Irish Youth Justice through Incremental Change?

Ireland's pathway towards a youth justice system which prioritises children's rights has not been a linear one and is far from complete. As a dualist country, Ireland takes an incremental approach to its incorporation of international obligations (Forde & Kilkelly, 2021). This means that a wide range of actions at legislative, judicial, administrative and local level are required to fully implement UNCRC rights (UNCRC Committee, 2003; Kilkelly, 2018). It further means that the extent to which children's rights are respected or violated must be understood in the broader context of the overall operation of the Irish youth justice system.

Adopting a new legislative framework for youth justice in Ireland which incorporated some children's rights provisions through the Children Act 2001 represented a milestone set a course for the development of the system since then. However, while sections of the Act emphasise respect for children's rights, they were not the central focus of the legislation. As such, Ireland's efforts to develop in line with the requirements of the international children's rights standards must be understood in the context of broader global debates concerning youth justice and national criminal justice priorities.

Traditionally, youth justice systems globally have been characterised as 'welfare'-based or 'justice'-based systems, depending on whether a response to offending behaviour based on the needs of the child or on responding to the offence itself using traditional criminal justice approaches is prioritised (Forde 2021; Smith, 2005). In characterising a system as 'welfare' or 'justice'-based, both the goals that are pursued in responding to children's offending, and the structures and processes used to implement these aims – whether this takes place in a relatively traditional 'criminal justice' framework, or a framework focused on children's needs and welfare – are relevant. They often combine contradictory ideologies (Fergusson, 2007; Muncie, 2006), and are influenced by the broader political context and by practitioners' role in shaping practice (Fergusson, 2007; Gray, 2013; Field, 2007; McAlister & Carr, 2014). In introducing the Children Act 2001, Irish legislators expressly tried to avoid the pitfalls of a system which adhered too stringently to either a 'welfare' or 'justice' approach, describing it as an "error" (Dáil Éireann Debate, 2000: Col 35). In avoiding articulating a specific ideology to underpin the Irish youth justice system, the drafters of the legislation were arguably displaying a pragmatism and preference for informalism which has been identified as a key characteristic of Irish criminal justice policy (Hamilton, 2016).

Irish youth justice has been characterised as a "hybrid" of traditional welfare and justice approaches (Kilkelly, 2006b). While predominantly a 'justice'-based system in which a traditional criminal justice system response through the courts is commonly used, this is tempered by a strong focus both on diversion and on the welfare of the child at various points, particularly at sentencing stage and in relation to the care of children in detention. Therefore, while many of the structures and processes which constitute the Irish youth justice system are relatively traditional 'justice'-based processes, the aims pursued both by the legislation at particular points of a child's progress through the system, and by many individuals within that system is understood to be substantially based on children's welfare and the importance of rehabilitation (Hamilton et al., 2016; Forde, 2021; Kilkelly, 2006b). These distinctive aspects of the Irish legislation have resulted in a system in which the potential for excessively punitive responses is markedly reduced.

While it cannot be said that the 2001 Act was focused on developing a rights-based system of youth justice, the legislation is notable for its incorporation of key principles derived from international children's rights law. The extent to which it does so, alongside notable omissions from the Act, represent both strengths and limitations of the legislation. The Act reflects key international standards such as the importance of diversion, the necessity of having a range of sanctioning options, the integration of restorative justice principles, and the principle that detention should only be used as a last resort (UNCRC Committee, 2019). There are also significant omissions from the legislation. In addition to the lack of specific reference to the UNCRC, insufficient attention is given to requirements relating to the child's best interests, the right to effective participation, principles of non-discrimination, and calls to raise the minimum age of criminal responsibility (Arthur, 2010; Kilkelly, 2006a; Hamilton,

Fitzgibbon & Carr, 2016). Both the strengths and limitations inherent in the legislative scheme have set the scene for the developments which have taken place since then.

These developments have largely been progressive in tenor, and have most recently found expression in the *Strategy's* commitment to developing a rights-respecting youth justice system. This is characteristic of a broader approach to the implementation of UNCRC obligations in Ireland, where policy development has been an important incorporation tool (Forde & Kilkelly 2021; Lundy *et al.*, 2012). The emergence of this stronger focus on children's rights in the Irish youth justice system has occurred in the context of an increasing awareness of children's rights nationally. Constitutional change has introduced a requirement that the best interests of children should be the primary consideration in specified types of cases, though youth justice is notably absent from this list (Arthur, 2010). In addition to the *Youth Justice Strategy*, several other national children's policies have been developed which explicitly reference the UNCRC (Forde & Kilkelly, 2021). The *National Children's Participation Strategy* (2015), for example, sets out a vision for the increased participation of children in society to realise the child's right to be heard under Article 12 UNCRC. These developments, combined with advocacy and research highlighting areas in which children's rights principles had not been adequately respected (e.g. Martynowicz & Ní Dhrisceoil, 2009; Carroll & Meehan, 2007) have contributed to the increasing acceptance of the relevance of the international children's rights standards in the development of Irish youth justice.

While commitment to implementing UNCRC standards in the Irish youth justice system appears to be a priority for the system's future development, doing so within the parameters of a hybrid welfare/justice system, and within the limitations of the 2001 legislation presents specific challenges. The following sections seek to explore the progress Ireland has made in moving towards children's rights-based approaches to children in conflict with the law in three areas – diversion, serious crime and detention. Each of these areas represent issues which are of importance to countries seeking to develop their youth justice systems internationally.

Towards a Child Rights-Based Approach in Irish Youth Justice?

The diversionary ethos and children's rights

Diversion constitutes a key feature of Irish youth justice and the vast majority of children in conflict with the law are diverted from prosecution (Garda Youth Diversion Bureau, 2019). The Children Act 2001 established a statutory basis for the operation of the Garda Diversion Programme, through which children who come into conflict with the law can be diverted from formal criminal prosecutions before the courts. This reflects the importance given to diversion within the Article 40(3)(b) of the UNCRC (see further UNCRC Committee, 2019), though it is significant that the Irish commitment to diversion pre-dates the UNCRC itself. As such, while the commitment to diversion in Ireland is complementary to these requirements and provides a firm foundation for the development of children's rights approach, further attention may be required before it fully represents a children's rights-based approach.

Internationally, diversion is a core component of children's rights-based approaches. Article 40(3) of the UNCRC recommends the use of diversion "whenever appropriate and desirable", subject to the proviso that legal rights and safeguards are fully respected. The UNCRC Committee is clear that opportunities for diversion should be maximised to the greatest extent possible at multiple points of the system, but equally insist on strong protections for children's procedural rights (UN Committee on the Rights of the Child, 2019). The principle

that diversion should be maximised wherever possible is also supported by research evidence (McAra & McVie, 2010; McAra & McVie, 2007; Kilkelly *et al.*, 2021).

While the Irish emphasis on diversion reflects the centrality of this issue under the UNCRC, the Irish approach stems from an early commitment to welfarist and progressive practices, and represents a clear attempt to focus on the welfare of children and to remove them from the potential harms of contact with formal justice processes. Dating back to the early 1960s, the Garda Diversion Programme was set up as a local, informal initiative in Dublin (Bowden, 2006). The programme was characterised by police discretion within the wider context of the Irish community policing model (O'Sullivan, 2015), and chimes with observations of Irish penal policy that have highlighted a preference for informalism (Hamilton, 2016). In its early acknowledgement of the social causes of 'youth crime', the emphasis on diversion also mirrors 'pastoral' (Brangan, 2021) aspect of Irish penal policy during the 1970s.

The 2001 Act placed the Diversion Programme on a statutory footing and established a requirement that diversion should be considered in all cases where the child accepted responsibility for their actions. This laid the groundwork for a maximalist approach to police diversion, rather than limiting possibility only to children who commit minor offences. It is particularly notable that this re-commitment to diversionary principles in Ireland occurred at a time when more punitive approaches to children in conflict with the law were prioritised in neighbouring England and Wales (Muncie, 2004). This early and strong commitment to diversion has thus been crucial to avoiding a similarly punitive turn in Irish youth justice (Convery and Seymour, 2016). Further, the strong diversionary approach to children at the front-end of the Irish youth justice system is a factor that has contributed significantly to low detention rates in Ireland (Hamilton, Fitzgibbon & Carr, 2016). This has been influential in helping Ireland to meet the requirement under Article 37 UNCRC that detention should only be used as a last resort.

Since the introduction of the Act, attention has been given to maximising the opportunities for diversion – in line with UNCRC Committee guidance (2019) – both in practice and in national policy. For example, several local initiatives have since been developed to further this aim by diverting children who are involved in more atypical and serious offending (Egan, 2019). Recent research has highlighted the use of restorative justice through the Diversion Programme for some children who commit sexual offences, though expertise in this area is mostly limited to Dublin (O'Connor, 2021). This highlights that these actions need to be adequately resourced and co-ordinated at national level to ensure that children have access to more child-centred responses to this type of offending.

This focus on maximisation is also evident in national policy, with the *Strategy* seeking opportunities to extend diversionary approaches, including through extending the Programme to young adults aged 18-24. The proposal in the *Strategy* to extend the reach of the Programme to young adults is reflective of a growing awareness nationally and internationally that young adults' developmental characteristics and needs also warrant an age-appropriate and developmentally-informed response (Irish Penal Reform Trust, 2015; Brewster, 2019; Schmidt *et al.*, 2021). This also aligns with UNCRC Committee guidance (2019) that child-specific youth justice approaches should apply to those aged 18 or older, particularly where the offence was committed when the individual was still a child. In setting out this aim, and in steps taken to develop pilot diversion projects for young adults (Egan, 2021), Ireland is seeking to address a challenge which has been recognised globally as an issue of concern, and maximising the benefits of the Diversion Programme for a new cohort.

However, there are limits to the extent to which Ireland's approach to diversion can be said to be fully compliant with UNCRC requirements, particularly in relation to the implementation of diversion in practice. Commentators have highlighted the lack of statutory entitlement to legal advice prior to admission to the Programme, and the potential for 'up-tarrifing' in future court proceedings as areas where Ireland is falling short (Brennan, 2012; Campbell, 2005; Kilkelly, 2006a). Equally, while there have been clear attempts to maximise opportunities for diversion at the pre-trial stage, it has been suggested that there should be an option for courts to refer a child back to Diversion to fully support a rights-based approach (O'Connor, 2021). This demonstrates the limits of the 2001 Act and highlights how the lack of more detailed attention to children's procedural rights limits the extent to which the Irish approach to diversion aligns with children's rights principles.

Overall, Ireland's approach to diversion highlights both the opportunities and the challenges which exist in moving towards a children's rights-compliant youth justice system. Given the importance of diversion within the UNCRC, the continued efforts to expand Ireland's system of diversion fits well with the aim of developing a youth justice system in line with international children's rights standards. The broader preference for informal responses where possible – including in relation to some serious offences – places Ireland in a comparatively progressive position, and is also in line with key priorities set out in the UNCRC. In addition to a strong legislative basis for diversionary approaches, the commitment and activism of policy-makers and local practitioners has been influential in efforts to develop the capacity of the Programme in relation to children who commit more serious offences and to young adults, which are both issues of global concern (Lynch & Liefwaard, 2020). However, there are also areas where Ireland is falling short of the international requirements, highlighting the limits of the current legislative provision. Overall, the experience demonstrates that while strong commitment to the ethos of diversion can help to move Ireland closer to meeting its UNCRC obligations, equal focus on fully incorporating the detailed requirements relating to children's procedural rights in law, policy and practice are necessary to fully realise the ambition set out in the *Strategy* to deliver a rights-compliant youth justice system.

Responses to Serious Offending

In seeking to move towards a children's rights-respecting youth justice system, a major challenge lies in developing appropriate responses to children who commit serious crimes such as homicide offences and serious sexual offences. While levels of offending generally amongst children in Ireland are low, with levels of serious offending being even lower (Kilkelly *et al.*, 2021), this represents a challenge considering the significant violations children who commit serious offence experience globally (Lynch & Liefwaard, 2020; van den Brink & Lynch, 2021). While research has demonstrated a continued awareness at an individual level of the relevance of welfare considerations in more serious cases (Hamilton *et al.*, 2016; O'Connor, 2019) attempting to develop a children's rights-based approach to children who commit serious crimes remains difficult. Children who are not diverted face a primarily 'justice'-based response through the courts, including the possibility of transfer to adult court that are not adapted for children's needs.

Internationally, jurisdictions have experienced significant difficulties in identifying responses to children who commit serious crimes that are in line with international children's rights standards (Lynch *et al.*, 2022). Children who commit serious crimes are often transferred from child-specific courts to adult courts (Cleland, 2016; Dyer, 2016) and subject to punitive

sentencing regimes which impose long sentences of detention, including life sentences (Nowak, 2019, Lynch and van den Brink, 2021; Huls *et al.*, 2022). This is often the case even in countries which otherwise take more welfare-based, child-orientated approaches to youth justice (Forde, 2021; Cleland, 2016; Dyer, 2016). UNCRC provisions requiring that all children should be treated in an age-appropriate way with a focus on their reintegration (Article 40(1)) and requiring detention to be used only as a last resort (Article 37) apply equally to children who commit serious crimes (Kilkelly & Liefwaard, 2022).

Ireland's response to children who commit serious offences remains relatively punitive, and potentially lengthy periods of detention are possible (Huls *et al.*, 2022). While a defining feature of the Children Act 2001 is the emphasis it places on concerns relating to welfare and reintegration in sentencing, realising this objective within the broader context of this largely 'justice'-based response to serious offending creates challenges. Previous research has highlighted that individual legal practitioners within the courts system often attempt to maintain a focus on the welfare of children, including in attempting to relax procedural rules (Hamilton *et al.*, 2016); despite these attempts, however, within the scheme of the legislation itself, the 'justice' elements of Ireland's hybrid welfare/justice youth justice dominate at this stage. In this regard, it is significant that the 2001 Act does not directly address the issue of serious crime, and the parameters it sets out mean that a relatively traditional criminal justice response is often followed in cases of serious offending. The age of criminal responsibility in Ireland is low by international standards, and has been repeatedly criticised by the UNCRC Committee (2016). Children above the age of 12 can be held criminally responsible for their actions, and children aged 10 and 11 can be charged with specified serious offences including murder, manslaughter and rape. While most children are tried in the Children Court, and it is possible for the Children Court to retain jurisdiction on a discretionary basis in some more serious cases (such as, for example, drugs offences), children charged with specified serious crimes such as murder, manslaughter and rape are transferred to the adult, unspecialised Circuit or Central Criminal Court.

Importantly, the Act mandates that welfare principles should take priority in sentencing. Section 96 of the 2001 Act provides that any penalty should cause as little interference as possible with the child's legitimate activities and requires that detention must only be imposed as a last resort; further, a range of community sanctions are provided for. This seems to reflect UNCRC requirements highlighting the importance of reintegration and non-custodial sanctions, and the minimal use of detention (UNCRC Committee, 2019). However, the lack of guidance in the Act as to how the interests of the child, victim and society should be balanced (Kilkelly, 2008b) makes applying provisions within the framework of a relatively traditional criminal justice process challenging in cases of serious crime (O'Connor, 2019).

The lack of consideration given to serious crime within the legislation creates a lacuna for children's rights in relation to their procedural rights and in sentencing. International research demonstrates that difficulties frequently arise in ensuring that children's procedural rights are adequately protected in adult courts (Cleland, 2016; Dyer, 2016). While no assessment of the protection of children's rights in adult courts in Ireland exists, research in the Children Court has documented the difficulties children experience in participating in a meaningful way (Carroll & Meehan, 2007). Given that the 2001 Act does not set out detailed requirements for the adaptation of court environments to reflect international principles of child-friendly justice (Liefwaard, 2020), efforts by professionals to adapt practice to take further account of the rights of children are critical. There are some indications that the judiciary has been

developing their practice with a view to implementing children's rights standards. Most notably, the development of a Bench Book, providing guidance to judges trying cases involving child defendants (O'Connor, 2021) indicates a growing acknowledgment of the importance of realising these rights in practice.

Similarly, recent research into sentencing practice in cases of sexual offending highlights some of the difficulties in applying the sentencing framework set out under the 2001 Act. While many judges were prepared to consider rehabilitative approaches in these cases (O'Connor, 2022), significant weaknesses including the continuing operation of a quasi-adult sentencing process, a lack of judicial training and specialisation, and inadequate resources to support the implementation of appropriate alternative sanctions remain (O'Connor, 2021). This highlights that while the judiciary can play an important role in advancing rights-compliant approaches, structural supports to increase expertise amongst judges about issues affecting children and dedicating resources nationally to funding child-centred measures are essential. Efforts are therefore needed at both national policy and implementation level to achieve the progressive aims set out in the *Strategy*. While the *Strategy* itself emphasises continuing to maximise the use of diversion in appropriate cases involving serious offending, developing new community-based interventions, and keeping the legislation under review, in light of the statutory limitations (Kilkelly, 2008b), activism on part of the judiciary and other legal professionals remains particularly important in securing progress in this area.

In the absence of further legislative guidance and of fuller incorporation of UNCRC standards in national law, the role of professionals – particularly the judiciary – becomes critical in upholding children's rights in this sphere. There are some indications of a growing awareness amongst the judiciary of the importance of protecting children's rights in an unusual case of very serious offending. In 2019, the trial took place of two 13-year-old boys following the murder and sexual assault of a 14-year-old girl. The case drew national attention and outcry, giving rise to challenges related to the conduct of the trial and sentencing similar to those which have arisen in comparable high-profile cases in other jurisdictions (Green, 2008). However, in this case, steps taken by the judiciary attempted to mitigate the potential for punitive excesses. In addition to adaptations to make the trial more compliant with principles of child-friendly justice (Delahunt, 2020), the court took a strict view of the need to protect the privacy of the two young defendants, putting strict reporting restrictions in place and calling social media companies to account for steps they had taken to prevent publication of identifying material (Gallagher, 2019). In the absence of detailed legislative requirements aimed at securing children's effective participation (Forde, 2022), this type of judicial action is critical to meeting international children's rights obligations.

There also appeared to be an awareness of the need for an adapted approach to sentencing in this case. While murder carries an automatic life sentence where it is committed by an adult in Ireland, it was unclear up until this trial whether this applied if a child was convicted of murder (Law Reform Commission, 2020). Instead, 'reviewable sentences' – one life sentence subject to review after 12 years, and one 15-year sentence subject to review after eight years – were imposed. The willingness to impose reviewable sentences has been described as representing "green shoots" in the system, indicative of a willingness to consider future rehabilitation, and facilitated by "the recent emergence of a specialist judiciary" in the higher courts (O'Connor, 2021: 100). This indicates that developing increased levels of judicial expertise may act as a buffer to more punitive tendencies which are often evident in responses to serious cases (Green, 2008). This point is also emphasised by the UNCRC Committee in stressing the importance of the judiciary and other professionals in the justice

system in developing youth justice systems that respect children's rights (UNCRC Committee, 2019).

Despite efforts such as these, the response to children who commit serious crimes in Ireland is based on an adult model of justice and is insufficiently adapted to take account of children's needs and characteristics. Adult courts can present serious difficulties for children in exercising their rights, and even in the case of reviewable sentencing, lengthy sentences which are likely to involve eventual transfer to adult prison represent a punitive approach that stands in contrast to other more child-centred aspects of the Irish system. While Ireland is far from unique internationally in the difficulties it faces in developing rights-compliant responses to children who commit serious crimes (Lynch *et al.* 2022), the difficulties experienced by Ireland – a system which otherwise attempts to allow for welfare-oriented approaches – may indicate the limits of a hybrid model of youth justice in which 'justice'-based processes predominate when children are charged with specified serious crimes. Despite the continuing awareness of the relevance of children's welfare and rehabilitation amongst legal professionals (Hamilton *et al.*, 2016; O'Connor, 2019), it may be necessary to address the inherent limitations of the legislative approach to children who commit serious offences in order to secure a more rights-compliant approach.

In working towards developing a more children's-rights based approach in this area, actions are required across a range of domains. Further efforts to promote expertise about children's development and children's rights amongst the judiciary and other legal professionals through mainstreaming training on children would develop the potential for judicial innovation in protecting children's rights. However, as demonstrated by O'Connor's research (2021), a stronger legislative basis for more child-friendly measures and adequate resourcing to support implementation are also required. Above all, what may be most necessary in implementing CRC obligations in this area is political will (Kilkelly *et al.* 2021b). While the *Strategy* emphasises that children younger than 14 are only prosecuted as a last resort, the continued resistance to raising the age of minimum criminal responsibility may point to an underlying ambiguity towards children in conflict with the law, despite otherwise quite progressive and welfarist inflections in the Irish youth justice system. Despite the intentions of the *Strategy*, no suggestion in relation to raising the age of criminal responsibility is advanced. This represents one of the most significant barriers in delivering a youth justice system that is compliant with international children's rights obligations in this area.

Reforming Detention in Ireland

Deprivation of liberty is an area where an explicit focus on children's rights principles has brought about the most significant transformation in practice in Irish youth justice. Relatively small numbers of children in Ireland end up in detention (Kilkelly *et al.*, 2021a); the vast majority of children in conflict with the law are diverted (Garda Youth Diversion Bureau, 2019), and a minority of children prosecuted before the court are sentenced to detention or are detained while awaiting trial. Issues relating to the treatment of children in detention in Ireland has also been a subject of long-standing concern; the historical practice of institutionalising children and related abuses has contributed to an acute awareness of carceral practices amongst both policy-makers and the public (Powell *et al.*, 2012; Raftery & O'Sullivan, 1999). A strong emphasis in the Children Act 2001 on providing child-centred care for children deprived of their liberty, combined with an explicit focus by practitioners on using the international children's rights standards as a basis for developing a new model of care for children have been key factors in driving change in this area in Ireland. Given the

considerable progress achieved, the steps taken by Ireland towards a more child-rights compliant model of care may serve as an inspiration for other countries.

Protecting children's rights in detention has posed ongoing challenges for many jurisdictions (Lynch & Liefwaard, 2020; Cunneen *et al.*, 2017). In 2019, the United Nations Global Study documented that a large number of children are deprived of their liberty globally, and highlighted the poor treatment of detained children and inadequate conditions of detention (Nowak, 2019). These longstanding concerns have led to calls for a complete end to the practice of detaining children (Goldson, 2005). However, the practice of detaining children persists worldwide, and as a result, efforts are needed both to reduce the number of children in detention and to improve standards of care for detained children.

The Children Act 2001 has been important in setting the conditions necessary to improve detention practice in Ireland. Firstly, the Act states unequivocally that “a period of detention should only be imposed as a last resort”, directly mirroring the language of Article 37(c) UNCRC. This statutory proscription has been particularly important – in combination with the strong focus on diversion – in lowering the number of children who have been detained in Ireland (Buckley, 2021; Hamilton *et al.*, 2016; Kilkelly and Bergin, 2022). Figures consistently demonstrate that the number of children detained in Ireland is low, with a daily average of 36 children recorded in 2020 (Oberstown Detention Campus, 2021a). The importance of the principle has been reiterated in the recent *Youth Justice Strategy*, and additional initiatives such as a Bail Support Programme have been developed to reduce the number of children detained on remand (Naughton *et al.*, 2019). These steps are important in ensuring that detention is in fact only used as a last resort so that properly-resourced, rights-compliant care can be provided to detained children who often have high levels of need (Oberstown, 2021a).

Secondly, the 2001 Act sets out the objectives of detention within the statutory framework, with a clear focus on education and welfare (O'Malley, 2006). It states that the purpose of detention is to provide appropriate education and training to children with a view to promoting their reintegration into society through regard for their health, welfare and interests, their personal identities, and recognition of the value of promoting positive family relationships. This is a strongly child-focused provision, which reflects many of the key components of the international standards (UNCRC Committee, 2019), and which sets a clear vision for the treatment of children in detention.

An awareness of the shortcomings in this area of Irish practice has also been important in encouraging change. Alongside the awareness of the historical failures of systems of institutionalising children, both national advocacy and the observations of international monitoring bodies such as the CPT and the UNCRC Committee have led to important developments such as the closure of inappropriate, adult penal institutions which detained older children (DoJ, 2017), and eventually the establishment of a single national detention campus in Oberstown (Dublin) for children deprived of their liberty.

Since then, sustained efforts by Oberstown Detention Campus have resulted in significant changes in practice (Kilkelly & Bergin, 2022). Here, local efforts to translate the legislative objectives of detention under the 2001 Act and the international children's rights principles into meaningful operational guidance for children have been particularly significant. An explicit focus on the international children's rights standards was used to design and implement a new Children's Rights rules and policy framework, which sets standards for the

treatment of children in Oberstown (Oberstown, 2021a; Oberstown, 2021b). These new rules have recently been put into operation, and early reports from the national inspectorate charged with monitoring Oberstown have noted improvements in practice as a result (HIQA, 2021).

Efforts to introduce rights-based change in Oberstown has drawn from other national policies that aim to implement important UNCRC provisions. The right to be heard is a core pillar of the international children's rights standards, enshrined in Article 12 of the UNCRC, and encompasses a right to be heard in all aspects of children's lives (UN Committee on the Rights of the Child, 2009). Here, the *National Children's Participation Strategy* has been applied and a Participation Strategy has been implemented in Oberstown (Oberstown, 2017), which has resulted in the appointment of a staff Advocacy Officer responsible for ensuring the voices of young people are heard on a range of issues, the establishment of a child-led Campus Council, and the involvement of young people in various research and outreach activities (Oberstown, 2021a). Most notably, young people in Oberstown have recently been actively involved in the recruitment of senior personnel, including a new Director of the Campus (Kilkelly & Bergin, 2022: 161-162). This is the first detention campus worldwide, to the authors' knowledge, to take such steps, and can serve as a clear source of inspiration for other countries seeking to ensure that systems of deprivation of liberty take the rights of children seriously.

In a global context where children's rights in detention are routinely violated (Nowak, 2019), the efforts made in Ireland to bring about change based on children's rights principles are likely to be of interest to other jurisdictions facing similar challenges. While there is a need to avoid complacency given the vulnerability of children in detention and in light of ongoing challenges in the Irish context in relation to issues such as relatively high rates of detention on remand (Oberstown, 2020: p.8), the use of restrictive practices and securing adequate supports for aftercare for young people leaving detention (Kilkelly and Forde, 2019), the transformation in detention practice is noteworthy. A number of factors have propelled this change. First, the strong emphasis on the welfare of children in detention in the legislation set a clear vision for future development. Second, an explicit focus on translating the international standards into a system of rules and procedures that are capable of being used in practice has been significant. Thirdly, it is notable that these changes have been brought about in a small local context where professional expertise has driven innovations in practice. Finally, national and international advocacy and ensuring children have access to the courts to seek a remedy where rights violations may have occurred have also grounded changes in the Irish system of detention.

Conclusion

The recent publication of the *Youth Justice Strategy 2021-2027* envisages a system of youth justice for Ireland in which children's rights under the UNCRC are respected. This builds upon previous decades of comparatively progressive approaches to youth justice, particularly in relation to diversion. The inclusion of an express commitment to development of a youth justice system based on international children's rights represents an important next step in a journey that was set in motion by the introduction of the Children Act 2001. In doing so, Ireland can be counted amongst jurisdictions such as Scotland and New Zealand that are also explicitly seeking to develop their youth justice systems based on respect for international children's rights principles. Unlike these countries, however, Ireland has not sought to directly incorporate its UNCRC obligations into national law; instead, its path is defined by a more indirect approach, in which a variety of legislative, policy and practical steps interact to

effect change, and in which many actors in the youth justice system act as drivers of change. In light of this, both the successes and challenges faced by Ireland can be useful in understanding how change is enacted within a youth justice system.

At a legislative level, both the opportunities and the limitations inherent in the Children Act 2001 have influenced the extent to which Ireland can be said to be moving towards a rights-based model of youth justice. The Children Act maintains a hybrid character that combines both justice and welfare approaches across the system and decision-makers are mandated to consider the welfare of the child at various points of the system. Priority is also accorded to a non-punitive and informal approach where possible through diversion. Where children are convicted of an offence through the courts, there is also a strong emphasis on rehabilitation and an effort to minimise the use of detention, in line with core UNCRC requirements. However, there are several limitations which are equally inherent in the Act. While the strong diversionary ethos provides significant opportunity, the lack of attention to children's procedural rights represents an obstacle to the development of truly rights-compliant practice. Similarly, and despite an ongoing awareness and commitment to welfare principles amongst practitioners (Hamilton et al, 2016; O'Connor, 2019), the lack of attention in the Act to the issue of serious crime, combined with the limitations inherent in continuing to apply adult-like 'justice'-based approaches to children who commit serious crimes means that there remains significant room for the development of Irish practice in this area if it is to move towards a children's rights-based approach to youth justice.

While the legislation is clearly important, the variety of other measures adopted to implement Convention provisions are equally important. It has been commented that within a relatively slow-moving political landscape where legislative change tends to be equally slow, there is real potential for professionals such as the judiciary to develop creative approaches and more rights-aware solutions to pressing problems (O'Connor, 2021). Increased judicial attention to children's rights principles has provided some recent examples of how these actors do improve practice in protecting children's rights, even when constrained by punitive aspects of the legislative framework. Equally, in the development of new initiatives in diversion aimed at extending its benefits to older children and children who commit serious offences, and in developments to improve the treatment of children in detention, the influence of local experts and practitioners in developing more rights-compliant approaches is clearly evident. This highlights that increased awareness and expertise of professionals can contribute to incremental progress which has the potential to further move Ireland towards a rights-compliant youth justice system, and underscores the importance of promoting expertise and knowledge about children's rights among all professionals in the youth justice system (UNCRC Committee, 2019).

An increased explicit focus on implementing the UNCRC provisions more fully – in national policy, in legislation and in practice – have brought about substantial changes in youth justice in Ireland. A continued commitment to developing and maximising opportunities for diversion are in line with the requirements of the international children's rights standards in their own right, and have continued to contribute to the low rates of detention in the Irish youth justice system. In relation to children in detention, a national reckoning with historical institutional abuse scandals and associated political will to achieve change has, combined with rights-based advocacy, resulted in progressive reform. The influence of national and international monitoring bodies in highlighting breaches of rights, and legal challenges brought by children through the courts have further highlighted the violations of children's rights that have occurred and areas in need of reform (Kilkelly & Bergin, 2022). Importantly,

a clear focus on translation of the international children's standards themselves into practice – through increasing the participation of children in Oberstown and in developing a rights-based rules framework – have also helped to propel change.

The *Strategy* sets out an ambitious goal to make Ireland's youth justice system a children's rights-respecting one, building on progress achieved since the introduction of the Children Act 2001. While the incremental and piecemeal approach to incorporation of the UNCRC means that progress in protecting children's rights across the Irish youth justice system has been somewhat inconsistent, a number of important steps have been taken since the introduction of the 2001 Act to develop an increasingly progressive approach to Irish youth justice. The importance and relevance of international children's rights principles in many parts of the youth justice system, as well as the commitment to established principles of diversion and welfare in responses to children during sentencing and in detention have created a system which has managed to avoid punitive excesses. In light of this, and without ignoring the continued need for sustained attention across a number of domains, the explicit commitment and adherence to children's rights principles in law, policy and practice provides a basis for optimism about the continued rights-based development of Irish youth justice into the future.

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