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

Dermot P.J. Walsh

Abstract
This article is based on a paper delivered at the Irish Youth Justice Service Conference, ‘Best Practice for Youth Justice, Best Practice for All’, in March 2008. It examines how the tensions between welfare values and due process protections are being moderated in the context of a significant injection of welfare based reforms in the Irish juvenile justice system. The two examples used are the Garda Diversion Programme and the family conference facility in the Children Court as provided for by the Children Act 2001, as amended by Part 12 of the Criminal Justice Act 2006. The broad conclusion is that the benefits to be gained from these welfare reforms are being purchased at the cost of a dilution of judicial norms and processes.

Keywords
Juvenile justice; youth justice; Children Court; due process

Introduction
It has long been accepted that it would be unjust and contrary to the best interests of the child offender and society as a whole to process him or her through the criminal justice system as if he or she was an adult (Tanehaus 2004; Crawford and Newburn 2003:6–11; White 2002: 9–31; O’Malley 2006: 360–367). Protecting the welfare of the child offender is still accepted as a primary objective in the juvenile justice system (Van Bueren 2006). This is reflected directly in the growth of measures which encroach upon the freedom and autonomy of the child for the purpose of rehabilitation as distinct from punishment, and indirectly through measures which protect him or her from the full rigours of the regular criminal process. Indeed, it might not be an exaggeration to say that the child offender has a right to have his or her welfare needs catered for in the criminal process.¹ It would also seem self evident that the welfare rights of the child in the criminal process should increase as his or her age decreases.

It is also firmly established that the child has other rights as an independent, autonomous human being Kilkelly 2006: xvii–xxv). In the criminal context these rights derive from universal principles such as the right to due process in the determination of guilt and in the application of penal measures.² They encompass basic values such as the right not to be subjected to punishment or similar constraints on personal freedom and autonomy, unless convicted of a criminal offence in a court chaired by an
independent juvenile justice judge and in accordance with fair procedures. Related values include: the right to legal advice and assistance, the right to equality of treatment and the right to proportionality between the severity of the penalty or coercive measure and the gravity of the offence (Emmerson, Ashworth and Macdonald 2007). It must also be remembered that due process values are not concerned only with the defendant. They also concern the victim and the public as a whole. So, for example, they require that the criminal trial should normally be heard in public. These rights are fundamental to fairness in the criminal process. They cannot be ignored or overridden to achieve what adults or the State consider to be in the best interests of the child (Van Bueren 2006).

Inevitably, there is potential for conflict in an attempt to accommodate the welfare needs of the child with these due process rights in the juvenile justice system. How that conflict can best be resolved in theory and in practice has been the subject of debate among researchers and policy-makers for quite some time and no doubt will continue for the foreseeable future as new ideas and experiences are examined among the welfare, justice, managerialist, rights, child-centred and other approaches to juvenile crime (O’Malley 2006: 360–364; Crawford and Newburn 2003; Goldson 2000; Muncie and Goldson 2006; Muncie, Hughes and McLaughlin 2002). This paper aims to make a very modest contribution to that debate by exploring how and the extent to which traditional due process values in the Irish juvenile justice system have been affected by recent welfare oriented developments. The selected developments are the statutory reform and expansion of the Garda Diversion Programme and the introduction of restorative justice methods to the trial stage of the criminal process. In each case, the primary welfare features are outlined, followed by a critical examination of the due process sacrifices that have been made to deliver them. What emerges is that the Irish system incorporates a strong welfare component at the heart of both the prosecution and trial stages. While some commendable efforts have been made to balance these with due process protections, the underlying reality would appear to be the displacement of due process values by the growth of executive control and a lack of transparency.

For the most part the critique is based on an analysis of the underlying statutory provisions in the Children Act 2001. This is supplemented, where possible and appropriate, by reference to the official data, reports of an Oireachtas Joint Committee on Restorative Justice and a government appointed Commission on Restorative Justice, and the growing body of independent research on these aspects of the juvenile justice system. Unfortunately, the manner in which the official data has been gathered and presented is such that it is not yet possible to offer a comprehensive evidence-based assessment of the reforms.

The Garda Diversion Programme

The Garda Diversion Programme has been in operation now for over 45 years (Shanley 1970; O’Dwyer 2002; Kilkelly 2006: 66–99; Shannon 2005: 406–409; Griffin 2005a). Its statutory objective is defined as being to divert a child from committing further offences or engaging in anti-social behaviour where the child has accepted responsibility for his or her criminal or anti-social behaviour. Accordingly, it might be described as one of the major welfare oriented features of the Irish juvenile justice system. Once admitted to the
Programme, the child is protected against prosecution or antisocial behaviour proceedings in respect of the conduct in question, and is spared a criminal record. Instead of seeking retribution for the harm done by the child’s offending, the Programme offers support to the child to help him come to terms with his criminal or anti-social behaviour and to render it less likely that he will engage in repeat behaviour. Accordingly, the child is cautioned instead of being formally punished. This can be accompanied by a period of supervision by a Garda juvenile liaison officer and a restorative justice type conference. There is also provision for the victim to be invited to attend the administration of a formal caution for the purpose of engaging in a discussion about the child’s behaviour and, possibly, to facilitate an offer of an apology and/or reparation from the child. These are termed restorative cautions.

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

The conference is an interesting innovation in the Diversion Programme. It is a meeting of persons concerned with the welfare of the child with a view to: establishing why the child became involved in the behaviour; discussing how they can help the child to avoid engaging in such behaviour in the future; and reviewing the child’s behaviour since admission. While the victim has no absolute right to attend, the facilitator is under a duty to invite him or her. One of the primary functions of the conference is to draw up an action plan for the child which can include: making an apology and reparation to the victim; attendance at school or a training programme; participation in sport or recreational activity; being at home at certain times; and staying away from certain places. In effect, it represents an injection of restorative justice methods at the diversion stage, with the circumstances of the child offender being a central focus (O’Dwyer 2002; Griffin 2005a).

It is worth noting that the Diversion Programme has an unusually broad scope (Kilkelly 2006). Potentially it can be applied to any criminal offence from the most minor to the most serious. It is also applicable to children who have behaved anti-socially (not a criminal offence) and to children as young as 10 years of age. Any such child can be considered for admission so long as he or she accepts responsibility for his or her offending or anti-social behaviour. From a welfare perspective this conveys a sense of reaching out to as many ‘at risk’ children as possible and to intervene as early as possible.

In 2007, which is the last full year for which statistics on the Programme have been published, 27,853 cases, involving 21,941 children, were considered for admission. In the course of the year almost 17,000 child offenders were processed through the Programme by means of a formal or an informal caution rather than by a prosecution through the courts. These figures are part of a steady increase in referrals to the Programme since the implementation of the statutory provisions in 2002. Significantly, the age of children referred are heavily weighted towards the upper age groups. More than half of the 2007 referrals are in the 16 and 17 year old bracket, while only three per cent are less than 13 years of age. Although this broadly reflects the age profile of
young offenders (Walsh 2007: 320–350), it also suggests that an effort is being made to reach out to young offenders and divert them from an offending lifestyle before they cross the threshold into the adult criminal justice system. Further support for this assessment can be found in the range of offences for which children are being referred. While most of the cases concern alcohol offences, road traffic offences, theft, criminal damage and public order offences, there are significant representations from more serious offences such as burglary, drugs and assault.\(^\text{19}\)

There were 378 restorative events in 2007, an increase of 71 on 2006. Of these, 373 were restorative cautions, while only 5 were restorative conferences (down from 14 in 2006). It is too early yet to determine whether these figures signify the early demise of the restorative conference in the Diversion Programme. The signs are, however, that the Garda are displaying a preference for administering cautions without embarking upon the more time consuming restorative process (Kilkelly 2006: 80–82). The net effect is that the family/community are pushed out of the process as it becomes almost exclusively an internal Garda procedure.

Despite the relatively low numbers of restorative events, the global figures suggest that the Diversion Programme is making a valuable contribution to its primary welfare oriented objective of addressing child offending without resorting to the formal criminal trial process. Equally, however, they reveal the extent to which the State is dealing with child offenders, frequently for serious offences, beneath the radar of the public courts system. It is important to consider, therefore, how and to what extent due process values are preserved in these cases.

A positive feature from a due process perspective is that the Programme is now placed on a statutory foundation and operates in accordance with law. For almost the first forty years of its existence the Programme operated exclusively on the basis of administrative guidelines internal to the Garda (Walsh: 24–26). The principles and procedure governing the eligibility of a child for admission are now set out in the Children Act 2001. Moreover, the Programme is managed by a statutory Director who is a senior member of the Garda Síochána appointed by and answerable to the Garda Commissioner.\(^\text{20}\) He or she is given certain specific powers and duties by the legislation, including the decision whether to admit a child in any individual case.\(^\text{21}\) The administration of cautions is also the subject of statutory regulation.\(^\text{22}\)

A key element in the procedure is the requirement for the child to accept responsibility for his or her criminal or anti-social behaviour in order to be admitted to the Programme.\(^\text{23}\) This is the equivalent of a guilty plea and an acceptance of remedial interventions in his or her autonomy and freedom (Griffin 2003: 5). These interventions can be far-reaching and prolonged, and can be more severe than punishment that may have been inflicted by a Court if it had found the child guilty of the behaviour in question. It would not be unusual, for example, for the Children Court to impose no formal penalty on a child offender for a first offence at the lower end of the scale (Carroll and Meehan 2007: 45). If, however, the child is dealt with through the Garda Diversion Programme, it is possible that he or she will be subject to a period of supervision by a Garda juvenile liaison officer for a period of up to 12 months.\(^\text{24}\) Moreover, while admission to the Programme technically does not amount to a criminal record, circumstances may arise subsequently where the prosecution may inform a court of the child’s acceptance of responsibility for the underlying criminal or
anti-social behaviour and/or involvement in the Programme. This can happen where the court is considering the sentence to impose on the child for an offence committed after admission to the Programme. It is vital, therefore, that the child should be afforded due process protections equivalent to those that would attach to the accused in respect of a plea and sentencing in the criminal process (Kilkelly 2006: 75–77).

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

Once the child has admitted responsibility for his or her behaviour, the due process protections diminish. The substance and direction of the subsequent procedure, while broadly regulated by law, are heavily dependent on the discretion of the Director, gardaí and, where relevant, Probation Officers (Kilkelly 2006; Griffin 2005a). It is a matter for the Director to decide whether or not to admit the child. She can admit a child where she considers admission appropriate in the best interests of the child and not inconsistent with the interests of any child or victim. The Director also decides whether the caution shall be an informal or a formal caution and, in the case of the latter, whether it shall be a restorative event. Despite the fact that there are significant differences between them, the Director has a very extensive discretion to choose in any individual case. The criticism has been made that the Director’s discretion to admit is increasingly being exercised in a manner which catches children who would not previously have been processed formally through a police procedure in respect of their behaviour (Griffin 2005b).

The Director’s discretion extends to the conference. She enjoys a very broad discretion in determining whether the conference option should be offered in any individual case. It seems that each case is considered on its merits, and no particular offence or class of offender is excluded (O’Dwyer 2002). Unfortunately, there are no published principles or criteria to guide decisions on the merits. The Director also appoints the convenor and chair of the conference (they can be, and usually are, the same person). The former is designated the facilitator in the conference proceedings. Critically, he or she enjoys extensive discretion over the composition, timing and location of the conference, the procedure to be followed and the manner in which it conducts its business. Clearly the facilitator plays a key role in the conduct and outcome of the conference. Significantly, he or she is almost invariably a member of the Garda Síochána (O’Dwyer 2002). Once again, there are no published principles or criteria on how his or her discretion should be exercised in these matters.

The action plan which may result from a conference can be viewed as a significant departure from due process norms (Kilkelly 2006: 82–83). Despite the fact that it can impose obligations on the child more severe than those that would have been imposed by a court, it is more like a private contract drawn up among several unequal parties, rather than a public judicial decision handed down by an impartial judge applying established sentencing principles. The child, in particular, is potentially in a very weak bargaining position in such a conference. There is no guarantee that family members will represent his or her interests, and he or she is not represented by a solicitor. It is possible, therefore that the child will be confronted by what might seem to him or her
to be a large number of adults, all of whom appear to be pressurising him or her to accept the action plan.

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

What emerges from all of this is a process that is almost wholly under the control of gardaí acting in an executive capacity (Kilkelly 2006: 83–84), as distinct from judges or other independent officials acting in a judicial capacity. The emphasis is on a negotiated agreement to which the child is a relatively weak and passive party. There is also a distinct lack of transparency in that it all happens behind closed doors, and the victim may not necessarily be a participant. In short, the diversion process reflects a major departure from due process norms, even though it deals with a child for a criminal offence by imposing constraints on his freedom and autonomy that can surpass those that might have ensued in the formal criminal process. The welfare trade off is that the child is spared the experience of the formal criminal process and is given support to avoid getting sucked in to further criminal activity. It should be possible, however, to retain these advantages while at the same time injecting a greater degree of due process and transparency into the Programme (Kilkelly 2006). The latter could be enhanced through, for example, the formulation and publication of policies governing the key decisions at each stage of the Programme, together with the publication of detailed data that will facilitate an informed assessment of the extent to which the Programme is operating equitably and is diverting children away from crime.

**The Children Court’s Jurisdiction and Procedure**

The jurisdiction and procedure of the Children Court reflect several welfare oriented modifications compared with the criminal trial procedure for adults. Two of the major procedural modifications have the effect of blurring the distinction between formal criminal proceedings and extra judicial interventions aimed at rehabilitating the child. The first of these enables the Court to divert the child out of the criminal process and into the care and supervision jurisdiction of the Health Service Executive (HSE). Instead of proceeding with the trial of the child, the Court can direct the HSE to convene a family welfare conference (as distinct from the ‘conference’ of the Garda Diversion Programme). This is another restorative justice type conference which considers the circumstances of the child with a view to recommending the making of a care and supervision order application under the civil procedure of the Child Care Act 1991. On being informed of the HSE’s action in the matter, the Court may dismiss the charge against the child on its merits if it is satisfied that it is appropriate to do so.

The second major modification is the power of the Court to adjourn the criminal proceedings and set up a family conference (as distinct from a Garda Diversion Programme conference or a family welfare conference) to devise an action plan to address the child’s offending. A fundamental pre-requisite for this option is that the child accepts responsibility for his or her criminal behaviour. The family conference is another restorative justice type mechanism, very similar to the conference in the Garda Diversion Programme, except that it is convened and chaired by a Probation Officer, as distinct from a member of the Garda.
The role of the family conference is to: identify why the child became involved in criminal behaviour; determine how he or she can be diverted from such behaviour; mediate between the child and the victim; and address the concerns of the victim. The overall aim is to formulate an action plan which the child will be expected to follow over a defined period. This may include matters such as: attendance at school or work; participation in a training programme; staying at home at specified times; staying away from specified places or persons; and an apology and/or compensation to the victim. The plan is submitted to the Court for approval. Where this is forthcoming, the Court will deal with the case on the basis of the plan. If it is satisfied that the child has complied with the plan, the Court can dismiss the criminal charge against him or her on its merits. Otherwise it will proceed with the criminal proceedings and impose a sentence in the normal way in the event of a conviction.

This family conference option represents the adoption of a distinctly restorative justice procedure at the heart of the criminal trial (Crawford and Newburn 2003; Hudson, Morris, Maxwell and Galaway 1996; and Morris and Maxwell 2001). In effect the twin objects of rehabilitating the child offender and reconciling him or her with the victim displaces the administration of justice through the formal adversarial and accusatorial procedure.

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

It is also worth noting the more visible modifications to the trial procedure which have been devised specifically to cater for the special needs of the child. Some of them have a welfare or rehabilitative aspect. These include the establishment of a separate Children Court, protections for the privacy of the child and the restriction on publicity (Kilkelly 2006: 132–146; Walsh 2005: 70–85). Others have welfare and due process aspects. These include: the efforts to achieve a more informal atmosphere, restrictions on public access, dispensing with the wigs and gowns and the avoidance of technical language (Kilkelly 2005). By enhancing the capacity of the child’s awareness and participation these measures can enhance due process values.

Despite these welfare-oriented features, there is still an emphasis on formal due process in the Children Court (Walsh 2005: 85–93, 105–115; Griffin 2003). A child will only appear before the Court to answer charges consequent on a lawful arrest or as a result of being summoned to appear before the Court at a specified date, time and location. Either way he or she is entitled to be legally represented in the proceedings. The legal representation will be paid for by the State where the defendant cannot afford it. If charged with an indictable offence the child can assert his or her right to a
jury trial. In the event of a guilty plea the case will often be adjourned to allow for the preparation of probation and other reports on the child to assist the judge in determining an appropriate sentence. In the event of a not guilty plea the trial proceeds in the normal way. The decision on guilt and sentence, if applicable, is made by the judge in accordance with established principles of law and procedure. It is worth noting at this point that he or she is an independent judge of the District Court (Kilkelly 2005; Walsh 2005: 77). Where a child is convicted and sentenced in the Children Court he has a right of appeal to the Circuit Court.

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

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

The results of Kilkelly’s work on the Children Court would suggest that the experiences of child defendants continue to fall significantly below due process standards (Kilkelly 2005). Despite the modifications, the trial procedure operates in practice more like an administrative bureaucracy where the defendants are processed in a manner that leaves them largely detached from and confused by the proceedings and decisions affecting them. In addition to excessive pre-trial delays caused by repetitive adjournments, contributory factors include: ‘hanging around’ outside the courtroom for several hours while waiting for their cases to be called; poor acoustics in the courtroom; rushed proceedings; judges with no specialist training in juvenile justice issues attempting to cope with excessively heavy caseloads; prosecutors and defence lawyers with no specialist training in juvenile justice issues; lack of coordination between agencies; and significant differences between court areas (Kilkelly 2005).

Even more fundamental questions are raised by the family conference. Where a conference is convened, the immediate effect is to remove the substance of the sentencing stage from the floor of the court and judicial procedure to the closed room.
of supervised discussion among a potentially wide range of individuals. In addition to the child, these will include the child’s parents or guardians and, quite likely, one or more members of the child’s family and/or relatives, the victim and one or more members of the victim’s family and/or friends, a Garda Liaison Officer, one of the child’s teachers (and/or employer, youth leader, sports coach and so on), and representatives from the Probation Service and the Health Service. The conference is convened by a Probation Officer, as distinct from an independent judicial figure. Apart from that, its purpose and procedure largely follow that of the conference in the Garda Diversion Programme. Despite the best efforts of the chairperson, the dynamics of the setting are such that much, if not most, of the discussion will be dominated by the adults, with the child being a relatively passive participant. The purpose, however, is to draw up an action plan for the child in the manner of a private agreement between the parties. As with the action plan in the Garda Diversion Programme, it would not be unusual for this action plan to impose more onerous constraints and obligations on the child, in respect of his or her liberty and privacy, than might have resulted had he or she been convicted and sentenced by the Court in the traditional manner. Overall, it would seem that by submitting to the conference the child is accepting a diminution in his or her formal due process rights in return for a sharper and more sustained focus on his or her rehabilitation.

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

While these due process concessions are useful, they do not change the reality that the family conference largely replaces the more transparent judicial procedure with an administrative procedure that is conducted largely among private parties behind closed doors. It represents a significant re-alignment in the trial procedure of the Children Court which had already been modified in an effort to strike a reasonable balance between formal due process rights and standards and the special needs and the future welfare of the child defendant. As Kilkelly’s research has shown, however, the established modifications have not succeeded in engaging the child fully in the process in a meaningful manner (Kilkelly 2005). It is by no means clear, therefore, that the longer term interests of the child and the common good will be better served by the re-alignment which favours a restorative justice process conducted by the parties behind closed doors, than by a trial process which keeps the traditional focus on the centrality of the independent judge, formal procedure and the transparency of the courtroom. An evidence based assessment of the merits of the re-alignment will have to await more research on how and the extent to which the restorative justice method is used and, critically, on the impact it has on the rate of recidivism among the offenders concerned compared with those dealt with in the traditional manner.

The early indications are that the restorative justice family conference is not being widely used. An examination carried out by Mary Burke found that there had only been 62 references to a family conference by March 2006. This compares with a total
of more than 2,500 cases being prosecuted in the Children Court per annum. Undoubtedly, pressure on resources is a significant factor on the low uptake. Preparation for, the conduct of and follow up to these family conferences are resource intensive, particularly but not exclusively for the Probation Service (National Commission on Restorative Justice, 2008: 5.14). Where resources are scarce, there will be a temptation to avoid the family conference by processing cases through the traditional procedure of the Children Court. Without a major injection of new resources, which has not been forthcoming, it is simply not practicable to divert large numbers of cases through the family conference procedure.

Another operative factor that should be noted is the consequential impact of the Garda Diversion Programme and associated restorative caution and conference facilities. This is diverting many of the cases that might otherwise have been deemed suitable for a court directed family conference (Burke 2006). There may also be an element of judicial reluctance to use the family conference option. This may be due, at least in part, to unfamiliarity with the procedure. From October 2004 to March 2006 there was a gradual decline in the number of referrals by the Court. Most were made by a single Dublin-based judge. However, there is evidence of a distinct increase in 2007.

For those child offenders who were referred to a family conference, the initial results are encouraging; bearing in mind that these tend to be at the more serious end of offending and class of offender. Very serious offences such as: robbery, burglary, arson, assault, causing harm and possession of drugs with intent to supply have been among those referred (National Commission on Restorative Justice 2008: 5.9). Of the 62 referrals made up to March 2006, 50 (81%) resulted in a conference. The victim attended in 38 (76%) of these cases. Virtually all of the conferences (98%) resulted in an agreed action plan. When those still under review are excluded (10 cases), the rate of successful completion is 65 percent. Twenty two percent were unsuccessful and arrest warrants had to be issued in the other 13 percent (Burke 2006). When it is considered that these statistics include many cases which were deemed not suitable for admission to the Diversion Programme because of the nature and gravity of the offence and/or criminal record of the offender and/or some other factor, the success rate can be considered promising. There is no Irish data on the recidivism rate among offenders who completed a family conference and action plan successfully. International data suggests a marginal decrease in recidivism among offenders who participated in a restorative justice programme (Joint Committee on Justice, Equality, Defence and Human Rights 2007: 34).

Despite these encouraging signs, there is still room for improvement in the operation of the family conference procedure from a due process perspective. The most noticeable issue concerns transparency in the manner in which cases are selected for referral. Superficially, the decision is taken openly in the Children Court. In practice, it is effectively pre-determined behind the scene by the parties involved, either on their own initiative or consequent on a request from the Court to consider the matter. Usually, these parties will be the Garda/DPP, the Probation Service and the child’s legal representatives and parents. The problem with this approach is that there are no published principles or criteria to guide these parties in making a recommendation to the Court, or to guide the Court in making the determination. It
is possible, therefore, that similar cases could be treated differently in the matter of a family conference on the basis of arbitrary factors. In the absence of published principles or criteria it is very difficult to reach conclusions on whether the option is being used fairly and efficiently.

Due process rights can also be diminished by delay in the trial procedure. This is particularly problematic in the case of child offenders as it is generally recognised that the potential benefits of corrective action will be lost on a child if it is not taken close in time to the associated offending (Ashford, Chard & Redhouse 2006: 2.101 et seq.). Moreover, there is evidence to suggest that where there is a lengthy period between the commencement and completion of proceedings, a child offender can accumulate many additional charges during that period (Kilkelly 2005: 51). Unfortunately, delay has been a feature of the Irish juvenile justice system for several years. Even before the restorative justice modifications were introduced it was normal for a child offender to appear several times over a period of at least six months before his or her case was completed. In their study of 400 cases dealt with by the Children Court in 2004, Carroll and Meehan found that each child had an average of eight Court appearances before his or her case was finalised (four children had over fifty appearances each). This was compounded by the fact that each child waited on average for six months for his or her first Court appearance (Carroll and Meehan 2007). As yet there is no clear data on whether resort to the family conference is having the effect of prolonging court proceedings beyond the norm in cases where the conference is not used. If managed carefully, it is possible that the family conference could actually result in a swifter process. On the other hand, if it is used in a manner that does not dispense with or significantly reduce the current practice of repetitive adjournments for sentencing, then the result will be even greater delays with all of the implications that that will have for due process.

Conclusion
The prosecution and trial stages of the Irish juvenile justice system clearly incorporate significant welfare measures aimed at the rehabilitation of the child offender. Some of these actually have the potential to enhance the due process rights of the defendant by making the trial process more accessible and meaningful to him or her. Others, however, entail a significant departure from traditional due process values in the criminal process. The primary examples are the Garda Diversion Programme and the family conference set up by the Children Court. Both of these require the child to forego his right to have his guilt determined in accordance with due process norms in return for the welfare benefits that they are believed to offer. They both reflect a distinct move away from a model based on judicial norms and process to one that is controlled by the executive in the shape of the Garda and the Probation Service. Another distinctive ingredient in these reforms is the increased opportunity for resort to the restorative justice method in which the child is encouraged to admit his guilt and to submit to a process behind closed doors where individuals from a range of backgrounds, including possibly the victim, encourage him to make amends and submit to rehabilitative measures which they devise.

The pragmatist might be inclined to ask, ‘but does it work?’ in the sense of steering large numbers of child offenders away from criminality. Others might want to know how it is working with a view to assessing its fairness against relevant international
norms. Providing answers to these questions will require research and the availability of comprehensive, consistent, detailed, hard data on the operation of all aspects of the system.

There is a small, but growing, body of research on the operation of the Garda Diversion Programme and the Children Court. The primary examples have been cited at points throughout this paper. Research in these areas, however, has been hampered by the historically poor quality of the data. The officially published data is spread over at least five sources, each dealing with distinct aspects of the subject. Some of them overlap, but none of them seem to be consistent with each other in terms of methodology or coverage. Some have not sustained internal consistency over recent years. While improvements are being made, especially in the area of the Garda Diversion Programme, there is still a dearth of systematic and detailed data on the operation of the restorative justice methods in both the Programme and the Children Court. There is also a lack of comprehensive and consistent data on relevant matters such as sentences being handed down in the Children Court and the criminal records of child offenders. Until these deficits are fully addressed, further critical insights and perspectives on the operation of these vitally important aspects of juvenile justice will be limited to what can be achieved through empirical observation and critical analysis of the deficient data available.

Notes
1. See UN Convention on the Rights of the Child, Articles 3 and 40(1), (2)(vii), (3) and (4).
2. Universal Declaration on Human Rights, Articles 10 and 11.
3. UN Convention on the Rights of the Child, Articles 12, 37 and 40(2).
4 Children Act 2001, s.19(1).
5. Ibid., s.49.
6. Ibid., s.48(1). Paradoxically, if the child is subsequently convicted of an offence, the Prosecution may inform the court of the child’s admission to the Programme on a previous occasion at the sentencing stage; s.48(2).
8. Ibid., ss.27–31.
9. Ibid., s.26.
10. There are now over 100 juvenile liaison officers. These are specially trained gardaí who work exclusively with young people. A parliamentary committee has recommended an increase in their number to facilitate an increase in the use of the conference procedure (Joint Committee on Justice, Equality, Defence and Women’s Rights 2007).
11. It has been described as a major innovation in Irish criminal law (McDermott and Robinson 2003: 65).
12. Children Act 2001, s.29.
13. Ibid., s.39.
14. The Minister for Justice, Equality and Law Reform has the power to exclude specific offences from the Programme; Children Act 2001, ss.23(3) and 47. This power has yet to be exercised.
15. Anti-social behaviour is defined as behaviour which causes or, in the circumstances is likely to cause, to one or more other persons who are not of the same household as the child: harassment; significant or persistent alarm, distress, fear or intimidation; or significant or persistent impairment of their use or enjoyment of their property; Children Act 2001, s.257A(2).
16 Children Act 2001, s.23(6).
17. Ibid., s.25.
18. This aspect of juvenile diversion has been criticised on the basis that it draws in a wider range of children.
to State intervention at an earlier stage in a manner which can have prejudicial consequences for them in the criminal process in subsequent years (Kilkelly 2006: 90).

19. The concern has been expressed that admission to the Programme is being managed in favour of children who are less likely to re-offend (Kilkelly 2006: 75).

21. Ibid., ss.23 and 24(1)
22. Ibid., ss.25 and 26.
23. Ibid., s.23(1).
24. Ibid., s.27(1).
25. Ibid., s.48(2). Kilkelly suggests that this may be in breach of the child’s right to due process under both Article 40 of the UN Convention on the Rights of the Child and Article 6 of the European Convention on Human Rights (Kilkelly 2007: 6).

26. Children Act 2001, s.23(1).
27. Ibid., ss.23 and 24(1).
28. Ibid., s.25.
29. Ibid., ss.30 and 31.
30. Kilkelly (2006: 81) notes that overall the number of restorative events is modest and that there is considerable disparity in the number of restorative events taking place across the country.

32. Ibid., ss.33–35.
33. As noted earlier, it would not be unusual for the Children Court not to impose a formal penalty on a child. Even where a formal penalty is imposed it will not always involve a significant intrusion on the liberty or privacy of the child. The empirical research suggests that anything between one third and one half of the formal penalties do not entail a custodial order, community service order or a fine (Carroll and Meehan 2007: 45; Kilkelly 2005: 26). Action Plans adopted in the Diversion Programme conferences, on the other hand, can entail significant restrictions and obligations on the child. These can include: providing some form of recompense to the victim, staying away from particular localities or persons, undertaking a course or programme of activities and submitting to regular meetings with a Probation Officer and/or Garda Juvenile Liaison Officer (O’Dwyer 2002).

34. Children Act 2001, s.41.
35. Ibid., s.42.
36. Ibid., ss.76A–C and 77.
37. Ibid., s.77(3).
38. Ibid., s.78.
39. Ibid., s.78(1)(a).
40. Ibid., s.79.
41. Ibid., s.80(2).
42. Ibid., s.81.
43. Ibid., s.82(1).
44. Ibid., s.84.
45. Ibid., s.85.
46. Ibid., s.96(2).
47. Ibid., s.56.

48. Kilkelly found that in the application of these general principles there was considerable inconsistency in practice between individual judges and between courts (Kilkelly 2005: 53–54). Walsh and Sexton (1999) found a similar problem in the application of community service orders.

49. Children Act 2001, s.96(1)(a).
50. Ibid., s.96(1)(b).
51. Ibid., s.96(3).
52. Ibid., s.96(4).
53. Ibid., s.96(5).
54. Griffin (2003) makes the valid point that the victim is given a significant role in the restorative justice aspects of the juvenile justice procedure, and that this can be reflected disproportionately in sentencing.
55. Children Act 2001, s.78(1)(a).
56. Ibid., s.82.
Recent research suggests that there is a very high rate of recidivism among child offenders who are convicted and sentenced to a term of detention. More than 80 per cent of offenders detained in Trinity House (the State’s most secure detention unit for young offenders) had re-offended within one year of being released in 2006 (O’Brien 2009; see also Carroll and Meehan 2007: 48–49). It seems that these recidivism rates may be significantly higher than the comparable figures for certain classes of adult offender in Ireland (see O’Donnell, Baumer and Hughes 2008).

References


Biographical Note
Dr Dermot P.J. Walsh is Professor of Law and Director of the Centre for Criminal Justice at the University of Limerick. His research focuses on policing, criminal justice, criminal procedure and human rights. Major works include: Human Rights and Policing in Ireland: Law, Policy and Practice (Clarus Press, 2008); Juvenile Justice (Thomson Round Hall, 2005); and Criminal Procedure (Thomson Round Hall, 2002).

Address
Professor Dermot Walsh,
Office FG-011,
School of Law,
University of Limerick.
Tel.: + 353-61-202533
Email: dermot.walsh@ul.ie